IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEX GHIBAUDO, Appellant, vs TARA KELLOGG Respondent	Case No.: 82248 District court: D-15-522043-D

RESPONDENT'S REPLY BRIEF AND OPENING BRIEF

On Appeal from the Eighth Judicial District Court, Clark County

JONATHAN K. NELSON, ESQ.
Nevada Bar No. 12836
J.K. NELSON LAW, LLC
41 N. HWY 160, SUITE 8
Pahrump, NV 89060
Telephone (775) 727-9900
courts@JKNelsonlaw.com
Attorney for Respondent

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NRAP 26.1 DISCLOSURE

I hereby certify that the following are the person and entities described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualifications or recusal:

1. Jonathan K. Nelson, Esq.
2. Alyssa Hirji, Esq.
3. Yasmin Khayyami, Esq.
4. JK Nelson Law, LLC

As for the individuals name, disclosure regarding parent corporations and stock ownership are not applicable. There is no corporation or other entity with any ownership interest in which disclosure is needed pursuant to NRAP 26.1 as it concerns JK Nelson Law. Partner and associates of the following firm have appeared for or are expected to appear for Appellant:

J.K. Nelson Law

Dated this 3rd day of November, 2021.

__/s/ Jonathan K. Nelson___
Jonathan K. Nelson, Esq.
Attorney at Law

TABLE OF AUTHORITIES

STATE CASES

STATE STATUTES AND RULES

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JURISDICTIONAL STATEMENT

This Court has appellate jurisdiction in this matter pursuant to NRAP 3A(b)(1) as this appeal involves the district court's final order concerning a family matter.

ROUTING STATEMENT

Pursuant to NRAP 17(b)(10), which states "cases involving family law matters other than termination of parental rights or NRS Chapter 432B proceedings" shall be assigned to the Court of Appeals.

STATEMENT OF THE ISSUES

1. Whether the district court properly awarded alimony to Respondent.
2. Whether the district court properly held that the Decree of Divorce, and specifically the spousal support provisions contained therein, are enforceable.

STATEMENT OF THE CASE

The parties were married December 30, 2001. Appellant's Appendix ("AA"), 078. The parties attended a Settlement Conference on May 18, 2016. AA 006. During the conference, the parties entered into an agreement for separate maintenance and were informed, and they acknowledged, that each of them had a right to get divorced and turn the terms of the legal separation into a divorce. AA 468, 138-141. On November 15, 2016, Respondent filed a motion for entry of Decree of Divorce which was granted by the court on February 3, 2017. Respondent's Appendix ("RA"), 001. The Decree, among other things, ordered that Appellant pay Respondent child support and spousal support, which Appellant

agreed to in the Settlement Conference agreement. AA 081. Appellant did not comply with these orders and Respondent filed Motions for enforcement. The Decree of Divorce was binding and was never appealed. Over two years later, on May 18, 2019, Appellant filed a Motion to Modify Spousal Support. AA 149. In that Motion, Appellant asked that the portion of the Decree of Divorce ordering Appellant to pay alimony to Respondent be vacated. AA 111. Appellant also asked for a hearing on this issue of alimony, or in the alternative, for a modification of the alimony terms in the Decree based on an alleged breach of the terms by the Respondent. AA 111. There was an evidentiary hearing on this Motion on September 17, 2020, and the Order from that hearing was entered on November 10, 2020. AA 179. The Order granted Appellant's Motion in part, by reducing the alimony amount to $2,500 per month, but denied the motion in part, by refusing to reduce the 15-year time period in which alimony must be paid. AA 474. Both Appellant and Respondent filed appeals.

STATEMENT OF THE FACTS

The parties were married December 30, 2001. AA 001. The parties had one minor child in common, Nicole Ghibaudo, born May 17, 2001, who has now reached the age of majority. AA 002. Respondent filed a Complaint for Divorce on October 1, 2015. AA 001. The parties attended a settlement conference with former Judge Kathy Hardcastle on May 18, 2016. AA 006. During that conference, the parties reached an agreement which led to a Decree of Separate Maintenance.

