Alex B. Ghibaudo, Esq.
Nevada Bar No. 10592
ALEX GHIBAUDO, PC
197 E. California St., Suite 250
Las Vegas, Nevada 89104
T: (702) 978-7090
F: (702) 924-6553
E: alex@glawvegas.com
Appellant in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

ALEX GHIBAUDO, Appellant, v. TARA KELLOGG, Respondent.	Case No. 82248

APPELLANT'S REPLY BRIEF ON CROSS APPEAL

From the Eighth Judicial District Court, Clark County, Nevada

Honorable ARTHUR RITCHIE, District Court Judge, Family Division

Respectfully Submitted,

/s/ Alex Ghibaudo

Alex B. Ghibaudo, Esq.
Nevada Bar No. 10592
ALEX GHIBAUDO, PC
Appellant in Proper Person

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NRAP 26.1 Disclosure

Undersigned counsel of record certifies that the following are persons and entities, as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal: 1) Parent Corporation: None; 2) Publicly held company that owns 10% or more of the party's stock: None; 3) Law firms who have appeared or are expected to appear for Appellant: Alex B. Ghibaudo, PC

Certificate of Compliance Pursuant to NRAP 28(a)(12)

1. I 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3021 words.

3. Finally, I certify that I have read this petition, 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 petition complies with all applicable Nevada Rules

of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the petition 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.

4. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED December 17, 2021.

Respectfully Submitted,

/s/ Alex Ghibaudo

Alex B. Ghibaudo, Esq.
Nevada Bar No. 10592
ALEX GHIBAUDO, PC
197 E. California St., Suite 250
Las Vegas, Nevada 89104
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Routing Statement

Pursuant to NRAP 17(a)(12) the Supreme Court should retain this matter because the issues on appeal raised by appellant in his opening brief, dealing with void orders, is a matter that has not been addressed adequately by the Supreme Court (See appellant's opening brief at pages 12-13) as to decrees' of divorce in family court matters.

Jurisdictional Statement

This is an appeal from the District Court's Order awarding granting appellant's motion to modify spousal support in part and denying it in part. Appellant timely filed his notice of appeal from said Order; which is a final judgment. Notice of entry of findings of fact and conclusions of law were entered on November 20, 2020. Notice of Appeal was filed on December 14, 2020.

DATED December 17, 2021.

Respectfully Submitted,

/s/ Alex Ghibaudo

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Statement of the Issues Presented for Review in Cross-Appeal

1. WHETHER THE DISTRICT COURT ERRED IN MODIFYING THE SPOUSAL SUPPORT AMOUNT THAT WAS THE PRODUCT OF A SETTLEMENT AGREEMENT PLACED ON THE RECORD?
2. 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?

MEMORANDUM OF POINTS AND AUTHORITIES

STATEMENT OF THE CASE

This appeal arises from Appellant's motion filed by Appellant making various claims for relief that were largely ignored: 1) The district court was without jurisdiction to enter a summary decree of divorce containing support terms that were not agreed to by the parties; 2) The provisions of the decree regarding spousal support are void; 3) The change of circumstances since the parties' settlement conference justifies a review of Alex's obligation of alimony; and 4) Kellogg should be estopped from enforcing the decree regarding alimony, and her failure to comply with the terms of the decree require the modification of the alimony provisions.

The only claim addressed by the district court Judge, Arthur Ritchie, was number 3, supra. In that respect, the district court granted Appellant's motion in part and granted Respondent's claims for arrears completed. Appellant asserts that the district court erred and abused his discretion by not ruling on claims 1, 2, and 4, actually indicating at the time of the decision that those arguments belong with the Supreme Court, without actually ruling on them. This appeal addresses those claims and why this Court should reverse and remand for further proceedings.

Cross-Appellant now argues 1) that the district court erred in modifying the spousal support amount that was the product of a settlement agreement placed on the record; and 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.

STATEMENT OF FACTS

The statement of facts provided here are relevant to Respondent/Cross-appellant's (Tara's) cross appeal concerning her argument that she was not willfully underemployed and that income was imputed without substantial evidence. The district court indeed made findings concerning Tara's ability to work. See Appellant's Appendix (AA) 443; lines 15-24. AA 444; lines 1-8. Tara testified that she was seven (7) classes away from a bachelor's degree but did not finish. AA 286; lines 20-24; She further testified that the only job she applied for since 2016 was at a rehabilitation facility. AA 110; lines 21-24: see also AA 297; 2-5.

