

**IN THE SUPREME COURT OF THE STATE OF NEVADA**

JOSE OSCAR SALAZAR,  
Appellant,

v.

AGUSTINA CERVANTES LANDA,  
Respondent.

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Supreme Court No.: 83111

District Court No.: D-19-595434-D

**APPEAL FROM DECREE OF DIVORCE AND PLAINTIFF'S  
MOTION TO RECONSIDER**

Eighth Judicial District Court of the State of Nevada  
In and for the County of Clark  
THE HONORABLE DAWN THORNE  
DISTRICT COURT JUDGE

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**APPELLANT'S OPENING BRIEF**

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## **I. NRAP 26.1 DISCLOSURE**

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed:

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In the course of the proceedings in the district court, Appellant was also represented in an unbundled capacity by Rodolfo Gonzalez, Esq., Nevada Bar # 012751, of Gonzalez and Flores Law firm and Respondent was also represented by Brett Whipple, Esq., Nevada Bar # 6168, of The Justice Law Center; and by Christy Escobar, Esq., Nevada Bar #2300, China Amie, Esq., Nevada Bar #14820 of Escobar & Associates Law Firm of Escobar and Associates Law Firm, LTD. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

DATED this 28th day of October, 2021.

/s/ Emily McFarling

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#### **IV. JURISDICTIONAL STATEMENT**

This court has jurisdiction pursuant to NRAP the 3A(b)(1), which permits a party to appeal from “[a] final judgment entered in an action or proceeding commenced in the court in which the judgment is rendered.” The final order appealed from is an Order entered on May 25, 2021. 1AA000185-190. The notice of entry of order was filed on May 26, 2021. 1AA000191 - 000198. Appellant timely filed a notice of appeal on June 22, 2021. 1AA000202 - 000203.

#### **V. ROUTING STATEMENT**

This case should be assigned to the Court of Appeals as stated in NRAP 17(b)(5) because it involves a family law issue.

#### **VI. STATEMENT OF THE ISSUES**

- A.** Did the district court err in calculating Jose’s monthly alimony payments to Augustina?
- B.** Did the district court err in calculating Augustina’s monthly alimony payments to Augustina?
- C.** Did the district court err in not including alimony income in its child support calculation?
- D.** Did the district court err in calculating Augustina’s alimony award?

- E.** Did the district court abuse its discretion in determine Jose's and Augustina's financial condition?
- F.** Did the District Court abuse its discretion in determining the duration of the marriage?
- G.** Did the District Court abuse its discretion in determining Augustina's earning capacity?
- H.** Did the district court err in awarding the property at 1600 Ardmore Street as Augustina's sole and separate property?

## **VII. STATEMENT OF THE CASE**

This appeal arises from a District Court's final Decree of Divorce and Plaintiff's Motion to Reconsider. AA000202-0203. The parties were married in name only for 19 years with each party living separate and apart lives for 11 of the 19 years. AA000001. The issues of the two-day trial (October 26, 2020 and November 16, 2020) include custody of their three (3) minor children, child support, alimony, property and debt division, and attorney's fees. AA000205-493.

The District Court awarded Jose primary physical custody of the children, \$144 in child support and the Panocha home. AA000113-0118. The District Court awarded Augustina \$600 a month for 120 months in alimony, the Ardmore home and her community property equity interest of \$60,000 in the Panocha home to be paid in a lump sum. AA000113-0118. Seven days follow the

Decree of Divorce, Jose filed a Motion to Reconsider the alimony award due to improper calculation of both parties' gross monthly income and the property distribution. After the Motion to Reconsider, the District Court deny Jose's reconsideration of alimony. AA000153-0164. The District Court denied his motion in regards to alimony, but amended the property equity interest amount to \$38,999.50. 1AA000186. Jose now appeals. AA000191-0192

### **VIII. STATEMENT OF THE FACTS**

#### **A. Relationship History**

Jose and Augustina were married on March 12, 2001 in Las Vegas, NV. 1AA000001. At the time Jose filed for divorce, on August 27, 2019, the couple had been married for 19 years. *Id.* Prior to their marriage, Jose purchased a home in 1999 at 1600 Ardmore Street. 2AA000281. In 1999, when Jose purchased the Ardmore home, Augustina was married to another man. 2AA000391. Jose testified that Augustina did not aid paying the \$5,000 for the down payment. AA000391. Conversely, Augustina argued that she contributed \$2,000 of the down payment. 2AA000330. Jose solely made and continued to make the payments for the Ardmore home even after they were married. 2AA000390.