AA 138. As part of the agreement, the parties decided that Appellant would be responsible for paying Respondent child support and spousal support, among other things. AA 139. The parties agreed that Appellant would pay Respondent a minimum total of $2,500 per month, which included his $819 obligation toward child support. AA 139. Specifically, the agreement stated that Respondent would receive spousal support in the amount of $2,500 per month for a term of 15 years or 50% of Appellant's gross monthly income, whichever is higher. AA 86. Respondent would always receive a minimum of $2,500 per month during that time. AA 86. Appellant proposed that spousal support should be paid for a duration of 15 years. AA 139. The parties agreed that would be a fair and just term. *See* Court Records, Video Minutes of Settlement Conference at 02:39 and 02:40. The parties were informed at the conference that each of them had a right to get divorced and turn the terms of the legal separation into a divorce. AA 468. The parties each acknowledged this right at the conference. AA 468, *See* Court Records, Video Minutes of Settlement Conference at 02:30. The parties agreed that a Decree of Divorce could be entered and that the Decree of Divorce entered in this matter adopted the agreements that were part of the settlement agreement which was reduced to judgment in the Decree. AA 468.

The parties were divorced by Decree of Divorce filed February 1, 2017. AA 105. Notice of Entry of the Decree of Divorced was filed on February 3, 2017. RA 001. The agreement concerning legal separation was incorporated in the Decree of

Divorce and the court made the appropriate findings regarding alimony as required under NRS 125.150. AA 470. In doing so, court considered each party's financial situation, discussed the factors, and made findings for each. AA 470. The court found that Respondent was unemployed and did not have an income and was supported by the charity of her family. AA 471. The court also found that Appellant is an attorney and had a law practice that, at the time, had developed over four (4) years. AA 471. The court found that Appellant had an earning capacity of $140,000 while Respondent only had the earning capacity of $24,000 per year. AA 471. Based on its analysis, the court ultimately concluded the appropriate amount of support to be paid to Respondent is $2,500 a month. AA 472. The court stated that was an appropriate and equitable support amount that would reflect a spouse who makes $140,000 a year and a spouse who can make between $24,000 to $30,000 a year. AA 472.

Also, in making its final decision regarding spousal support, court reviewed and played in open court before the parties the relevant sections of the videotape transcript of the May 18, 2016 case conference. AA 472. The court specifically relied on that transcript to "better understand the agreement *of the parties* that formed the basis of the terms of the Decree of Divorce regarding alimony." AA 472 (emphasis added). The video of the settlement conference revealed that Alex himself "proposed the 15-year term of alimony that was then incorporated into the Decree of Divorce. AA 473. As such, the court found that while it did have the

discretion to reduce the term of alimony, it would not be just or equitable to terminate alimony or reduce the term at that time because it found no change in circumstances to warrant a modification. AA 473. Specifically, the court noted that Alex proposed the term himself, and only three (3) years had passed since the entry of the Decree. AA 473. The court confirmed that Alex's obligation of alimony to Tara shall continue through April 1, 2031. AA 473. The court further found that Alex owes Tara another $47,500 at the rate of $2,500 per month which shall be reduced the judgment in favor of Tara against Alex. AA 473. The court also noted that judgments accrue interest. AA 473. The court granted Tara's Motion for Enforcement of the Decree of Divorce. AA 474. The court found the Decree is a final, enforceable judgment in this case. AA 468. Appellant has not complied with the spousal support or child support requirements under the Decree or any subsequent orders. Appellant reopened this case when he filed his Motion to Modify Spousal Support on May 30, 2019. AA 110. Specifically, Appellant challenged the spousal support provisions of the Decree. The Order granted Appellant's Motion in part, by reducing the alimony amount to $2,500 per month, but denied the motion in part, by refusing to reduce the 15-year time period in which alimony must be paid. AA 474. This appeal followed.

ARGUMENT

III. Whether the district court properly awarded alimony to Respondent.

a. There was an underlying rationale for awarding alimony.

