IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * *

JENNIFER MAE MASON, Executrix of the Estate of ROD E. MASON, Deceased,

Appellant,

vs.

MARTINE CUISENAIRE,

Respondent.

SC NO: 49293
DC NO: D-01-273923-D

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

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FEDERAL STATUTES

STATE RULES

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MISCELLANEOUS

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STATEMENT OF ISSUES PRESENTED

1. Did the court abuse its discretion in denying Jennifer's *Motion to Set Aside the February 2, 2007, Order pursuant to NRCP 59 and NRCP 60(b)*?

2. Do the defects in the Appellant's Appendix warrant imposition of fees on appeal for violation of NRAP 30(c)(1) and 30(c)(2)?

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STATEMENT OF THE CASE[1]

This is an appeal from a post-divorce order denying Jennifer's[2] *Motion to Set Aside February 2, 2007 Order*.[3] Jennifer's appeal is based on her argument that she did not have notice of the hearing in which the order was issued, and that she had a meritorious defense.

This case was remanded from this Court for an evidentiary hearing.[4] Notice of the proceedings on remand was provided to all counsel of record, all of whom conferred with their respective clients.[5] Despite more than four months of specific notice, Jennifer elected not to appear, personally or through counsel, and an order was rendered in favor of Martine.[6]

Jennifer moved to set aside the order.[7] The motion was opposed.[8] A hearing was held, and full argument entertained.[9] Jennifer's *Motion* was determined to be both procedurally and substantively deficient, and was denied.[10] This appeal followed.[11]

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[1] NRAP 28(b) provides that Respondent may provide a Statement of the Case if "dissatisfied" with that of the Appellant. The "Statement of the Case" in Jennifer's *Opening Brief* mixes procedure, factual assertions (some accurate, and some not), and motivational explanations. Accordingly, it is submitted that the "Statement of the Case" in the *Opening Brief* is defective, and the Court is asked to refer to the recital in this *Answering Brief* pursuant to NRAP 28(b).

[2] Technically, Appellant is the Estate of Rod Mason, which substituted into the first appeal while it was pending decision. As Rod's last wife, Jennifer, was Executrix, references to the Estate are made to "Jennifer" for convenience.

[3] The single volume Appendix submitted by Jennifer is referenced as "App.," and the one volume submitted by Martine is referenced as "R. App." All references to Appellant's Opening Brief are to "AOB."

[4] App. 9.

[5] App. 10, 119-120, 124, 161.

[6] App. 23-26 (Combined item that had been separately filed.); R. App. 22-25.

[7] App. 28.

[8] App. 67 (No file stamp); R. App. 48.

[9] App. 98-126.

[10] App. 125, 161.

[11] In disregard of NRAP 30(a), Jennifer's counsel did not confer with our office regarding the possibility of filing a Joint Appendix. Jennifer's Appendix is deficient. Martine's Appendix includes omitted documents, documents which in Jennifer's Appendix had no file stamps. Martine has also included copies of all pertinent Orders. There are multiple additional errors in Jennifer's Appendix, mainly as to combining items that were separately filed, and documents (and pages of documents) that are simply missing. Those errors should not affect the Court's review in any significant way, given our Appendix. It should be noted these are the same errors which were identified in the earlier appeal in this case, and have required Martine's counsel to expend additional time and effort to provide the Court with an adequate

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STATEMENT OF FACTS[12]

A. Overview of Case

In the context of the issues actually presented in this appeal, it does not seem necessary to repeat the entire factual history of Rod and Martine's marriage, divorce, and subsequent legal actions. That legal history, however, is what gave rise to the alignment of the parties here, and explains the prior events referenced throughout the record in this appeal.

In brief, Rod retained all material possessions acquired during his marriage to Martine, paid no child or spousal support thereafter, and he and Jennifer wrongfully retained Audrey after summer visitation. Martine lives in poverty in Europe. The child was eventually recovered by way of a Federal Court Hague Convention action through *pro bono* counsel, but was so damaged from the abuse inflicted by Rod and Jennifer that she required institutional care for years.[13] Proceedings over financial matters in Nevada Family Court ensued, leading to the first appeal. The Statement of Facts submitted in that appeal is attached to this brief for the Court's convenience.[14]

The remand in this Court's *Opinion* in *Mason v. Cuisenaire*[15] directed the Family Court to hold an evidentiary hearing, which was set by the court for February 2, 2007. Notice of the hearing was sent by that Court to all attorneys of record, apparently twice.[16]

The evidentiary hearing was limited to three issues:

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file for review. Please also see footnote 45, *infra*.

[12] NRAP 28(b) provides that Respondent may provide a Statement of Facts if "dissatisfied" with that of the Appellant. The "Statement of Facts" in Jennifer's *Opening Brief* greatly intermixes procedure, factual assertions (some accurate, and some not), a good deal of argument, and motivational explanations. For example, Jennifer discusses the *Notice of Entry of the Order* entered below as "problematical and freudian [*sic*]" at 7, and attacks the pleadings below at some length at 8-9, claiming that filings constituted "acknowledgments" of error that don't exist, and discussing how she finds the various filings "puzzling." Accordingly, it is submitted that the "Statement of Facts" in the *Opening Brief* is defective, and the Court is asked to refer to the recital in this *Answering Brief* pursuant to NRAP 28(b).

[13] R. App. 27.

[14] R. App. 7-19.

[15] *Mason v. Cuisenaire*, 122 Nev. 43, 128 P.3d 446 (2006).

[16] App. 10, 115, 120; R. App. 20-21. As Mr. Kelleher conceded, he withdrew before the first appeal was concluded. Attorneys Marshal S. Willick (for Martine), and Daniel F. Polsenberg and Mario D. Valencia (for Jennifer) all were notified. There is no record of any of these attorneys ever withdrawing from the case.

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1. Child support arrearages applying North Carolina child support guidelines.

