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IN THE SUPREME COURT OF NEVADA

YOAV EGOSI, Appellant, vs. PATRICIA EGOSI, Respondent.	Case No.: 76144 Dist. Ct. No. D-16-540174-D **APPELLANT'S RESPONSE TO THIS COURT'S ORDER TO SHOW CAUSE WHY THIS APPEAL SHOULD NOT BE DISMISSED**

COMES NOW, Yoav Egosi ("Appellant"), through his attorney of record, Alex Ghibaudo, Esq., of Alex B. Ghibaudo, P.C. and files his response to this Court's order to show cause as follows:

MEMORANDUM OF POINTS AND AUTHORITIES

On December 23, 2019 this Court filed an Order to Show Cause (OSC) why the appeal concerning the September 4, 2018 order should not be dismissed for lack of jurisdiction. This Court addressed the same

Docket 76144 Document 2020-02918

jurisdictional defect when it decided Respondent's motion to dismiss this appeal, filed March 6, 2019. In that motion, Respondent argued that the September 4, 2019 *and* the September 7, 2019 order was not final and thus the appeal was premature. In its order denying that motion, this Court stated that: "[a]n order that alters the rights and obligations of the parties after a final judgment is independently appealable…" citing *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983).

It appears this Court failed to consider the September 4, 2018 order when rendering its decision, as the *Burton* case is not applicable to consideration of that order. The *Burton* case assumes a final order exists and a post-judgment motion seeking to modify that order was filed and denied. Here, the September 4, 2019 order is an order after an evidentiary hearing held in June of 2017 that addressed Appellant's motion to validate a prenuptial agreement the parties executed prior to their marriage.

On September 18, 2018 Appellant filed a "Motion to Certify the Order Filed September 7 [sic],[1] 2017 as Final Under NRCP 54(b) and Motion to

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[1] The order referenced in the motion is actually the September 4, 2018 order at issue here.

Stay These Proceedings Pending Appeal" in the district court.[2] There, Appellant advanced the argument that his claim, that the parties' prenuptial agreement is valid, is not closely related to other claims for relief in the parties' divorce action and, as such, the September 4, 2018 order should be certified as final.[3] In its order resolving the motion, the district court stated:

> Based on prior appellate direction, this Court concludes that, since the 2004 amendments to NRCP 54 (effective January 1, 2005), orders that remove claims are no longer amenable to certification. ***Although this Court indeed intends that the orders governing the issue of the prenuptial agreement to be final orders as to that particular issue***, Defendant's request that this Court "certify" the issue is improper and should be denied. Moreover, as this issue is on appeal, this Court is divested of jurisdiction to entertain the remaining financial issues in this matter. In this regard, the financial issues are not ancillary to the issues raised in the appeal. Therefore, this Court does not have jurisdiction to proceed and Defendant's request has been rendered moot by his appeal. (Emphasis Added).[4]

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[2] There, Appellant argued that the order at issue should be certified as final under NRCP 54(b) and the proceedings stayed. Appellant advances the same argument here as he did in section III.a of his motion (attached as exhibit 1, pages 3-6) and incorporates the same here by reference.

[3] See Exhibit 1, section III.a., pages 3-6.

[4] See Exhibit 2, page 2.

Clearly, the district court considers the order at issue to be a final order. Indeed, though the motion was denied, the proceedings below were stayed, and have remained so, since this appeal commenced.

CONCLUSION

The district court has indicated that it intends for the September 4, 2018 order to be final. Indeed, the proceedings have been stayed since the commencement of this appeal. For the sake of judicial economy, and pursuant to NRAP 2, Appellant requests this Court consider the September 4, 2018 order as a final order, as the district court intended, and allow the appeal challenging that order to proceed.

DATED this 21st day of January, 2020.

/s/ Alex Ghibaudo
ALEX B. GHIBAUDO, Nevada Bar No. 10592
ALEX B. GHIBAUDO, PC
Attorney for Appellant

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Certificate of Service

Pursuant to NRAP 25, on January 21st, 2020 APPELLANT'S RESPONSE TO THIS COURT'S OSC was served upon each of the parties to appeal 76144 via electronic service through the Supreme Court of Nevada's electronic filing system.