In his Opening Brief, Appellant argues that there must be some underlying rationale for awarding alimony, citing *Kogod v. Cioffi-Kogod,* 439 P.3d 397 (Nev. 2019). See Appellant's Opening Brief, 20. Appellant argues that the district court took no steps to make this determination. *Id*. Appellant asserted that the district court assumed that there was a rationale and used Alex's post-marriage income to justify awarding Respondent any alimony at all. *Id*. He maintains that was the result of legal error and the award of alimony should be reversed. *Id*.

When granting a divorce, a district court may award alimony to either spouse "as appears just and equitable." NRS 125.150(1)(a). The decision of whether to award alimony is within the discretion of the district court. *Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5(1974). The district court must look to the particular facts of an individual case, and on that basis, may award spousal support. *See Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983). Appellant relies on *Kogod v. Cioffi-Kogod*, but in that case, the court specifically held that alimony can be "just and equitable" both when necessary to support the economic needs of a spouse and to compensate for a spouse's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living. *Kogod v. Cioffi-Kogod,* 439 P.3d 397, 401 (Nev. 2019). The court further notes, "Alimony, in its most elementary form, is based on the receiving spouse's need and the paying spouse's ability to pay." *Id*.

NRS 125.150 authorizes alimony and also directs district courts to consider several factors that aid the court to understand the spouses' financial needs and ability to pay. *Id* at 402. Pursuant to NRS 125.150(9), the district court must consider:

(a) The financial condition of each spouse
(b) The nature and value of the respective property of each spouse
(c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030
(d) The duration of the marriage
(e) The income, earning capacity, age and health of each spouse
(f) The standard of living during the marriage
(g) The career before the marriage of the spouse who would receive the alimony
(h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage
(i) The contribution of either spouse as homemaker
(j) The award of property granted by the court in the divorce. . . to the spouse who would receive the alimony, and
(k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

After considering these factors, and any other relevant circumstance, case law makes clear that a district court may award alimony to ensure that an economically powerless spouse receives sufficient support to meet his or her needs. *See Gilman v. Gilman*, 114 Nev. 416, 423-24, 956 P.2d 761, 765 (1998).

Here, the court did not abuse its discretion in awarding alimony to Respondent. Based on the evidence before it, the court made specific findings as to each factor under NRS 125.150(9) in determining whether to award alimony. The district court Judge has discretion in deciding whether to award alimony and is in the best position to make these determinations. This is because the district court witnessed

arguments and testimony on the merits firsthand, while appellate courts are limited to the record. There was an underlying rationale for awarding alimony as Respondent spent 16 years of their relationship as mother and housewife, while supporting Appellant through his undergraduate and out of state law school education. She contributed to the household. Pursuant to *Kogod*, alimony here would be to compensate for a Respondent's economic losses from the marriage and divorce, including to equalize post-divorce earnings or help maintain the marital standard of living. The court did not abuse its discretion as its decision to award alimony under the circumstances was not arbitrary or capricious and did not exceed the bounds of law or reason. As such, the district court's decision that alimony is appropriate in this case should be given deference.

b. The did not abuse its discretion when it denied modifying the 15-year spousal support term as that decision was supported by substantial evidence.

Appellant argues that there was no trial in this matter and therefore no competent evidence could have been, or was, presented for this district court's consideration. See Appellant's Opening Brief, 20.

Spousal support awards are purely discretionary pursuant to NRS 125.150(1)(a). *Blanco v. Blanco*, 129 Nev. at 732, 311 P.3d at 1176. Spousal support may be modified based on a showing of changed circumstances. NRS 125.150(7). The district court has wide discretion in determining whether to grant spousal support, and this court will not disturb the district court's award of alimony

absent an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 17 P.3d 998, 1000 (2001) (citing *State, Dept of Motor Vehicles & Pub. Safety v. Root*, 944 P.2d 784, 787 (1997)). In reviewing an award of spousal support, the Supreme Court of Nevada extends deference to the discretionary determination of the district court and withholds its appellate power to modify or reverse except in instances where an abuse of the trial court's discretion is evident from a review of the entire record. *Shane v. Shane*, 84 Nev. 20, 22, 435 P.2d 753, 755 (1968).