2. Whether the military Survivor Benefit Plan (SBP) should be paid to Martine.

3. Attorney's Fees and Costs.

Rod had amassed significant arrearages in child support, but had transferred all assets in his possession (including all money and property accrued during his marriage to Martine) to Jennifer, and arranged for all military and other insurance policies to be directly payable to her, so that Rod's "estate," per se, had no assets.[17] Therefore, the requested rulings on remand that Rod owed arrears of child support, and compensation for assorted litigation misdeeds over the preceding five years were largely of a symbolic nature, and did not result in either Martine or Audrey actually receiving anything.[18]

The SBP designation, however, was the single way that any money would ever be received by Martine or Audrey. In fact, it was the single way that either mother or child would ever receive ***anything*** from the long marriage of Martine to Rod, or compensation for Audrey's abuse at the hands of Rod and Jennifer. Martine had been married to Rod during most of the military service, and had the largest time rule interest in the retirement benefits that were to be secured by the SBP.[19] The District Court found all of this to be true and, in accordance with federal and Nevada law, issued an order that Martine be deemed the SBP beneficiary.[20]

B. Procedural History

John Kelleher, Esq., represented Rod during the proceedings before the Family Court leading to the first appeal. Mario Valencia, Esq., made his first appearance in the case on October 9, 2002,

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[17] App. 118.

[18] App. 18-19.

[19] *See Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[20] R. App. 24.

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by filing the *Notice of Appeal* in the Family Court for the first appeal taken in this case.[21] He was later joined by Daniel Polsenberg, Esq., whose firm appeared in the oral argument before this Court.

Mr. Valencia sought and obtained multiple delays and continuances, dragging out first the appellate settlement process, and then the briefing and oral argument, for years. After three years – on September 28, 2005 – Rod's original trial counsel, Mr. Kelleher, withdrew from this case after Rod's death, while the case was still pending decision after oral argument,[22] although he continued as Jennifer's counsel in another family law action.[23]

On February 9, 2006, this Court ruled on the first appeal, and remanded to the District Court the three issues listed above.[24] The *Opinion*, including notice of the matters remanded, was sent to both Mr. Polsenberg and Mr. Valencia as counsel of record.[25]

Neither Mr. Polsenberg nor Mr. Valencia withdrew from the case after issuance of the *Opinion*. Eight months later, on September 29, 2006, as the listed Attorneys of Record, both were noticed of the February 2, 2007, hearing[26] – more than four months before the scheduled hearing date.[27] The hearing date and time were recited on the face of the notice.

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[21] R. App. 4-6. Mr. Valencia listed himself as "Attorney for Plaintiff" [Rod] in Case No. D273923. Jennifer nevertheless asserts – at least three times – that Mr. Valencia never made an appearance of any kind in the Family Court proceeding. AOB at 5, 6.

[22] R. App. 20-21. Not in August, ***2006***, as claimed in the *Declaration of Jennifer Mason*. App. 41-43, and AOB at 10. This is relevant because Jennifer's affidavit makes the false claim that Mr. Kelleher had withdrawn the day before the notice of hearing was sent – hinting broadly that there was some kind of plot to not provide notice to him. In actuality, he had withdrawn a year earlier, and notice was provided to the two attorneys who had replaced him in the ongoing litigation.

[23] App. 117.

[24] App. 1-9.

[25] App. 3.

[26] App. 10.

[27] As Mr. Kelleher concedes, he withdrew at the district court level and never appeared in the appeal. Daniel F. Polsenberg, Marshal S. Willick, and Mario D. Valencia all were notified. There is no record of any of these attorneys ever withdrawing from the case.

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Mr. Kelleher in his filings,[28] states that he is the attorney for the Estate of Rod Mason, that Jennifer did not receive proper notice of the hearing scheduled for February 2, 2007, and that after speaking with potential appellate counsel, the date for filing an appeal on that order would be April 9, 2007.[29]

Mr. Kelleher eventually conceded upon direct questioning by Judge Marren, they both received the notice, ***both*** reported that notice to Mr. Kelleher, and one or both also discussed the notice, and the upcoming hearing, with Jennifer directly.[30] Mr. Kelleher ***also*** discussed both the notice and upcoming hearing with Jennifer.[31]

Neither counsel of record withdrew, and none of Jennifer's three attorneys, or Jennifer herself, submitted any paperwork, contacted this office, or appeared at the date and time set for hearing, which was presided over by Judge Steven Jones on February 2, 2007. We prepared and submitted a trial memorandum in accordance with EDCR 7.27 and timely filed it at the conclusion of the hearing.[32]

The *Order* was subsequently signed and filed.[33] *Notice of Entry* was filed March 6, 2007,[34] and sent to Jennifer and Mr. Kelleher.[35]

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[28] R. App. 67-71.

[29] R. App. 70.

[30] App. 115-116, 119-121.

[31] App. 115-116; R. App. 70. Unfortunately, despite this record, Jennifer represents that she "was specifically unaware of a hearing date or *Notice of Hearing*." AOB at 10.

[32] R. App. 26-38.

[33] App. 23-26 (Combined item that had been separately filed.); R. App. 22-25.

[34] App. 21.

[35] At some point between the hearing on February 2, and the *Notice of Entry* on March 6, this office was directed to send the documents to Jennifer and Mr. Kelleher instead of to Mr. Valencia and Mr. Polsenberg; we can't tell from our file if this direction was received from Mr. Kelleher, Mr. Valencia, or the District Court. We were in the middle of moving into our new building at that time and had served a *Notice of Change of Address* on Mr. Valencia in this case that same week, and it is possible that we received the direction as to who to serve by phone in response to the notice of our change of address.

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Without apparently ever filing a substitution or association of counsel, Mr. Kelleher reappeared in the case, filing Jennifer's *Motion to Set Aside February 2, 2007, Order*, on March 19, 2007.[36] The hearing on Jennifer's *Motion* was heard on April 9, 2007, before Senior Judge Terrance P. Marren.[37]

Upon questioning by Judge Marren, Mr. Kelleher conceded that Mr. Polsenberg and Mr. Valencia ***did*** receive the notice,[38] that they had contacted both he and Jennifer, and that he had discussed the matter with her as well.[39] Without explanation, however, he asserted that the notice was "received incorrectly" by Jennifer's two attorneys of record.[40] Eventually conceding that notice had been properly received, Mr. Kelleher admitted that the only issue was whether neglect was excusable.[41] He also gave his argument on the merits of whether Martine could or should be named the SBP beneficiary,[42] following up on his written submission on the merits.[43]

On appeal, however, Jennifer characterizes Mr. Kelleher's various concessions at oral argument as "unsworn, hearsay recollections," inserts modifiers not found in the transcript

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[36] App. 28-65.