/s/ Alex Ghibaudo

_____

An Employee of Alex B. Ghibaudo, PC

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Exhibit 1

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MOT
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DISTRICT COURT, FAMILY DIVISION
CLARK COUNTY, NEVADA

PATRICIA EGOSI, Plaintiff, vs. YOAV EGOSI, Defendant.	Dist. Ct. No.: D-16-540174-D Dist. Ct. Dept.: Q **MOTION TO CERTIFY THE ORDER FILED SEPTEMBER 7, 2018 AS FINAL UNDER NRCP 54(b) AND MOTION TO STAY THESE PROCEEDINGS PENDING APPEAL** **HEARING REQUESTED**

NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION/COUNTERMOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION/COUNTERMOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION/COUNTERMOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE

Comes Now Defendant, Yoav Egosi ("Joe"), through his attorney Alex Ghibaudo, Esq. of the Law Office of Alex B. Ghibaudo, PC, and files

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the above titled motion requesting the following relief:

RELIEF REQUESTED

1. That this court certify the judgment entered on September 7, 2018 as final;
2. That this court stay these proceedings pending Defendant's appeal; and
3. For such other relief as this court deems just and equitable.

This motion is based upon the following Memorandum of Points and Authorities, including the affidavits and documents previously filed, the papers and pleadings on file herein, and any oral argument permitted at the time of the hearing.

DATED this 17th day of September, 2018.

/s/ Alex Ghibaudo

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NOTICE OF MOTION

TO: ALL PARTIES & COUNSEL OF RECORD

NOTICE IS HEREBY GIVEN that the undersigned will bring the above and foregoing Motion on for hearing on the 18th day of October, 2018, at the hour of ___.m. in Department Number Q of the above-entitled Court, or as soon thereafter as counsel may be heard.

No Appearance Required

DATED this 17th day of September, 2018.

/s/ Alex Ghibaudo

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TABLE OF CASES

Cases

Hallicrafters Co. v. Moore, 728 P.2d 441 (Nev., 1986).....3, 4

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Memorandum of Points and Authorities

V. Introduction

On June 11, 2018 Joe filed his notice of appeal contesting this court's decision denying his motion to reconsider. However, an order denying a motion to reconsider is not substantively appealable. The challenged decision stemmed from an evidentiary hearing held on June 13 & 14, 2017 concerning the validity of the parties' prenuptial agreement. No order was ever reduced to writing or entered by this court memorializing this court's decision before Joe's motion was filed. On September 7, 2018, this court entered its order and notice of entry of the order from the June 13 & 14, 2017 evidentiary hearing.

On September 13, 2018, the Nevada Supreme Court entered an order to show cause why the pending appeal on the decision concerning the prenuptial agreement should not be dismissed. In its order, the Court stated that "our preliminary review of the docketing statement and the documents submitted to this court pursuant to NRAP 3(g) reveal…[that] it appears that the judgment or order designated in the notice of appeal is not substantively appealable." The Court refers to the initial notice of appeal referencing this court's denial of Joe's motion to reconsider.

That defect was cured when, on September 10, 2018 Joe filed an amended notice of appeal referencing this court's order and notice of entry of order filed September 7, 2018. However, an additional procedural defect may exist: the order entered September 7, 2018 may be considered an interlocutory order depriving the Court of jurisdiction to consider Joe's appeal. As such, Joe now requests that this court certify that judgment as final pursuant to NRCP 54(b).

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VI. Summary of facts and procedural history

On September 26, 2016 Plaintiff filed her complaint for divorce. On October 16, 2016, Joe filed his answer and counter-claim. In his counter-claim, Joe alleged that the prenuptial agreement the parties entered into in Georgia prior to their marriage should be enforced. Paragraph 9 of Joe's counterclaim stated:

> *Defendant and Plaintiff entered into a Prenuptial Agreement ("Agreement") prior to their marriage on August 13, 2008; that said Agreement complies fully with the requirements of NRS 123A and is valid and enforceable Agreement in all respects. A copy of said Agreement is attached hereto as Exhibit "A". The Court shall confirm the terms of the parties' Agreement.*

On October 28, 2016, Plaintiff filed her reply to Joe's answer and counterclaim. There, Plaintiff denied paragraph 9, referenced above. On January 5, 2017, Plaintiff filed her motion entitled "Plaintiff's notice of motion and motion to invalidate the prenuptial agreement, for a business valuation, for spousal support arrears, and for attorney's fees and costs."