After only a few months of being married, Augustina was deported to Mexico in late 2001. 2AA000330. After getting deported, Augustina found a place to live where she reconnected with a man name Pedro Castelan. 2AA000331. The two were



engaged in a romantic relationship and lived together as husband and wife. *Id.* During the eleven years she lived in Mexico, Jose only visited once a year for about a week at a time. 2AA000330. These visits all took place in outside cities instead of the town where Augustina's residence was at Augustina's insistence. 2AA000376. Despite the short visits, Augustina gave birth to three children Mellyarive, Maybel, and Jormy, all fathered by Jose. 2AA000375.

All three children were born in the United States receiving U.S. birth certificates, but Augustina also obtained birth certificates from Mexico in order for them to be baptized in Mexico. 2AA000352. On Maybel's Mexico birth certificate, the father is listed Pedro Castelan. 2AA000354. In 2009, three years after the birth of Maybel, Augustina took the children to be baptized. 2AA000353. The baptism certificates listed Pedro as the father of not only Maybel, but also Mellyarive and Jormy. *Id.* The children even referred to Pedro's sister as "Aunt." AA000354. In 2010, Pedro died and Augustina finally made steps to return to the United States. 2AA000337. All three children lived with Augustina and Pedro as their mother and father from birth until Pedro's death. 2AA000377. In 2011, upon the children finding out Jose was their father and not Pedro, the children were confused and traumatized. 2AA000377. Finally, in 2012, after nearly 11 years living in Mexico and with Pedro, Augustina returned to Las Vegas. 2AA000338.

Augustina returned to Las Vegas and lived with Jose for the sake of the children beginning in 2012. 2AA000439. In his own words, Jose stated that, “We had an agreement that we were going to stay together so that or be together so that the children could see us, but there was no more marriage in itself.” [sic] *Id.* In 2014, Jose purchased a second home at 3127 Panocha Street. 2AA000341. Upon purchase of this Panocha home, the couple decided to rent out the Ardmore residence. *Id.*

Throughout their union, Jose continued to be the primary financial earner and “gave them everything.” 2AA000465. Beginning in 2018, Jose opened his own business where he would deliver construction product to different places. 2AA000379. As the sole owner of the business the gross monthly income is calculated after the business expenses are deducted. *Id.* The deduction includes repairs, fuel, insurance, food, tires, etc. *Id.* After deduction, the take home profit varies every year. *Id.* In 2017, Jose made a profit of \$43,000, in 2018 \$42,000, and in 2019 he made a profit of \$43,000. 2AA000380 – 0381. However, in 2020, Jose did not make a profit at all, but instead suffered a loss as a result of his truck catching on fire. 2AA000382 – 0383. As a result of the fire, Jose had to take out a \$40,000 loan to purchase another truck to continue his business. 2AA000385.

Since Jose owns his own business, he is also able to set his own schedule. 2AA000386. Prior to the COVID-19 pandemic Jose would work as both a long-haul trucker and a short-haul truck driver. 2AA000435. During his long hauls he would

work 10 to 12 days at a time as long-haul truck driver. 2AA000436. Since the beginning of the COVID-19 business has reduced. 2AA000386. Due to travel restrictions, Jose has been working as a short haul trucker locally in Las Vegas. 2AA000432. During the times when Jose would work, Augustina worked very little. 2AA000319. During the 11 years that Augustina lived in Mexico, Jose would send her money to live off of. 2AA000340. As stated by Augustina herself from 2012 to 2015 she did not work so she could stay home with her children. 2AA000458. In 2015, Augustina was injured and had three discs removed in her back. 2AA000322. Augustina stated that she does not have a work permit as it was taken away so she could not get a formal job. 2AA000322. Instead, Augustina would work Monday-Friday approximately 3 hours a day cleaning houses. *Id.* She brought in approximately \$800.00 a month which was paid to her in cash. *Id.* Since this salary was paid in cash, Augustina admitted that she has no idea what her true financial situation is. AA000318. However, Augustina holds a Bachelor of Arts college degree. 1AA000125.

**B. Procedural History Leading Up to Trial**

Jose and Augustina were married on March 12, 2001, in Las Vegas, NV. 1AA000001. *Id.* On August 27, 2019, Jose filed for divorce from Augustina after 19 years. *Id.* Jose alleged that he should have primary physical custody of the three minor children. 1AA000003. On October 9, 2019, Augustina filed her answer to

Jose's Complaint for Divorce and subsequent Counterclaim for Divorce by and through her attorney Christy Brad Escobar, Esq. and China Amie, Esq. of Escobar & Associates Law Firm. 1AA000026-0027. Accompanying her Answer and Counterclaim for Divorce Augustina filed a General Financial Disclosure Form. 1AA000018-0025. On the Financial Disclosure Form, Augustina noted that she had no gross monthly income or other sources of income. 1AA000019. Augustina also noted that she had no monthly personal expenses stating that for all categories the "Monthly Amount I Pay" was N/A or Not Applicable. 1AA000021. Additionally, Augustina noted that the total monthly expenses that she spends each month for her children was N/A or Not Applicable. 1AA000022.