[37] R. App. 68-69. *Motion* was heard on *Order Shortening Time*, as requested by Jennifer.

[38] App. 115:

Court:	Mr. Kelleher do you agree this mailing was made? Do you know whether this mailing was in fact received by these recipients?
Mr. Kelleher:	Yes, your Honor, and if I may address that. . . .

[39] App. 115-116:

Mr. Kelleher:	. . . so I, you know, basically I told my client . . . that if she got [a re-notice allegedly promised by a law clerk], whatever else, that we'd go from there. I never received any notice and nor did she.

[40] App. 115.

[41] App. 121:

Court:	So really . . . the technical issue of notice appears to have gone against her if you will . . . but you're saying that she's in the area of excusable neglect based –
Mr. Kelleher:	Right, Your Honor.
Court:	– on her failure to pay attention to these details?
Mr. Kelleher:	Right.

[42] App. 102-106.

[43] App. 28, 37-39, 88-96.

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("perhaps") to suggest an uncertainty that Mr. Kelleher never expressed, and implies that Mr. Kelleher may have been lying when he admitted that notice had been received and that counsel had discussed the matter with Jennifer.[44]

After hearing argument from both sides, Judge Marren found that service had been made correctly,[45] that Jennifer had been informed of the hearing, that "none of the requirements of Rule 60(b) have been met."[46]

Mr. Kelleher filed a *Notice of Appeal* of the February 2 *Order* on April 9, 2007.[47] Jennifer then substituted Mr. Rosenberger for Mr. Kelleher in this appeal on May 14, 2007,[48] but Mr. Kelleher continued litigating on her behalf in the Family Court. We filed a *Motion for Attorney's Fees and Costs* on May 17, 2007.[49] Mr. Kelleher opposed it on May 25, and made a countermotion for fees.[50]

On June 20, Judge Jones convened a hearing on the matter, but deferred it without argument to Judge Marren, who had heard the substantive motion. On July 5, Judge Marren entered a Minute Entry resolving the cross-motions for fees, finding that Martine "was required to incur great expense to oppose [Jennifer's] MOTION TO SET ASIDE, etc.," and awarding Martine $5,000 accordingly.[51]

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[44] AOB at 9, 10.

[45] App. 122, 125.

[46] App. 125.

[47] App. 127-128.

[48] App. 163-167.

[49] App. 130, R. App. 87-102. As noted in FOOTNOTE 11, Jennifer's Appendix does not include file stamped documents, as noted here, in order to keep the record clean and complete we have included the file stamped copy. Jennifer's Appendix has failed to include relevant orders, and cited only the court minutes rather than the actual orders themselves. Given the ongoing problem we have had throughout this case with deletions of exhibits from the copies served on us, fraudulent translations, and repeated false submissions to the various courts which have touched this case, we believe that this Court should strongly condemn Jennifer's continuation of such behavior in this appeal.

[50] App. 140.

[51] App. 156-57. R. App. 108-110. The *Notice of Issuance of Decision* was filed July 9, 2007 and is included in Respondent's Appendix, again for clarity of the record.

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The formal written *Amended Order,* filed July 26, noted that Jennifer's *Motion* had not met "the technical, procedural, or substantive requirements" for relief under either NRCP 59 or NRCP 60(b).[52] No appeal was taken from that *Order,* but Jennifer's appeal of the February 2 *Order* attacks it anyway.[53]

[52] App. 160-62.

[53] AOB at 10-11.

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ARGUMENT

I. PRELIMINARY STATEMENT

The Family Court determined on February 2, 2007, that Martine Cuisenaire was the appropriate beneficiary of the monthly Survivor's Benefit Plan (SBP) payments. Boiled down to its essence, the question presented in this appeal is whether Jennifer can demonstrate that the District Court abused its discretion in refusing to set aside that *Order*. She cannot, and certainly has done no such thing in the *Opening Brief*.

The standard of review is a steep one, requiring Jennifer to show how the *Order* is outside the "wide discretion" this Court has held that district courts have in considering such motions, particularly on the question of "what neglect is excusable, and what is inexcusable."

In this case, Jennifer's inaction for many months, despite opportunity to consult – and actual consultation – with her three attorneys, was an ample basis for the Family Court to find the neglect inexcusable. Notably absent from the record is any statement from her counsel of record denying that she was fully and fairly informed, but simply chose to ignore the litigation.

Jennifer's argument that notice was inadequate is belied by the face of the record, and as detailed below, she had no meritorious defense in any event. Her intent to delay for its own sake has been made clear in the lengthy proceedings ongoing while she pocketed payments every month that were due to Martine.

No abuse of discretion has been, or can be demonstrated on this record. Jennifer did not make out a case for setting aside the *Order* deeming Martine the SBP beneficiary under NRCP 59, NRCP 60(b), or otherwise, and the Family Court's order denying her *Motion to Set Aside* was proper.

II. THE STANDARD OF REVIEW IS "ABUSE OF DISCRETION"

The *Opening Brief* does not mention the applicable standard of review. A motion to set aside a judgment is governed by NRCP 60(b), and this Court has repeatedly stressed that the District Court has wide discretion in such motions, and, barring an abuse of discretion, its determination will not

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be disturbed.[54] Jennifer's counsel conceded below that the only issue in the hearing was whether Jennifer's neglect was excusable,[55] and this Court has long specified that district courts have "wide discretion" in determining "what neglect is excusable, and what is inexcusable."[56]

Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous."[57] An open and obvious error of law can also be an abuse of discretion,[58] as can a court's failure to ***exercise*** discretion when required to do so.[59] Also, a court can err in the exercise of personal judgment and does so to a level meriting appellate intervention when ***no*** reasonable judge could reach the conclusion reached under the particular circumstances.[60]

A court does ***not*** abuse its discretion when it reaches a result which could be found by a reasonable judge.[61]

In *Price v. Dunn*,[62] this Court recited guidelines for lower courts to follow when facing a request to set aside a default judgment, including determining whether there is some reasonable excuse for the party's failure to answer and whether there has been some showing of a meritorious defense, and that the lower court should "recognize" the underlying policy to have cases decided on their merits.[63]

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[54] *Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980); *Heard v. Fisher's & Cobb Sales & Distribs., Inc.*, 88 Nev. 566, 502 P.2d 104 (1972).