In that motion, Plaintiff alleged that "The Parties' Prenuptial Agreement is Invalid Under Georgia Law and Does Not Satisfy the Scherer Test." On February 9, 2017, Joe filed his opposition to Plaintiff's motion. On June 13 & 14, 2017, an evidentiary hearing on the issue of the parties' prenuptial agreement. At the conclusion of that evidentiary hearing, this upheld the prenuptial agreement in part, but invalidated key portions of the agreement, namely that certain assets acquired after the marriage were community property, despite provisions of the agreement that dictate a different result. To reach that decision, this court took evidence, primarily in the form of live testimony from various witnesses, that revealed events which occurred prior to the parties' marriage.

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On April 24, 2018, Joe filed his motion requesting that this court reconsider its decision regarding the prenuptial agreement. On May 29, 2018, that motion was denied. On July 10, 2018, this court vacated the trial on financial matters then pending in light of Joe's notice of appeal, filed June 11, 2018. On September 7, 2018, this court entered its order and notice of entry of order from the June 13 & 14, 2017 evidentiary hearing on the validity of the parties' prenuptial agreement. This motion follows.

VII. Discussion

a. This court should certify its order entered September 4, 2017 as final pursuant to NRCP 54(b)

i. Governing law – NRCP 54(b)

NRCP 54(b) provides that a judgment or order of the district court which completely removes a party ***or a claim*** from a pending action may be certified as final "only upon an express determination that there is no just reason for delay...."[1] Thus, the rule clearly contemplates certification of a judgment resolving a claim.[2]

ii. The district court may certify a judgment as final under NRCP 54(b) where claims for relief are not closely related

This court may certify a judgment as final where there is no just reason for delaying such certification. If there is just reason for the delay, then certification is inappropriate: there can be no finding that there is no just reason for delay if the claims asserted in an action, albeit separate, are so closely related that the Nevada Supreme Court must necessarily decide important issues pending in the district court in order to decide the issues

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[1] *Hallicrafters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441, 442 (Nev., 1986).
[2] *Mallin v. Farmers Ins. Exchange*, 106 Nev. 606, 797 P.2d 978, 981 (Nev., 1990).

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appealed. In such a case, certification of an order deciding some but not all of those claims as final is an abuse of the district court's discretion.[3]

The analysis depends on defining when claims for relief are "closely related." Concisely stated, where claims require proof of facts and elements not necessary to the proof of other claims, the claims for relief ***are not*** closely related;[4] claims for relief ***are*** closely related where it would necessarily decide the law of the case on any claims still pending in the district court. [5] In either case, consideration of an appeal would result in "piecmeal litigation" rendering certification of a judgment as final inappropriate.[6]

iii. Joe's claim that the parties' prenuptial agreement is valid is not closely related to other claims for relief in the parties' divorce action

Here, the parties made various claims for relief arising from a single transaction: their marriage. The claims for relief included claims related to custody of the minor child at issue, the division of assets and debts, and related relief typical of any divorce proceeding. Not typical of most divorces, one of Joe's claims for relief was that this court validate the parties' prenuptial agreement. The claim related to the prenuptial agreement is not closely related to claims for relief concerning custody, assets, and debts.

First, the elements of Joe's cause of action concerning the parties' prenuptial agreement are distinct from a determination of custody, which, at

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[3] *Hallicrafters Co. v. Moore*, 102 Nev. 526, 728 P.2d 441, 443 (Nev., 1986); citing *Mid-Century Ins. Co. v. Cherubini*, 95 Nev. 293, 593 P.2d 1068 (1979); *Las Vegas Hacienda v. G.L.M.M. Corp.*, 93 Nev. 177, 561 P.2d 1334 (1977).