Here, the district court did not abuse its discretion as the evidence overwhelmingly justified keeping the alimony term set at 15 years. The Decree of Divorce incorporates agreements made by the parties from the Settlement Conference. The court obtained videotape transcripts from the settlement conference, reviewed it, and played it in open court before the parties. AA 472, 473. The court specifically stated that it "relied on that transcript to better understand the terms of the agreement of the parties that formed the basis of the terms of the Decree of Divorce regarding alimony." AA 472. Appellant was informed, and he acknowledged, that both parties had a right to get divorced and turn the terms of legal separation into a divorce. Also, during the settlement conference, Appellant himself expressly "proposed the 15-year term of alimony

that was then incorporated into the Decree of Divorce." The video transcript of the Settlement Conference captures audio of Appellant agreeing to everything in the agreement. See Court Records, Video of Settlement Conference. Now, Appellant has buyer's remorse and is attempting to lessen the duration of ordered spousal support despite being the person who recommended that duration in the first place. The court did not act unreasonably in keeping the term at 15 years as it was Appellant who proposed the idea.

Further, after Appellant filed his Motion to Modify Spousal Support on May 30, 2019, there was an evidentiary hearing on the Motion on September 17, 2020. There, the Honorable Judge Arthur T. Ritchie made specific findings based on the evidence presented before the court. In making its decision, court considered sworn testimony, exhibits, motions, tax returns, videos of the Settlement Conference. AA1, 2-4.

The court found that there was no change of circumstances to warrant a modification of the term of spousal support. AA1, 8. The court again reiterated that Appellant was the one who proposed the 15-year term in which alimony was to be paid in the first place. AA1, 8. An abuse of discretion is not evident from review of the record as the record reveals that Appellant insisted on the term. Because the decision of the court was supported by overwhelming and substantial evidence, the term of alimony should not be disturbed on appeal as there was no abuse of discretion.

c. Appellant is attempting to improperly challenge and modify the terms of the Decree of Divorce even though the Decree is not the subject of this appeal.

Appellant argues that the Decree of Divorce is void as it did not contain any language that suggests a merger of the separate maintenance agreement such as, "adopt, incorporate, approve, and ratify." AA3, 10. Additionally, Appellant argues that the settlement conference itself if void. AA3, 16.

The agreement of separate maintenance fully and finally resolved the parties' marital community, leaving only their marital status intact. The agreement made a full and final determination of child custody, child support, spousal support, asset and debt division and determination of separate property. The parties were both informed, and they acknowledged that either had the right to get divorced and turn the terms of legal separation into a divorce. AA2, 3.

Appellant, in his Opposition to Plaintiff's Motion and Countermotion dated November 29, 2016, appeared to believe that the settlement agreement was a final agreement. AA6. In that Motion, he acknowledged that the parties reached a global settlement agreement and came to an agreement on all issues pending before the court. AA6, 2. There, Appellant stated:

> The terms of the agreement were already reached at the settlement conference and placed on the record, with the parties under oath, and after Judge Hardcastle canvassed Plaintiff and Defendant as to their understanding and willingness to enter into the agreement. As such, there was **nothing left to negotiate to finalize. All that was left to be done was prepare a final Decree**.

AA6, 2. At the evidentiary hearing, the Judge recognized that the Decree was not signed by Appellant and was prepared by Respondent's attorney but held that the provisions therein demonstrate that it is a full and final agreement and that the recitals and findings contradict Appellant's testimony at the evidentiary hearing. AA 258. The court found that the Decree is a valid contract. AA 259. Appellant also tried to argue that the Decree was ambiguous, but the Judge did not agree. AA 258.

Notwithstanding, Appellant had notice and ample opportunity to appeal the validity of the Decree but did not do so. Appellant is attempting to modify the terms of the Decree of Divorce through this appeal. This is not an appeal from the Decree of Divorce, or the agreement derived from the settlement conference. With respect to Appellant's Modification Motion, Appellant has buyer's remorse and is attempting to eliminate or lessen the duration of ordered spousal support despite being the person who recommended that duration in the first place.