[55] App. 121.

[56] *Union Petrochemical Corp. v. Scott, supra*; *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 445-46, 488 P.2d 911, 915 (1971) (*quoting Cicerchia v. Cicerchia*, 77 Nev. 158, 360 P.2d 839 (1961)); *Ogle v. Miller*, 87 Nev. 573, 491 P.2d 40 (1971).

[57] *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982).

[58] *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979).

[59] *Massey v. Sunrise Hospital*, 102 Nev. 367, 724 P.2d 208 (1986).

[60] *Franklin v. Bartsas Realty, Inc., supra*; *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942).

[61] *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).

[62] *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (1990).

[63] 106 Nev. at 104.

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III. NO ABUSE OF DISCRETION IS SHOWN BY THIS RECORD

Jennifer offered no reasonable excuse for her neglect of the hearing in her *Motion to Set Aside*, despite months of notice. In fact, she offered no basis of any kind, arguing only that notice had not been "properly" given, without explaining how that was true, or why that might matter.[64]

After it had been established at oral argument that proper notice ***had*** been given, Mr. Kelleher was asked to propose some reason for Jennifer's neglecting to file any opposition or appear personally or through counsel. His response was that "human weakness and human frailty will cause people to make mistakes and have excusable neglect."[65]

Although he admitted receiving messages from Mr. Polsenberg, and speaking to Mr. Valencia and to Jennifer about the noticed hearing between September, 2006, and February, 2007, Mr. Kelleher never offered any affidavit or statement from either counsel of record suggesting any potentially cognizable reason for Jennifer to have ignored the long-noticed proceedings.

In prior cases, this Court has detailed the kinds of circumstances that would permit a finding of ***excusable*** neglect, such as a party being medically disabled during the time period that a motion had to be filed,[66] or believing in good faith that an attorney would appear and represent their position at a hearing, only to find out after the fact and without advance knowledge that counsel had abandoned the case,[67] or being completely unaware, without fault, that a hearing was set.[68] Jennifer cites these cases,[69] but never says what acts, by which of her counsel, "amounts to misconduct" and failed to meet their professional obligations. We are not familiar with any such acts.

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[64] App. 28-43.

[65] App. 121-22. A few minutes earlier, Mr. Kelleher offered (without suggesting the existence of any evidence) that Jennifer was "from an emotional standpoint in a very tough place" and "pretty tapped out, pretty drained." App. 120-21.

[66] *See Cicerchia v. Cicerchia*, 77 Nev. 158, 360 P.2d 839 (1961).

[67] *Dagher v. Dagher*, 103 Nev. 26, 731 P.2d 1329 (1987); *Passarelli v. J-Mar Development*, 102 Nev. 283, 720 P.2d 1221 (1986); *Stachsel v. Weaver Brothers, Ltd.*, 98 Nev. 559, 655 P.2d 518 (1982).

[68] *Stoecklein v. Johnson Electric*, 109 Nev. 268, 849 P.2d 305 (1993).

[69] AOB at 19.

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Even where negligence is solely that of the lawyer, sometimes it is imputable to the client, and sometimes not.[70] To the best of our knowledge, however, there is no authority in Nevada – or anywhere else – labeling as "excusable" the failure of a represented person in good health to appear, oppose, or communicate about a hearing despite several months of notice and consultation with three attorneys, all of whom apparently advised her as to her rights and responsibilities, and any or all of which were capable of opposing the motion.

This Court has explained why there is no authority for labeling such inaction as "excusable":

As we stated previously in *Union*:

> we are not confronted here with some subtle or technical aspect of procedure, ignorance of which could readily be excused. The requirements of the rule are simple and direct. *To condone the actions of a party who has sat on its rights only to make a last-minute rush to set aside judgment would be to turn NRCP 60(b) into a device for delay rather than the means for relief from an oppressive judgment that it was intended to be.*

Union, 96 Nev. at 339, 609 P.2d at 324 (citing Franklin v. Bartsas Realty, Inc., 95 Nev. 559, 598 P.2d 1147 (1979); Central Operating Co. v. Utility Workers of America, 491 F.2d 245 (4th Cir. 1974)) (emphasis added). Kahn had sufficient knowledge to act responsibly.[71]

The same is true here; Jennifer had all the knowledge and advice necessary to act "responsibly," but no incentive to do so. As detailed below, so long as Jennifer could delay matters, she could continue to double-dip, taking (in the name of her children) the SBP payments that should have been paid to Martine every month, in ***addition*** to the DIC payments flowing to her personally.

From the pleadings and briefs served on Jennifer, she has known for years that there was no legal or equitable justification in doing so, but her utter lack of regard for the welfare of either Martine or Audrey is well documented by the record. Jennifer was perfectly willing to continue taking funds that should go to compensate Rod's impecunious former spouse, and the child who she helped abuse and traumatize, for as long as she could get away with it.[72]

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[70] *See* discussion in *Guardia v. Guardia*, 48 Nev. 230, 229 P. 386 (1924) (finding client responsible for her attorneys' failure to oppose a divorce complaint).

[71] *Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793-94 (1992), *quoting Union Petrochemical Corp. v. Scott*, 96 Nev. 337, 609 P.2d 323 (1980) (emphasis in original).

[72] In colloquy with Judge Marren, the closest thing Mr. Kelleher could propose for why it might be "unjust" to let the February *Order* stand is that if Martine and Audrey actually got the SBP benefits to which they were entitled, Jennifer's household budget would be reduced. App. 121-22.

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In the field of family law, the Court has repeatedly reiterated its intent to give substantial deference to the discretionary decisions of district court judges, particularly as to procedural matters,[73] even where this Court might have reached a different result.[74] Even Jennifer concedes that trial courts have "broad discretion" in making determinations of whether or not to grant motions under NRCP 59 and NRCP 60(b).[75]

Though motions to set aside default judgments on grounds of inadvertence or excusable neglect are treated with liberality in the interests of securing consideration of the merits, ***some*** showing must be made that the inadvertence or neglect was excusable.[76] In this case, as in *Barry v. Lindner*,[77] the party ruled against failed to present any facts establishing mistake, inadvertence, surprise, or excusable neglect, had received all the notice to which he was entitled, and actually knew of the hearing date.