[4] Id. at 442.

[5] Id.

[6] Id.

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its foundation, requires consideration of a child's best interests, and the division of assets and debts, which are considered community property absent compelling circumstances. Indeed, here, the elements of Joe's cause of action related to the prenuptial agreement depend on a consideration of Georgia law. Specifically, whether: 1) execution of the prenuptial agreement was not the result of fraud, duress, mistake, misrepresentation, or nondisclosure of material facts; 2) the agreement is not substantively unconscionable; and 3) considering the totality of the circumstances existing at the time of the execution of the prenuptial agreement, enforcement of that agreement would not be unfair. Thus, the claims for relief are distinct.

Second, the facts necessary to determine whether the elements of the cause of action concerning the validation of the prenuptial agreement are satisfied are markedly different from all other causes of action. The elements of the claim enunciated above require a consideration of facts and circumstances existing ***prior*** to the parties' marriage while the other claims for relief, including the division of assets and debts, and custody of the minor children, indeed all other claims for relief, depend on facts and circumstances existing or arising ***after*** the marriage. ***Thus, the claims for relief in this matter are not closely related.***

Furthermore, there are no pending claims for relief by other parties still pending in the district court. Therefore, there is no danger that consideration of Joe's appeal would trigger the law of the case doctrine, rendering other claims still pending in the district court uncertain. In other words, there is no way that certification of the challenged order as final would result in parallel litigation at the district court and the appellate court by multiple parties on closely related claims. As such, this court should certify the judgment as final.

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b. A stay pending appeal is appropriate in this matter

Under N.R.C.P. 62(d), proceedings to enforce a judgment may be stayed in this court by giving a supersedeas bond. The test applied in considering whether to grant a stay were set forth in *Fritz Hansen*, and is reiterated in NRAP 8(c):

- *Whether the object of the appeal/writ petition will be defeated if the stay is denied;*
- *Whether appellant/petitioner will suffer irreparable or serious injury if the stay is denied;*
- *Whether respondent/real party in interest will suffer irreparable or serious injury if the stay is granted; and*
- *Whether appellant/petitioner is likely to prevail on the merits.*

Fritz Hansen A/S v. Dist. Ct., 116 Nev. 650, 6 P.3d 982 (2000); see also, e.g., *Wiese v. Granata*, 110 Nev. 1410, 887 P.2d 744 (1994); *State ex rel. Pub. Serv. Comm'n v. First Judicial Dist. Court ex rel. Carson City*, 94 Nev. 42, 574 P.2d 272 (1978). Additionally, when confronted with a motion to reduce the bond amount or for alternate security, the district court should apply the factors considered by the 7th Circuit Court of Appeals, as delineated in *Dillon v. City of Chicago*, and adopted in *Nelson v. Heer*.[7]

The purpose of security for a stay pending appeal is to protect the judgment creditor's ability to collect the judgment if it is affirmed by preserving the status quo and preventing prejudice to the creditor arising from the stay.[8] However, a supersedeas bond should not be the judgment debtor's sole remedy, particularly where other appropriate, reliable alternatives exist. ***Thus, the focus is properly on what security will***

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[7] *Nelson v. Heer*, 121 Nev. 832 (2005).
[8] *Id.*

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maintain the status quo and protect the judgment creditor pending an appeal, to include waiving the bond entirely.

In reflecting on the purposes of security for a stay, the Seventh Circuit, in *Dillon v. City of Chicago*, set forth five factors to consider in determining when a full supersedeas bond may be waived and/or alternate security substituted:

- *the complexity of the collection process;*
- *the amount of time required to obtain a judgment after it is affirmed on appeal;*[9]
- *the degree of confidence that the district court has in the availability of funds to pay the judgment;*
- *whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and*
- *whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position.*

i. Discussion concerning the *Fritz Hansen* test

1. The Object of the Appeal

This factor addresses whether an appeal would be rendered moot if an order appealed from was allowed to go into effect. The question is whether enforcing the judgment appealed from would destroy the subject matter of the appeal. A stark example in a divorce matter would be the division and sale of a separate property home as community property – obviously failing to stay a judgment compelling that result would destroy and defeat the purpose of the appeal: i.e., keeping the separate property home. Put another

[9] In considering the second factor, the district court should take into account the length of time that the case is likely to remain on appeal. See, *Nelson v. Heer*, 121 Nev. 832 (2005).

