IN THE SUPREME COURT OF THE STATE OF NEVADA

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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

MOTION TO FILE ERRATA TO RESPONDENT'S ANSWERING BRIEF

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I. PRELIMINARY STATEMENT

This is an unusual case, in that litigation has continued on an ongoing basis in the district court throughout the pendency of this appeal. Recent filings in the district court caused us to question what we had written in the *Respondent's Answering Brief* filed last November. In light of our ongoing duty of candor to the Court, both generally and per RPC 3.3, we have investigated, and believe we have discovered an erroneous representation to this Court, how and why it happened, and how to correct it. This *Motion* for leave to file an errata follows.

We do not believe that the error discovered leads to any different result than that which we requested in the *Answering Brief*, and we believe that the Court would eventually have discovered the error in our submission discussed in this filing. Besides our ethical duty to point out such an error upon discovery, we also wish to save the Court and its staff from any wasted time dealing with a matter that need not be addressed. We do not believe there could be any prejudice from the granting of this motion, and nothing in the rules appears to prohibit a motion such as this one.[1]

This *Motion* is made in good faith and not to delay justice.

II. OUR ERROR

We believed, and informed this Court, that the appeal before it was from a post-divorce order denying Jennifer's *Motion to Set Aside February 2, 2007 Order*. It isn't. The *Notice of Appeal* was from the February 2, 2007, order itself – the same order about which that the *Motion to Set Aside* was filed. As we noted in the *Respondent's Answering Brief*, Jennifer treats the two synonymously in her appellate (and trial court) filings, even though she filed no appeal from denial of the *Motion to Set Aside*.

[1] NRAP 27; NRAP 1(c).

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III. HOW AND WHY WE MADE THAT ERROR

Jennifer filed her *Notice of Appeal* on April 9, 2007, and served us with that *Notice* thereafter. We believed, erroneously, that the appellate notice concerned the last hearing we had attended, not the motion hearing attended some months earlier on February 2.

Our error was compounded by the failure of Jennifer to file a docketing statement explaining what she was appealing. After being twice admonished by this Court, she eventually did file a Docketing Statement, but that Statement was never copied to us, despite the Certificate of Service falsely claiming that it had been.[2]

Additionally, most of the evidence relevant to the appeal actually came from the later hearing – where Mr. Kelleher conceded that Jennifer's various attorneys had received notice of the earlier hearing and discussed it with her on several occasions – not at the earlier hearing, where Jennifer made no appearance.

Opposing counsel might have noticed the error, but if so has never mentioned it, formally or informally. And because he chose to not file a *Reply Brief* (while also not complying with this Court's rule asking for notice of waiver of the right to file such a *Reply*),[3] he apparently has not given any such notice to this Court, either.

IV. EFFECT OF ERROR ON RESOLUTION OF THE APPEAL

Our error as to which order had been appealed should have no effect on the actual disposition of the appeal, but our confusion could cause the Court to waste time dealing with matters it need not consider, which distraction we deeply regret.

The appeal is from the original order naming Martine as the proper Survivor's Benefit Plan ("SBP") beneficiary, and not the later order refusing to set aside that order. Thus, this Court need not consider whether the district court abused its discretion in refusing to set aside the *Order* filed

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[2] As noted in both our *Answering Brief* and in our filings in the first appeal, our opponent's failures to file, failures to serve, and filing of incomplete, false, and redacted documents has been an ongoing problem throughout this litigation for nearly a decade at this point.

[3] NRAP 28(c).

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March 6, 2007, from the hearing of February 2, but only whether the district court was within its discretion in entering the original order.

As set out in the *Answering Brief*, the standard of review is "abuse of discretion," but the Court can and should disregard as irrelevant our discussion of the standards applicable to denials of motions to set aside orders. Only the lower court's discretion to enter the original order in Martine's favor is actually on appeal. And as discussed at some length in the *Answering Brief*, no abuse of discretion is demonstrated by the record.

The bulk of the *Answering Brief*, as to why Martine was properly deemed the SBP beneficiary, is precisely on point for the issue actually presented by the appeal actually filed.[4] As detailed there, the naming of an SBP beneficiary is within a trial court's discretion, Martine is the appropriate time-rule stakeholder in the survivor's benefits, and (as verified by the Supplement to the File showing the acceptance by DFAS of the order naming Martine as beneficiary) there are no technical or other impediments to such an order.

As noted in the *Answering Brief* (at 23-24), our opponents' steadfast refusal to follow court rules has made it that much more difficult for us to prosecute this matter without making mistakes. Having noted an error with the apparent potential of causing this Court to waste time and effort, however, we believe ourselves obligated to bring it to the Court's attention, despite the lack of any impact on the actual outcome of the appeal.

V. CONCLUSION

We apologize to the Court for our confusion as to which order had been appealed, and hope that our error does not delay final resolution of this appeal. DFAS will not actually make the SBP

[4] *See* RAB at 15-25.

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payments to Martine until after this appeal is resolved, which we hope will be as soon as reasonably possible.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this *Motion to File Errata to Respondent's 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 13th day of July, 2009.

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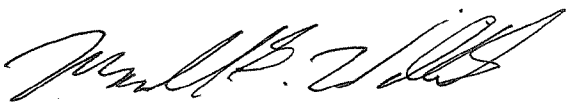

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CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the 13th day of July, 2009, by U.S. Mail addressed as follows:

James R. Rosenberger, Esq.
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That there is regular communication between the place of mailing and the place so addressed.

An Employee of the WILLICK LAW GROUP

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