In *Price*, this Court indicated that the second prong – the requirement of a showing of a meritorious defense – "must now be abandoned" under United States Supreme Court precedent, at least where "a person has been deprived of property in a manner contrary to the most basic tenets of due process."[78]

In ***this*** case, however, the trial court made a specific finding that Jennifer was not deprived of ***any*** due process, but rather that service had been made correctly and Jennifer had actually been fully noticed of the hearing.[79] In such circumstances, it is relevant to question whether the defaulted party had proffered any kind of defense to the relief granted to the other party. As discussed in the

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[73] *Kantor v. Kantor*, 116 Nev. 886, 8 P.3d 825 (2000) (denial of motion for leave to amend affirmed); *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (allowance of amendment to complaint to conform to the evidence affirmed).

[74] *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[75] AOB at 14-15.

[76] *Parsons v. Stardust Gardens No. 1*, 95 Nev. 207, 591 P.2d 1141 (1979); *Bryant v. Gibbs*, 69 Nev. 167, 243 P.2d 1050 (1952).

[77] *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003).

[78] 106 Nev. at 104, *citing Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80 (1988).

[79] App. 122, 125.

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next section, Martine was the appropriate SBP beneficiary and the Court was within its discretion in so finding.

The third consideration under *Price* is that the resolution reached be "on the merits" if possible.[80] Here, they ***were***. Jennifer did not show up at the February hearing, but her counsel fully pled her (incorrect) view of the law regarding SBP beneficiary designations thereafter, and argued that position at length.[81]

As this Court has recently observed, default is properly granted where "the normal adversary process has been halted due to an unresponsive party, because diligent parties are entitled to be protected against interminable delay and uncertainty as to their legal rights."[82] Martine has been trying to obtain some compensation for her marriage to Rod since 2001.

In short, Jennifer has the burden of showing in this appeal that under ***no*** set of circumstances could the trial court have found that her failure to appear and defend was not excusable. For the various reasons detailed below, Jennifer cannot, and certainly has not, met that burden. Jennifer failed to show that there was some unavoidable misfortune preventing her from defending against the orders sought on remand, and she has not suggested how Judge Marren "abused his discretion" in finding that there had been no excusable neglect.

IV. MARTINE WAS PROPERLY DEEMED THE SBP BENEFICIARY

Jennifer's appeal requires her to show a "meritorious defense" to the issues resolved at the February hearing – in this case, some reason (besides that she wants to keep Martine's money) why Martine could not, or should not, be deemed the SBP beneficiary. She did not do so below, and she has not done so in the *Opening Brief*.

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[80] 106 Nev. at 105; *see also Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003) (affirming trial court's refusal to set aside an order granted against a party who failed to appear or defend).

[81] App. 28, 37-39, 88-96, 102-106.

[82] *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998) (lower court had discretion to decide how much participation in the default proceedings to allow to the defaulted party), *citing Skeen v. Valley Bank of Nevada*, 89 Nev. 301, 303, 511 P.2d 1053, 1054 (1973).

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In fact, Jennifer's entire submission on the point is one and a half pages of text from pages 17 to 18, devoid of any authority of any kind. It consists of only the unsupported argument that for Martine to receive the SBP payments, she was required to send in the SBP application form within one year of her divorce from Rod and that, since she did not, she can't be the SBP beneficiary. Jennifer is simply wrong.

A. Introduction to the SBP & DIC

The Survivors Benefit Plan ("SBP") was created in 1972 to provide a monthly survivor's annuity to dependents of retired members of the Uniformed Services. All members entitled to retired pay are eligible to participate in the SBP,[83] under which a survivor's annuity is payable after a member's death.[84]

Congress amended the SBP program in 1986 to provide that courts are explicitly empowered to order members to elect to provide SBP annuities to former spouses, irrespective of the date of divorce, or retirement.[85] If the member refuses to submit the required paperwork, the former spouse has to file a written request with the appropriate Service Secretary requesting that the election be "deemed to have been made." The written request must be filed within one year of the date of the first court order awarding the SBP.[86]

Normally, a spouse or former spouse is the SBP beneficiary, for life. A dependent child can only be an SBP beneficiary under special and limited circumstances, and any award to a child ends when the child emancipates, terminating all SBP benefits to anyone.[87]

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[83] 10 U.S.C. § 1448(a)(1)(A).

[84] 10 U.S.C. § 1447 *et seq.*

[85] Pub. L. No. 99-661 (Nov. 14, 1986); 10 U.S.C. § 1450(f)(4). *MacMillan v. MacMillan*, 751 S.W.2d 302 (Tex. App. 1988).

[86] 10 U.S.C. § 1450(f)(3)(B)-(C).

[87] 10 U.S.C. § 1448(b)(4). In any event, for "child only" designations, the benefits continue only until the child is 18 years old (or 22, if a full-time student). 10 U.S.C. § 1447(5).

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The 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, making survivors of members who die in the line of duty[88] eligible to receive SBP. This has created a pre-retirement survivor annuity for spouses or former spouses, but there is not yet a body of rules in place for what applications must be made when, given that eligibility for the SBP now exists prior in time to the earliest normal date in which a member could name an SBP beneficiary.

The SBP is not divisible. It cannot be divided between a spouse and former spouse, or between two former spouses.[89] This was acknowledged by all sides to this case.[90]

An entirely separate program run by the Veteran's Administration pays Dependency and Indemnity Compensation ("DIC") to the surviving spouse and children of an active duty military member who dies.[91] DIC payments are not made to persons divorced from members.[92]

A spouse or former spouse cannot get both DIC and SBP. If a person happens to be the named recipient of both DIC and SBP payments, all DIC payments are subtracted from the SBP payments.[93] DIC payments are not taxed, and are therefore more valuable than the (taxable) SBP payments that would otherwise go to the survivor.

In this case, Jennifer is receiving DIC benefits for herself and her children. In her capacity as Executrix of Rod's Estate, she designated the children as SBP beneficiary, effectively directing both sets of payments to her, while ensuring that no money from either program went to Martine.[94]

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[88] Essentially defined as virtually any cause of death not experienced while AWOL or otherwise at odds with the military authorities.