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way, the question is whether a stay is necessary to preserve the issue on appeal: specifically, whether the "object of the appeal" is imperiled by enforcement of the underlying order, or the appeal would be rendered moot by such enforcement.

Here, as stated above, the purpose of the claim was to validate a prenuptial agreement that preserved assets acquired after marriage as Joe's sole and separate property, pursuant to the terms of the prenuptial agreement. If the district court proceedings are not stayed and a judgment is entered dividing that property, or any proceedings from its sale or dissolution, then the object of the appeal would be destroyed.

2. "Irreparable Harm" – Appellant

In *Hansen*, the Court explicitly held that litigation expenses "are neither irreparable nor serious." The question, necessarily, is whether any harm befalling Appellants is so irreparable that reversal on appeal would not ameliorate it. Here, again, the harm is the loss of a business and/or the proceeds from its operation or sale and all the good will attached to it. That is irreparable harm.

3. "Irreparable Harm" – Respondent

Though, in a theoretical sense, the relative interests of the parties are equal when the issue is strictly monetary, money may not always be a zero-sum game. Where the parties' situations are vastly different, even money changing hands could have vastly different impacts on the parties' relative welfare during the pendency of an appeal – an inconvenience to one could be a matter of life and death to the other. In this case, Joe is supporting Plaintiff through periodic payments in temporary alimony. Therefore, staying the proceedings pending appeal will not unduly prejudice Plaintiff.

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4. Likelihood of Prevailing

The Nevada Supreme Court held in *Hansen* that when moving for a stay pending an appeal or writ proceeding, a movant must "present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay." Here, there is a high likelihood of success on the merits. In previous hearings on Joe's motion to reconsider the challenged decision, this court noted that it may have ruled otherwise if it had the briefing undersigned counsel provided concerning the issue. The court noted that there are issues ripe for appeal. Given this court's misunderstanding of Georgia law, the likelihood that errors of law were made, as pointed out in great detail in Joe's motion to reconsider, is great. Thus, the likelihood of prevailing on appealable is equally great.

VIII. Conclusion

For the foregoing reasons, Joe requests this court grant him the relief requested in its entirety.

DATED this September 17th, 2018.

/s/ Alex Ghibaudo
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703 S. 8th Street
Attorney for Defendant

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CERTIFICATE OF SERVICE

I HEREBY CERTIFIY that on this 17th day of September, 2018, I served a true and correct copy of the foregoing **MOTION**, via the Court designated electronic service, addressed to the following:

John Blackmon

jblackmon@blackmonlawgroup.com

/s/ Joslyne Simmons
An Employee of ALEX B. GHIBAUDO, P.C.

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DISTRICT COURT
FAMILY DIVISION
CLARK COUNTY, NEVADA

Patricia Egosi
Plaintiff/Petitioner

v.

Yoav Egosi
Defendant/Respondent

Case No. D-16-540174-D

Dept. Q

MOTION/OPPOSITION FEE INFORMATION SHEET

Notice: Motions and Oppositions filed after entry of a final order issued pursuant to NRS 125, 125B or 125C are subject to the reopen filing fee of $25, unless specifically excluded by NRS 19.0312. Additionally, Motions and Oppositions filed in cases initiated by joint petition may be subject to an additional filing fee of $129 or $57 in accordance with Senate Bill 388 of the 2015 Legislative Session.

Step 1. Select either the $25 or $0 filing fee in the box below.

☐ **$25** The Motion/Opposition being filed with this form is subject to the $25 reopen fee.