If Appellant understood either the Decree of Divorce or the Separate Maintenance agreement to be void, the proper method would have been to file a timely appeal. The Nevada Rule of Appellate Procedure 4(a)(1) provide, "a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served." Rule 60 of the Nevada Rules of Civil Procedure provides relief

from a judgment or order under certain circumstances are present. The Rule states in pertinent part:

> On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
> (1) mistake, inadvertence, surprise, or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
> (6) any other reason that justifies relief.

NRCP Rule 60(b)(1)-(6). Here, the Decree of Divorce was filed on February 1, 2017 and the Notice of Entry of the Decree of Divorced was filed on February 3, 2017. RA 001. Pursuant to NRAP 4(a)(1), a notice of appeal must be filed after entry of a written judgment or order, and no later than 30 days after the date that written notice of entry of the judgment or order appealed from is served. Appellant did not do so. AA 278. Appellant has notice of such procedure as he is an attorney licensed in the State of Nevada and has demonstrated his understanding of this rule as he filed a timely appeal in this case. He also testified that he did not appeal the Decree during the evidentiary hearing. AA 229-230. He wrote a letter to the district court outlining his distaste with the Decree, but no appeal was filed. AA 107. At the evidentiary hearing, when discussing the Decree of Divorce, Appellant's attorney stated:

> Alex did not appeal that order, and you know, regretfully, he did not. He tried to have it set aside. He tried to have the findings and facts and conclusions of law changed. He wanted to have a hearing on the issue. All of that was denied by Judge Brown. But he didn't appeal it. And again, I think he regrets that to this day.

AA 191. Additionally, other remedies existed for Appellant to challenge the Decree in a timely manner. Pursuant to NRCP 60, if Appellant believed the Decree to be void, he could have filed for relief from the judgment based on that ground. NRCP 60(b)(4). A motion under Rule 60(b) must be made within a reasonable time — and for reasons (1), (2), and (3) no more than 6 months after the date of the proceeding or the date of service of written notice of entry of the judgment or order, whichever date is later. NRCP 60(c)(1).

Here, approximately four (4) years have passed since the Decree was filed and notice of entry of the judgment was entered. Four years cannot be considered a reasonable time pursuant to NRCP 60(c)(1). Appellant had numerous opportunities to timely challenge the Decree and failed to do so. By attempting to attack the validity of the Decree of Divorce four years later, Appellant is improperly trying to "take another bite of the apple" as he failed to file an appeal during the permitted time. During the July 8, 2019 hearing, the Judge specifically noted that Appellant's argument that the Decree is not valid and unenforceable is without merit as time to appeal or set aside "has long passed." See Court Records, video from July 8, 2019 hearing at 10:15. That was in 2019. This is an improper use of the judicial system as it violates the rules of appellate procedure.

Appellant argues that because he did not have a trial, the Decree is void and his 14th Amendment Due Process right was violated. See Appellant's Opening Brief, 3.

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Due process requires notice and an opportunity to be heard. *J.D. Constr., Inc. v. IBEX Int'l Group, LLC*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane* v. *Central Hanover Trust Co*., 339 U.S. 306, 314 (1950).

Appellant had notice as there was a Notice of Entry of the Decree, he was served with the Decree and all other court documents, and there was a hearing on the Motion to sign the Decree on January 10, 2017 where Appellant appeared.

IV. Whether the district court properly held that the Decree of Divorce, and specifically the spousal support provisions contained therein, are enforceable.