[89] The military retirement system has no provision for division of a survivorship interest. *See A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Committee on Armed Services of the House of Representatives, Department of Defense, Sept. 4, 2001), http://dticaw.dtic.mil/prhome/spouserev.html.

[90] App. 17, 122.

[91] 38 U.S.C. § 1311(a).

[92] *See* 38 U.S.C. §1311(a)(2).

[93] 10 U.S.C. § 1451(c)(2).

[94] Jennifer was unable to prevent one-third of the SBP payments from being held back by the Defense Finance and Accounting Service (DFAS) for Audrey's benefit, and ultimately paid to Martine for the institutionalized child. That is the only money to date recovered for either Martine or Audrey since Rod's death in 2005.

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B. The One-year Application Period Runs from the First Court Order Disposing of the Benefit, Not the Date of Divorce

Relying on an inaccurate Air Force "Instruction,"[95] Jennifer argues that Martine is "barred from receiving the SBP benefits" because she did not obtain or submit an order requiring payment within one year of her 1999 North Carolina *Decree of Divorce* from Rod.[96]

The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, including any order or final decree modifying the terms of the previously issued decree.[97]

The controlling statute provides that the designation of a survivor beneficiary must be received by the Secretary concerned within one year of the date of the first court order making the designation.[98] ***All*** known case authority states that the application period begins to run from the date of the court order actually granting the SBP interest.[99] The only two textbooks in this field say the same thing.[100]

The parties' *Decree of Divorce*[101] did not divide ***any*** of the marital assets. It was silent as to the SBP, as Jennifer's counsel conceded.[102] The first order addressing the issue of SBP was not

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[95] An internal operating document, apparently written by paralegal staff, that does not have the force of law. *See* App. 72-75, 104, 111-14. While it should go without saying, such an "instruction" cannot override a controlling statute.

[96] AOB 5, 17-18.

[97] 10 U.S.C. § 1408(a)(2), Definitions.

[98] 10 U.S.C. § 1450(f)(3)(C).

[99] 10 U.S.C. § 1450(f)(3)(B); 10 U.S.C. § 1450(f)(4); *See, e.g.*, Comp. Gen. B-232319 (*In re Minier*, Mar. 23, 1990); Comp. Gen. B-226563 (*In re Early*, Mar. 2, 1990); 71 Comp. Gen. 475, B-244101 (*In re Driggers*, Aug. 3, 1992); Comp. Gen. B-247508 (*In re Magill*, June 14, 1993); *Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994).

[100] Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) at 153-54; Mark Sullivan, THE MILITARY DIVORCE HANDBOOK: A PRACTICAL GUIDE TO REPRESENTING MILITARY PERSONNEL AND THEIR FAMILIES (ABA 2006) at 480-81.

[101] R. App. 1-3, *Decree of Divorce*.

[102] App. 103.

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made until February 2, 2007,[103] and the Deemed Election Letter[104] was filed with the Defense Finance and Accounting Service Center five days later, well within the one year application deadline.[105]

Nothing in the 2002 law (extending SBP coverage to active-duty members who are not yet eligible to retire) indicates that the rules governing applications were to be any different. And the Department of Defense Management Regulations cited above specifically contemplated the application going to DFAS after the date of the member's death.

Jennifer's claim that an order addressing the SBP must be issued within one year of the decree of divorce has simply never been the law. Nothing forecloses Martine being the deemed SBP beneficiary. And even if there ***was*** some technical provision of federal law that prevented the finance center from making direct payments to Martine, this Court has established that the party receiving the money she is owed is bound to pay it over to her.[106]

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[103] App. 21-26.

[104] DoD Financial Management Regulations, Volume 7B, Chapter 43 (September 2005):
430503. C. Deemed Elections. Deemed elections are applicable in cases where a member enters, incident to a proceeding of divorce, dissolution, or annulment, into a written agreement to elect to provide an SBP annuity to a former spouse, and such agreement has been incorporated in, or ratified or approved by, a court order, **or has been filed with the court of appropriate jurisdiction in accordance with applicable State law, or in cases where the member is required by a court order to make a former spouse election**. If such member then fails or refuses to make such election, the member shall be deemed to have made such election if the Secretary of the Military Department concerned receives a written request from a former spouse or the former spouse's attorney on behalf of the former spouse. The request is acceptable if it refers to, or cites provisions in, a court order concerning SBP former spouse coverage, or makes clear by other references to SBP that there is an intent that the annuity coverage be provided to the former spouse. The written request must be accompanied by a copy of the pertinent court order or agreement referring to the SBP coverage.
… .

4. **If a member dies before making an election, a former spouse's request, which is otherwise qualified, shall be honored even if the date of the request is after the date of the member's death**.

[105] 10 U.S.C. § 1450(f)(3)(C); *Holt v. United States of America*, 64 Fed. Cl. 215 (2005).

[106] *See, e.g., Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994) (trial court could avoid "ten year rule" restriction on direct payments to former spouse of military pension share by characterizing it as "permanent alimony"); *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*, 124 S. Ct. 1716 (2004) (member's choice to receive disability pay which is exempt from division with former spouse did not alter his obligation as determined by the state court, and he was required to make up to the former spouse, dollar for dollar, whatever was ordered paid to the former spouse, but which he actually received, however it was characterized).

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C. The District Court Was Within the Bounds of Discretion in Awarding Martine Survivor's Benefits

Retirement benefits earned during a marriage are divisible community property.[107] Survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided.[108] Normally, when a court distributes retirement benefits, it provides security for both spouses so that the death of one party does not effect a termination of the benefits of the other.

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*,[109] which held that survivor's benefits simply gave the wife a right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her." Many other courts have reached the same conclusion.[110] Some courts have viewed the survivorship benefit as a means of insurance, to ensure that the former spouse continues to receive retirement benefits, making the division of the military retirement more equitable.[111]

Jennifer makes no argument in law or equity why Martine ***should not*** be entitled to the benefit, stating only (and without authority) that securing the retirement benefits to the only person with a significant time-rule interest in the benefits is "a unique argument."[112] She also, without

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[107] *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988).

[108] *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992).

[109] *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

[110] *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of survivorship to spouse, reasoning that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division"); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that "to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate"); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Dist. Ct. App. 1991) (survivor's benefit is a separate and distinct property interest).