Tara testified that she was hired at the end of 2019 (Id.) but that the only job she applied for since 2016 was a twice a week job paying $40 a day. AA 295; lines 4-18. She testified that she did not take that job in 2019 because Alex spent time at her prospective AA 295; lines 19-22. AA 358; lines 12-15.

Tara further testified that she had substantial expenses. AA 301; lines 3-24: AA 302; lines 3-9. She also testified that if she finished school she would make

approximately $30,000.00 to $40,000.00. AA 304; lines 14-16. But she did not finish school, as she testified. The district court found her answer for why she did not finish school unpersuasive, perhaps because with 7 credits left to finish (AA 135; lines 15-18), and given her substantial income, as could be discerned from her expenses and income provided by her parents (AA 135; lines 7-10), she could in fact have finished school but refused to. She also testified that she was being supported by her parents. AA 135; lines 7-10. Tara also admitted that she was required to finish school pursuant to the marital separation agreement. AA 136; lines 17-21.

Her credibility was an issue as well as she brazenly lied to the Court during her testimony. See AA 361; lines 13-23.

Finally, and most importantly, though she appeals the modification of alimony, at the time of trial, Tara admitted that she preferred a flat fee as opposed to the calculation of support provided in the parties' decree of divorce, so she was agreeing that spousal support should be modified. AA 320; lines 320; lines 7-8.

As to disability, Tara admits that she did not have proof of disability aside from her testimony at the time of trial by stating, in her brief, that "Respondent now has clear evidence to determine that she does in fact suffer from a disability and that disability prevents her from working." Tara's Answering Brief at 22. The use of the word "now" in that statement strongly suggests she had no proof "then", or during trial.

STATEMENT OF STANDARD OF REVIEW

Tara asserts that the district court abused its discretion regarding its findings, or lack thereof. This Court reviews a district court's factual findings for an abuse of discretion and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Rogers v. Rogers*, 460 P.3d 31 (Nev. App. 2020); citing *Ogawa v. Ogawa,* 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment. *Ellis v. Carucci,* 123 Nev. 145, 149, 161 P.3d 239, 242 (2007). When determining whether the district court abused its discretion, this Court will not reweigh conflicting evidence or reassess witness credibility. *Id.* at 152, 161 P.3d at 244. However, the district court's interpretation and construction of a statute presents a question of law that is reviewed de novo. *Zohar v. Zbiegien,* 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

LEGAL ARGUMENT CONCERNING RESPONDENT'S CROSS-APPEAL

A. The district court had authority to modify spousal support.

Tara argues that the district court abused its discretion in modifying spousal support because the "[t]he Decree of Divorce incorporates agreements made by the parties from the Settlement Conference." Answering Brief at 9: AA 442 lines 20-24 and AA 443; lines 1-5. Tara, and the district court, both rely on the assertion that there was a merger of the settlement agreement with the decree of divorce. AA 442;

lines 22-23. Appellant disagrees. However, if, arguendo, it is true that the settlement made in the separate maintenance proceedings was merged with the decree of divorce, the district court in fact had authority to modify spousal support.

This Court has previously held that once an agreement is adopted by the trial court and merged into the decree, the agreement loses its independent existence and the parties' rights rest solely upon the decree. *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322 (1964); see also Rush v. Rush, 82 Nev. 59, 60, 410 P.2d 757, 757-58 (1966); (explaining that when the agreement and the decree each direct that the agreement is to survive the decree, subsequent litigation rests upon the agreement because the parties' rights flow from the agreement rather than the decree approving it); see also *Hustead v. Hustead*, No. 71773, at *4 (Nev. App. Dec. 28, 2017) (explaining that when an agreement mergers with a decree, it loses its independent nature as a contract and the parties' rights rest solely upon the decree). Here, Tara argues that the separate maintenance agreement was merged with the decree. Answering Brief at 20. Therefore, if this Court sides with Tara and finds that the separate maintenance agreement merged with the decree, under *Day* and *Rush*, the separate maintenance agreement lost its independent nature as a contract and the parties' rights rest solely upon the decree.

A decree of divorce cannot be modified except as provided by rule or statute. *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980). And here, NRS 125.150(8) expressly allows the district court to modify alimony awards in certain

circumstances. As a result, this Court must conclude that the district court had authority to modify spousal support. Indeed, under *Day* and *Rush*, again, if it relied on contract principles alone, as Tara asserts, that would have been improper and an abuse of discretion. Therefore, the district court did not abuse its discretion in modify alimony.