Appellant argues even if court finds the Decree of Divorce enforceable, Respondent should be estopped from enforcing the Decree as she refuses to comply with the terms. See Appellant's Opening Brief, 16. Appellant suggests that

the Decree requires Respondent to complete her degree and the income she earns as a result would act as an offset to Appellant's obligation. *Id*. Appellant argues that Respondent acted in bad faith because she did not pursue her degree or seek employment. *Id*. at 17. Appellant argues that Respondent violated the covenant of good faith and fair dealing. *Id*. Specifically, Appellant advances four (4) arguments:

(1) Respondent was "well aware that she would have to complete school as a condition of the legal separation agreement, later improperly added to the decree of divorce"
(2) Respondent "admitted that she never finished school and did not provide an adequate reason why she did not, though she testified she was seven credits short of completion and stopped in 2018"
(3) Until trial, Alex was completely unaware that Kellogg stopped attending school in 2018; and
(4) Alex relied on Kellogg to finish school because that would have reduced his family support obligation.

Id. at 19. Appellant argues that while the court noted that Respondent was "willfully unemployed [sic][1]," these arguments were not considered when the court rendered its decision. *Id*.

No provisions existed in either the settlement agreement or the Decree of Divorce which required Respondent to finish her degree or find employment as a condition of receiving alimony. This is a mischaracterization of the court's holding and the Decree. At the Settlement Conference and in the Decree of Divorce, the parties agreed that if Respondent obtained employment that would be factored into

[1] The court found Respondent was willfully underemployed, not unemployed.

the spousal support amount, but she would receive *no less than* $2,500 per month. AA 086 (emphasis added). The Decree of Divorce states:

> Upon Tara obtaining full-time employment (more than 32 hours per week), the monthly support payment that Alex is required to pay may be re-calculated to an amount of no less than 50% of the difference between the parties' gross monthly income. Regardless of the difference, Tara shall receive the minimum sum of $2,5000 per month.

AA 086. Regardless of whether she was employed or finished her degree, her minimum alimony payment would never be less than $2,500, which is what the spousal support award is set at presently. She therefore did not act in bad faith as Appellant's obligation would remain the same.

CONCLUSION

This Honorable Court should affirm the district court for the following reasons:

1. Awarding alimony to Respondent was proper and there was an underlying rationale for doing so.
2. Whether the district court properly held that the Decree of Divorce, and specifically the spousal support provisions contained therein, are enforceable.

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RESPONDENT'S OPENING BRIEF

STATEMENT OF THE ISSUES

I. Whether the district court erred in modifying the spousal support amount that was the product of a settlement agreement placed on the record.
II. Whether the district court abused its discretion when it held that Respondent was willfully underemployed and imputed her income for purposes of spousal support considerations without considering the evidence.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED IN MODIFYING THE SPOUSAL SUPPORT AMOUNT THAT WAS THE PRODUCT OF A SETTLEMENT AGREEMENT PLACED ON THE RECORD.

A Settlement Agreement is a contract recognized under Nevada law. *May v. Anderson*, 121 Nev. 668, 672 (2005). Like other contracts, the construction and enforcement of a Settlement Agreement is "governed by principles of contract law." *Id.* Basic contract principles require, for an enforceable contract, an offer and acceptance, meeting of the minds, and consideration. *Id.* An enforceable Settlement Agreement "has the attributes of a judgment in that it is decisive of the rights of the parties and serves to bar reopening of the issues settled." *The Power Co. v. Henry*, 321 P.3d 858, 861 (Nev. March 27, 2014). While a settlement agreement will not necessarily involve a judicial determination, it does resolve the relative legal rights and liabilities of the parties, eliminating the need to try any issues resolved by the agreement. *Id.* When parties have entered into a binding settlement agreement that resolves all of the issues pending in the action,