[111] *In re Marriage of Smith*, 148 Cal. App. 4th 1115 (2007).

[112] AOB at 17.

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explanation, appears to protest that the question of who receives this non-divisible benefit is "winner take all."[113]

There is no question that the District Court had authority to award the benefits. Domestic relations courts have both the authority and the duty to issue orders concerning valuable property rights.[114] Federal law since 1986 has specifically permitted state divorce courts to determine whether to require election of the former spouse as the Survivor's Benefit Plan beneficiary.[115]

The Court below was perfectly aware that Jennifer used her position as administratrix of Rod's estate to designate her children as SBP beneficiaries after Rod's death, and was fully informed of both legal and equitable considerations, on both sides.[116] The Court knew if Jennifer increased the sum flowing into her household for the remaining years until her children emancipate, it would deny the benefits to Martine for life. The Court also knew that Jennifer was receiving the full DIC benefits in ***addition*** to the SBP benefits, and would continue to do so.[117]

The *Opening Brief* does not even pretend to address the equities involved. It does not propose any rationale why Jennifer, who obtained all property remaining from Rod and Martine's marriage, massive insurance benefits payable upon Rod's death,[118] and all DIC benefits, should ***also*** get the monthly SBP benefits to the exclusion of the person who was married to Rod while those

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[113] AOB at 17-18.

[114] *See*, *e.g.*, *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[115] *See* Pub. L. No. 99-661, § 641, 100 Stat. 3885 (Nov. 14, 1986).

[116] R. App. 30-36; App. 28-43.

[117] App. 111-14.

[118] All members of the uniformed services are automatically insured under the Servicemembers' Group Life Insurance for $400,000 unless an election is filed reducing the insurance with spousal consent. *See* Pub. L. No. 109-80. Here, Rod and Jennifer were aware of his illness for a long time, and had no reason to decline this coverage; they have never suggested that they did so, and Jennifer almost certainly received the $400,000, plus whatever other insurance existed on Rod. It all passed outside of probate, and so not a penny went to satisfy Rod's massive child support arrears or attorney's fees owed to Martine.

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benefits accrued, and who was cheated out of all property, alimony, and even child support for Audrey.[119]

The closest Jennifer gets to addressing the equities at all is the quote on page 16 – with no apparent relevance to the facts of ***this*** case – from *Stoecklein v. Johnson Electric*[120] that the definition of "good faith" encompasses "a state of mind denoting honesty of purpose and freedom from intent to defraud." Over the past nine years, Rod, Jennifer, or both were engaged in a non-stop pattern of lying, kidnaping, child abuse, stone-walling, and fraud on the court including everything from submission of incomplete and falsified documents and translations in the federal and Family Courts, to selective deletions and omissions from the Appendix transmitted to this Court in the first appeal. On this record, it is hard to see why the quote was provided.

In any event, Martine was properly named the SBP beneficiary. Jennifer has not established that any "meritorious argument" did, or could, exist to the contrary, and the Family Court's *Order* denying Jennifer's *Motion to Set Aside* the Order naming Martine as beneficiary was properly denied, accordingly.

This Court has stated repeatedly that the public policy that cases be adjudicated on their merits "has its limits"[121]:

> We wish not to be understood, however, that this judicial tendency to grant relief from a default judgment implies that the trial court should always grant relief from a default judgment. Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity. Lack of good faith or diligence, or lack of merit in the proposed defense, may very well warrant a denial of the motion for relief from the judgment.[122]

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[119] *Cf., e.g., Smith v. Smith*, 102 Nev. 110, 716 P.2d 229 (1986), in which the moving party complained that she had been physically beaten until she agreed to the property division, and demonstrated that the division in the order was contrary to law, thus making a *prima facie* case of both procedural and substantive error. It is a hallmark of ***all*** the NRCP 60(b) cases that the movant has the burden of showing the clear injustice of the existing order as a ***requirement*** of going forward with such a motion. *See, e.g., Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (whether as a matter of fraud or mutual mistake, spouse who received only some 29% of all community property while being told she was getting "more than half" was entitled to redistribution of property).

[120] *Stoecklein v. Johnson Electric*, 109 Nev. 268, 849 P.2d 305 (1993).

[121] *Kahn v. Orme*, 108 Nev. 510, 516, 835 P.2d 790, 794 (1992).

[122] *Id., quoting from Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d at 256 (1968).

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Where, as here, a party ignored notice and exhibited a lack of diligence, and failed to carry her burden of showing either surprise or excusable neglect, her *Motion to Set Aside* an order rendered against her should be denied, because "The burden of proof on such a motion is on the moving party who must establish his position by a preponderance of the evidence."[123]

V. THERE IS NO LEGITIMATE ISSUE AS TO NOTICE

Throughout her *Opening Brief*, Jennifer reiterates that she had "no notice" of the February hearing, even though her trial attorney admitted that she did, and proper service and notice has been found as a matter of fact.[124] While the details of the *Statement of Facts* above will not be repeated, Jennifer raises a couple of ancillary points that should be addressed.

She asserts (at 5-8) that service of the *Order* on Jennifer and Mr. Kelleher in March, 2007, somehow proves that service of notice of the hearing on Mr. Polsenberg and Mr. Valencia the prior September was deficient. Actually, it only illustrates how Jennifer's non-compliance with rules complicated the record and made our task harder – as Jennifer is doing ***again*** in this appeal.

As detailed above, this office only served Jennifer and Mr. Kelleher directly after being told to do so, and complying with our general ethical responsibility to provide notice as requested.[125] The problem with trying to serve all notices correctly in this case is that Jennifer's various counsel have not complied with the rules for entering and leaving the case, leaving opposing counsel (us) to either guess who should receive what, or to rely on their informal instructions and notices.

NRAP 46(d) states that "withdrawals, substitution, removal and change of attorneys shall be governed" by SCR 46-48. SCR 46 and 48 provide:

> Rule 46. After judgment or final determination, **an attorney may withdraw as attorney of record at any time upon the attorney's filing a withdrawal**, with or without the client's consent.

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[123] *Lowrance v. Lowrance*, 87 Nev. 503, 507, 489 P.2d 676, 678 (1971) (Batjer, J., dissenting), *quoting from Luz v. Lopes*, 358 P.2d 289, 294 (Cal. 1960).