-OR-

☒ **$0** The Motion/Opposition being filed with this form is not subject to the $25 reopen fee because:

- ☐ The Motion/Opposition is being filed before a Divorce/Custody Decree has been entered.
- ☒ The Motion/Opposition is being filed solely to adjust the amount of child support established in a final order.
- ☐ The Motion/Opposition is for reconsideration or for a new trial, and is being filed within 10 days after a final judgment or decree was entered. The final order was entered on _____.
- ☐ Other Excluded Motion (must specify) _____.

Step 2. Select the $0, $129 or $57 filing fee in the box below.

☒ **$0** The Motion/Opposition being filed with this form is not subject to the $129 or the $57 fee because:

- ☒ The Motion/Opposition is being filed in a case that was not initiated by joint petition.
- ☐ The party filing the Motion/Opposition previously paid a fee of $129 or $57.

-OR-

☐ **$129** The Motion being filed with this form is subject to the $129 fee because it is a motion to modify, adjust or enforce a final order.

-OR-

☐ **$57** The Motion/Opposition being filing with this form is subject to the $57 fee because it is an opposition to a motion to modify, adjust or enforce a final order, or it is a motion and the opposing party has already paid a fee of $129.

Step 3. Add the filing fees from Step 1 and Step 2.

The total filing fee for the motion/opposition I am filing with this form is:
☒ **$0** ☐ **$25** ☐ **$57** ☐ **$82** ☐ **$129** ☐ **$154**

Party filing Motion/Opposition: Yoav Egosi Date 9/18/18

Signature of Party or Preparer _____

Exhibit 2

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CLERK OF THE COURT

ORDR

DISTRICT COURT

CLARK COUNTY, NEVADA

PATRICIA EGOSI, Plaintiff, v. YOAV EGOSI, Defendant.	)	CASE NO. D-16-540174-D DEPT NO. Q

ORDER

Defendant filed a Motion to Certify the Order Filed September 7, 2018 as Final Under NRCP 54(b) and Motion to Stay These Proceedings Pending Appeal (Sep. 18, 2018), (hereinafter referred to as Defendant's "Motion"). Defendant's Motion is set on this Court's October 18, 2018 Chamber Calendar. Plaintiff filed an Opposition to Defendant's Motion to Certify the Order Filed September 7, 2018 as Final Under NRCP 54(b) and Motion to Stay These Proceedings Pending Appeal and Countermotion for Attorney's Fees and Costs (Oct. 5, 2018) (hereinafter referred to as Plaintiff's "Opposition and Countermotion").

Based on prior appellate direction, this Court concludes that, since the 2004 amendments to NRCP 54 (effective January 1, 2005), orders that remove claims are no longer amenable to certification. Although this Court indeed intends that the

BRYCE C. DUCKWORTH
PRESIDING JUDGE

FAMILY DIVISION, DEPT. Q
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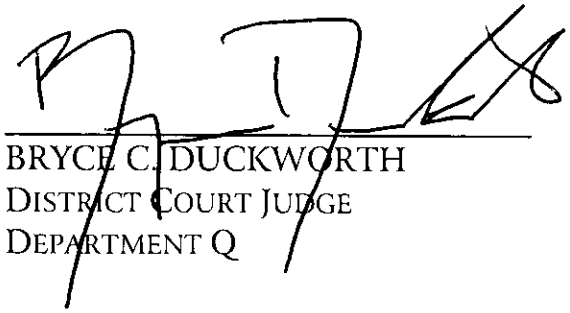
orders governing the issue of the prenuptial agreement to be final orders as to that particular issue, Defendant's request that this Court "certify" the issue is improper and should be denied. Moreover, as this issue is on appeal, this Court is divested of jurisdiction to entertain the remaining financial issues in this matter. In this regard, the financial issues *are not* ancillary to the issues raised in the appeal. Therefore, this Court does not have jurisdiction to proceed and Defendant's request has been rendered moot by his appeal.

Based on the foregoing, and good cause appearing therefor,

It is hereby ORDERED that Defendant's Motion is DENIED. It is further ORDERED that Plaintiff's Countermotion is DENIED.

DATED this 12th day of October, 2018.



BRYCE C. DUCKWORTH
DISTRICT COURT JUDGE
DEPARTMENT Q

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PRESIDING JUDGE

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