eliminating the need for a trial, the case has been "brought to trial" within the meaning of NRCP 41(e). *Power Co. v. Henry*, 130 Nev. 182, 188, 321 P.3d 858, 862 (2014). Whether a contract exists is a question of fact. *May v. Anderson*, 121 Nev. 668, 672 (2005). Interpretation of the terms of a contract is a question of law. *Galardi v. Naples Polaris LLC*, 129 Nev. Adv. Op. 33 (May 16, 2013). Contracts will be construed from their written language and enforced as written. The *Power Co. v. Henry*, 130 Nev.Adv.Op. 21, 321 P.3d 858, 861 (Nev. March 27, 2014). In analyzing the terms of a contract, certain long-standing and well-settled principles of interpretation exist to help guide the analysis. *Id.* Initially, the Court looks to the plain words of the written agreement. *Id.* The words of the agreement must be given their ordinary and plain meaning unless it appears clear that the parties intended otherwise. *Id.* Courts have no power to make new contracts or to impose new terms upon parties to contracts without their consent. Their powers are exhausted in fixing the rights of parties to contracts already existing. *New Orleans v. New Orleans Water Works Co*., 142 U.S. 79, 91, 12 S. Ct. 142, 147 (1891).

Here, the agreements reached from the settlement conference were clear and unambiguous. The settlement agreement was an enforceable contract as both parties were present and demonstrating their objective intent to be bound by the agreement. They were both under Oath and canvassed by the Judge to ensure that they understood what they were agreeing to. The agreement was placed on the record. The agreement relating to separate maintenance resolved all issues

including child custody, child support, alimony, and asset and debt division and determination of separate property. The agreement established the rights and liabilities of both parties. While Appellant argues that the conference was concerning a separation between the parties, the parties both acknowledged and agreed that either party had the right to turn the agreement into a divorce agreement.

The agreement, which was later incorporated in the Decree of Divorce, was that Respondent was awarded minimum spousal support in the amount of $2,500 per month for a term of 15 years or 50% of Appellant's gross monthly income, whichever is higher. AA 86. Respondent is also entitled to 50% of Appellant's bonuses received from his place of employment. Respondent testified that the alimony amount and duration was proposed by Appellant. AA 319.The reason behind the amount of Respondent's alimony award was that Respondent agreed to waive any claim that she otherwise had regarding Appellant's dissipation of marital assets. Respondent testified that she calculated that Appellant has spent approximately $1.6 million in marital waste. AA 318.

The court abused its discretion by modifying the amount of alimony. There was a valid contract between the parties regarding the amount of spousal support. They both agreed to this amount. There were no changed circumstances, as found by the court, so there was no evidence to suggest that a reduction in the amount of alimony is supported by substantial evidence. As such, the Court should reverse

and award Respondent the amount of alimony that was initially agreed to in the settlement conference.

III. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT HELD THAT RESPONDENT WAS WILLFULLY UNDEREMPLOYED AND IMPUTED HER INCOME FOR PURPOSES OF SPOUSAL SUPPORT CONSIDERATIONS WITHOUT CONSIDERING THE EVIDENCE.

Under NAC 425.125, if after taking evidence, the court determines that an obligor is underemployed or unemployed without good cause, the court may impute income to the obligor. NAC 425.125(1). The court found that Respondent was unemployed and did not have an income, but the court did not inquire as to whether she is unemployed without good cause. AA 468. The court stated that Respondent was "willfully underemployed" but did not provide sufficient explanation for this finding. AA 468. Respondent did get a job at one point but was uncomfortable working there as Appellant would physically be present at her place of employment from time to time. AA 288-289. Good cause would exist for Respondent refusing employment in an environment where Appellant is present as they have an extremely hostile relationship.

Respondent testified that she only stopped attending college after Appellant stopped paying his ordered spousal support. AA 287. As such, she was unable to pay for continuing her education. AA 287. She testified that to be able to work in her field, she needs a bachelors agree, but because Appellant refuses to pay his

ordered support, she cannot afford to continue her education. AA 287. Again, this seems to satisfy good cause.

If the court does imputes income, the court must take into consideration, to the extent known, the specific circumstances of the obligor, including, without limitation:

> (a) The obligor's:
> (1) Assets;
> (2) Residence;
> (3) Employment and earnings history;
> (4) Job skills;
> (5) Educational attainment;
> (6) Literacy;
> (7) Age;
> (8) Health;
> (9) Criminal record and other employment barriers; and
> (10) Record of seeking work;
> (b) The local job market;
> (c) The availability of employers willing to hire the obligor;
> (d) The prevailing earnings level in the local community; and
> (e) Any other relevant background factors in the case.