[124] App. 115, 122, 125, 160-61.

[125] *See generally* SCR 3.4 (Fairness to Opposing Party and Counsel); SCR 3.5A (Relations With Opposing Counsel).

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> Rule 48. When an attorney is changed, as provided in Rule 47, **written notice of the change** and of the substitution of a new attorney, or **of the appearance of the party in person, shall be given to the adverse party**; ***until then he shall be bound to recognize the former attorney***.

(Emphasis added). This case has not yet been "finally determined" since litigation was begun in 2001. Mr. Polsenberg and Mr. Valencia have ***still*** never withdrawn. When this Court's *Opinion* in the first appeal remanded to the Clark County Family Court, those attorneys were counsel of record. As soon as proceedings began in that Court, EDCR 7.40 became applicable:

> Rule 7.40. Appearances; substitutions; withdrawal or change of attorney.
> (a) When a party has appeared by counsel, the party cannot thereafter appear on the party's own behalf in the case without the consent of the court. Counsel who has appeared for any party must represent that party in the case and shall be recognized by the court and by all parties as having control of the case. The court in its discretion may hear a party in open court although the party is represented by counsel.
> (b) Counsel in any case may be changed only:
> (1) When a new attorney is to be substituted in place of the attorney withdrawing, by the written consent of both attorneys and the client, which must be filed with the court and served upon all parties or their attorneys who have appeared in the action, or
> (2) When no attorney has been retained to replace the attorney withdrawing, by order of the court, granted upon written motion, ...

As a technical matter, we may ***still*** be obligated to continue dealing with Messrs. Valencia and Polsenberg, but (first) Mr. Kelleher, and (now) Mr. Rosenberg have filed documents and papers claiming to be acting as Jennifer's counsel, and asking that we deal with them, instead.[126] We have done so, essentially basing our actions on counsel's word as a matter of professional courtesy.

We had the same problem in Family Court as we had on appeal, and took the representations of Mr. Kelleher at his word, as soon as we were informed who to do deal with, as a general matter of professional courtesy, even though there appears to be no paper trail of any kind of any transfer of authority from Mr. Polsenberg and Mr. Valencia to Mr. Kelleher.

If we are to be faulted for dealing with counsel as they directed, even when they did not comply with the letter of the rules, then so be it, but it does not affect the merits of this appeal. If anyone has a rule-based complaint, it is Mr. Valencia and Mr. Polsenberg because we did not send them notice of entry of the *Order* from the February 2, 2007, hearing. But that has no consequence,

[126] At least the transfer from Mr. Kelleher to Mr. Rosenberg was accomplished upon motion, App. 163-64.

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since Jennifer and her "new" counsel Mr. Kelleher were notified, able to file their *NRCP 59 and 60(b) Motion* within ten days, and timely filed a *Notice of Appeal*.

The point here is that service of notice ***of the February hearing*** was upon Jennifer's counsel of record, was admittedly relayed to Jennifer, and has been found as a matter of fact to be correct. Nothing else as to who got what later, or why, would appear relevant to this appeal. And in any event, Jennifer should not be permitted to complain about it, since it is the actions and inactions by her and her agents, outside the rules, that caused any confusion that has occurred.[127]

VI. THERE IS NO SCRA ISSUE

The *Opening Brief* makes the vague assertion (at 11) that somehow Jennifer's rights under the Servicemembers Civil Relief Act of 2003 ("SCRA") were not honored. Jennifer claims she was deployed from May 7 to about September 30, 2007.[128] That period ***starts*** several months ***after*** the February hearing at issue here, and a month after her motions under NRCP 59 and 60 were heard and resolved. It appears to be totally irrelevant. And, as noted, the attorney's fee order filed in July (but from that same April 9 hearing) was not even appealed.

The "mandatory stay" provisions of the SCRA applies only to cases where the member ***has not made an appearance***.[129] We are not familiar with ***any*** case in which it has been found applicable to a situation where all hearings have been held, and only entry of a final attorney's fee order is made later. And even if it did, the act only applies if the member's personal appearance is deemed necessary for the proceeding.

Here, there was no evidentiary proceeding convened after February, 2007, and Jennifer's agents were fully capable of doing anything she directed be done. We can only conclude that the military service has been trotted out as a red herring.

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[127] This Court held in *Wehrheim v. State*, 84 Nev. 477, 443 P.2d 607 (1968) (*quoting from Gottwals v. Rencher*, 60 Nev. 35, 92 P.2d 1000 (1939)): "a litigant party shall not be permitted to deny the authority of his attorney of record, whilst he stands as such on the docket. He may revoke his attorney's authority, and give notice of it to the court and to the adverse party; but whilst he so stands, the party must be bound by the acts of the attorney."

[128] App. 153.

[129] 50 U.S.C. § 501 (Dec. 19, 2003).

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VII. CONCLUSION

The Family Court – quite well informed after many years of litigation – found that Martine is the rightful beneficiary of the monthly Survivor's Benefit Plan payments. Jennifer asked the Court to reconsider that *Order* without suggesting any way in which her failure to appear at the prior hearing could be ascribed to mistake, inadvertence, surprise, or excusable neglect; her request was denied.

Jennifer's argument on appeal that she was not notified of the February hearing is belied by the record and findings of fact. Her claim that Martine may not be the SBP beneficiary is contrary to all cognizable authority, revealing the absence of any meritorious defense. Her attempts to bootstrap the appearances and substitutions of her various lawyers into a "notice" issue is both meritless and disingenuous.

The Family Court's *Order* deeming Martine the SBP beneficiary, and awarding child support arrearages and attorney's fees, and denying Jennifer's *Motion* to set those rulings aside, should be affirmed, either by order dismissing Jennifer's appeal, or by *Opinion* affirming the rulings below. Costs on appeal should be assessed against the Appellant.

Respectfully submitted,
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_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this *Answering 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 November, 2008.

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_____

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the _____ day of November, 2008, by U.S. Mail addressed as follows:

James R. Rosenberger, Esq.
PICO ROSENBERGER
1916 South Eastern Avenue
Las Vegas, Nevada 89104
Attorney for Appellant

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

_____
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