Notably, though she complains that spousal support should not have been modified, at trial Tara asserted that she wanted to modify spousal support so that the support should be a "flat" amount as opposed to the formula provided by the decree of divorce. AA 320; lines 7-8. Furthermore, Tara asserts that she requires support because of her "disability." However, in her answering brief Tara admits that she did not have proof of disability aside from her testimony at the time of trial by stating, in her brief, that "Respondent now has clear evidence to determine that she does in fact suffer from a disability and that disability prevents her from working." Respondent's Answering Brief at 22. The use of the word "now" in that statement strongly suggests she had no proof "then", or during trial.

B. Tara's was willfully underemployed because her testimony explaining why she was not employed could reasonably be considered not made in good faith pursuant to *Rosenbaum v. Rosenbaum*, 86 Nev. 550 (Nev. 1970).

Tara asserts that the district court abused its discretion when it ruled that Respondent was willfully underemployed without substantial evidence. Respondent's Answering Brief, page 21. ""Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion" *Ellis v.*

*Carucci,*123 Nev. 145, 149, 161 P.3d 239, 242 (2007); see also *Winchell v. Schiff*, 124 Nev. 938, 944 (Nev. 2008).

Here, concerning finding employment, Tara testified that:

1. she was seven (7) classes away from a bachelor's degree but did not finish. AA 286; lines 20-24;
2. the only job she applied for since 2016 was at a rehabilitation facility. AA 110; lines 21-24: see also AA 297; 2-5;
3. she was hired at a rehabilitation facility at the end of 2019. Id.;
4. that the job she applied for since 2016 was a twice a week job paying $40 a day. AA 295; lines 4-18;
5. she testified that she did not take that job because Alex spent time at We Care and there was domestic violence and she was scared, but actually she later testified that she did not remember any acts of domestic violence AA 178; lines 21-24: AA 179; 1-15;
6. indeed, Tara did not take that job, or any other for that matter – she didn't even look for another job. AA 295; lines 19-22. AA 358; lines 12-15.

As to schooling, Tara admitted that the agreement the parties reached required her to finish school. AA 136; lines 17-21. According to her own testimony, Tara only has seven (7) credits to go before finishing school. AA 135; lines 15-18. Tara alleged that she could not finish school because Alex did not pay her support.

However, Tara testified that she had substantial expenses that her parents were paying for. AA 301; lines 3-24: AA 302; lines 3-9: AA 135; lines 7-10. Tara testified that if she finished school she would make approximately $30,000.00 to $40,000.00. AA 304; lines 14-16. As a result of this testimony, the district court found that Tara was willfully under-unemployed for purposes of maximizing her spousal support claim. AA 443; lines 21-24: AA 444 lines 1-8.

In this case, Tara cites NAC 425.125(1) as the controlling rule. However, that rule pertains to child support, so it is not pertinent in this matter.

The only case that directly address willful underemployment in the context of spousal support is *Rosenbaum v. Rosenbaum*, 86 Nev. 550 (Nev. 1970). There, the key is what a spouse could, in good faith, earn. There, this Court held that:

> We think a trial judge, in exercising that discretion, should be allowed, but not required, in fixing the amount of alimony or child support to consider what a husband or father could in good faith earn if he so desired. This view is consistent with the law in other jurisdictions. The key to this rule is the good faith of the husband or father. If he intentionally holds a job below his reasonable level of skill or purposefully earns less than his reasonable capabilities permit, the court should take that into consideration in fixing the amount of alimony or child support. On the other hand, if a husband or father, through circumstances beyond his control, cannot in good faith obtain a job commensurate with his skills or by the exercise of ordinary industry of a person commanding those skills earn more money, the award should be in keeping with his ability to pay, having regard for all other factors which bear upon the issue.

Rosenbaum v. Rosenbaum, 86 Nev. 550, 554 (Nev. 1970) (internal citations

omitted). Here, Tara's own testimony suggests strongly that she was not acting in good faith. Indeed, the district court made that finding. Thus, the district court did not abuse its discretion in this regard.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's order with respect to Tara's cross-appeal.

DATED December 17, 2021.

Respectfully Submitted,

/s/ Alex Ghibaudo

Alex B. Ghibaudo, Esq.
Appellant in Proper Person

CERTIFICATE OF MAILING

I certify that on the December 17th, 2021, I served a copy of this ANSWERING BRIEF TO RESPONDENT'S CROSS-APPEAL upon Respondent through the Court's electronic service system to the following:

Jonathan Nelson, ESQ.
jonathan@jknelsonlaw.com
Attorney for Respondent

Dated this 17th Day of December, 2021.

/s/ Alex Ghibaudo, Esq.

_____
Alex B. Ghibaudo, PC