NAC 425.125 (2). The court did not consider evidence of Respondent's disability or her health when imputing income. The court found that Respondent did not present sufficient proof to support a finding that she is disabled and unable to earn income. AA 468. Respondent now has clear evidence to determine that she does in fact suffer from a disability and that disability prevents her from working. Also, Respondent testified that she only stopped trying to pursue her degree, which could lead to gainful employment, because Appellant stopped meeting his family support obligations. The court did not take into consideration that during the

marriage, Respondent was a stay-at-home mother who took care of the party's child and supported Appellant while he got his education. The court did not consider Respondent's age, educational attainment, or employment and earnings history. Respondent was unable to continue paying for tuition as Appellant was not paying his court ordered spousal support obligation.

During the evidentiary hearing, Appellant's attorney argued that a reasonable wage should be imputed to Respondent and that wage should be deducted as part of the comparison of the incomes. AA 195. The court found in the Findings of Fact that Respondent had the earning capacity of $24,000 per year. AA 471. Based on its analysis, the court ultimately concluded the appropriate amount of support was $2,500 a month. AA 472. The court stated that was an appropriate and equitable support amount that would reflect a spouse who makes $140,000 a year and a spouse who can make between $24,000 to $30,000 a year. AA 472.

This imputation of income to Respondent contrary to the evidence. This is an unreasonable imputation of income as this finding was based on the fact that "Tara testified that she hopes to get a job earning $30,000 to $40,000 per year but does not have her bachelor's degree at this time." AA 468. It is unclear how the court determined that her earning capacity was $24,000 a year. The evidence presented shows that Respondent, other than spousal support and occasional help from her parents, did not make *any* income. AA 312-313. The court abused its discretion in

improperly imputing income to Respondent and deeming her willfully unemployed.

CONCLUSION

This Honorable Court should reverse the district court for the following reasons:

1. The district court erred in modifying the spousal support amount that was the product of a settlement agreement placed on the record.
2. The district court abused its discretion when it held that respondent was willfully underemployed and imputed her income for purposes of spousal support considerations without considering the evidence.

J.K. Nelson Law, LLC

___/s/ Jonathan K Nelson_____
JONATHAN K. NELSON, ESQ.
Nevada Bar No. 12836
J.K. Nelson Law, LLC
41 N. HWY 160, SUITE 8
Pahrump, NV 89060
Telephone (775) 727-9900
courts@jknelsonlaw.com

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because: This brief has been prepared a proportionately spaced typeface using Times Roman 14-point
2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7)(a)(i) and (ii) because, excluding the parts of the brief exempted by NRAP 32(a)(7) (C), it is 27-pages and contain 6583 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is no in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 3rd day of November, 2021.

J.K. Nelson Law, LLC

_/s/ Jonathan K. Nelson_____
JONATHAN K. NELSON, ESQ.
Nevada Bar No. 12836
J.K. Nelson Law, LLC
courts@JKNelsonlaw.com
Attorney for Respondent

THE NEVADA SUPREME COURT
AFFIRMATION- NRS 239B.030

The undersigned does hereby affirm that the preceding document, RESPONDENT'S REPLY AND OPENING BRIEF ON APPEAL filed in case number 82248 does NOT contain the social security number of any person.

DATED this 3rd day of November, 2021

/s/ Jonathan K. Nelson_____
Jonathan K. Nelson, Esq
Attorney at Law

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CERTIFICATE OF SERVICE

I hereby certify that this document was filed electronically with the Nevada Supreme Court on November 3, 2021. Electronic service of the foregoing document shall be made in accordance with the Master Service List as follows:

1. Michancy Cramer, attorney for Appellant

I further certify that I served a copy of this document by mailing a true and correct copy thereof, postage pre-paid, addressed to:

1. Tara Kellogg
   2050 W. Warm Springs Road, Unit 2112
   Henderson, NV 89014
   Respondent

/s/ Jonathan K Nelson_____
Jonathan K. Nelson, Esq.
Attorney at Law