On November 19, 2019, the parties attended a case management conference regarding the Motion for Orders for Interim Custody, Child Support, Spousal Support, Exclusive Possession of the Marital Residence, Attorney's Fees, Non-Disparagement and Lis Pendens and the Opposition filed by Rodolfo Gonzalez, Esq. attorney for Plaintiff in an unbundled capacity. 1AA000054-055. During this meeting Jose was ordered to pay Augustina \$250.00 monthly for personal expenses. 1AA000057. Augustina was conversely ordered to provide Jose with receipts for the utilization of the funds he was paying her. *Id.* Jose was also ordered to continue paying the mortgage and household expenses for the Panocha home. *Id.* The order

signed by Judge Charles Thompson for Lisa M. Brown was signed on January 3, 2020. AA000058.

On January 20, 2020, Jose filed a General Financial Disclosure Form. 1AA000059-0068. On his Financial Disclosure Form, Jose noted that he has personal monthly expenses totaling \$4,175.00 including alimony, insurance, utilities, mortgage, food, and more. 1AA000062. In addition to the personal monthly expenses, Jose also noted that he pays a total of \$160.00 for braces for two of his minor children. 1AA000063. Accompanying the General Financial Disclosure Form, Jose also filed a Profit or Loss from Business for his business JOS Trucking. 1AA000067. Here, Jose noted that his net profit, or take-home salary, was \$43,630 in 2019. *Id.*

In March of 2020 Jose and Augustina were referred to attend Mediation and their three minor children Mellyarive, Maybel, and Jormy was recommended for a child interviews. AA000073-0075. On March 11, 2020, Judge Lisa Brown set a civil non-jury trial date of October 26, 2020, at 9:00am. 1AA000076. June 9, 2020, the parties appeared telephonically for a return hearing regarding the mediation and child interview orders. 1AA000078. Due to COVID-19 pandemic the child interviews were stopped. *Id.* The court re-referred the parents to Mediation and the minor children for child interviews.

On July 9, 2020, Augustina's counsel filed a motion to withdraw as counsel pursuant to NRCP 1.16(a)(5). AA000081-0088. This order for removal as counsel and for an attorney's lien for fees was granted on August 24, 2020, by Judge Lisa Brown. AA000091-0092.

October 19, 2020, Jose by and through his attorney of record Rodolfo Gonzalez, Esq. in an unbundled capacity filed his Pretrial Memorandum. AA000099-0104. Augustina subsequently filed her Pre-Trial Memorandum through her new attorney of record, Bret O. Whipple, Esq. of Justice Law Center. AA000106-0112.

**C. Trial and Decree of Divorce Order**

On October 26, 2020 and November 16, 2020, this cause came before the court in a Civil Non-Jury Trial overseen by Judge Lisa Brown. 2AA000398. As a result of this trial a Decree of Divorce was filed on February 11, 2020, by Rodolfo Gonzalez. 1AA000119 The court found that Augustina listed another man as the children's natural father and that the Defendant told the three youngest children Pedro was their biological father. 1AA000123. Additionally, the Court found that Augustina was not credible as to the reason for listing Pedro as the father, nor was she credible during the trial. *Id.* The court ordered that Jose and Augustina will have joint legal custody of the children and Jose will have primary physical custody of the minor children. *Id.*

The Court found that Augustina's gross monthly income was \$800 per month based on her testimony that she makes \$800 a month paid out in cash. 2AA000319. Her alleged income created a child support obligation of \$144.00 per month to pay to Jose effective January 1, 2021. 1AA000123. The Court ordered Jose to pay \$600 per month in spousal support for a period of ten years, or 120 months. 1AA000126.

The Court found that based on the respective Financial Disclosure Forms filed by both parties that the Ardmore home was valued at \$142,951 with approximately \$98,000 owed and the Panocha home was valued at \$277, 950 with \$155,000 owed. *Id.* The Court ordered that Jose shall be entitled to the Panocha home as his sole and separate property and that Augustina shall be entitled to the Ardmore home as her sole and separate property. 1AA000127. The Court found Augustina is entitled to \$60,000 in equity in the Panocha home as a result of the difference in value between the two residences. *Id.*

**D. Plaintiff's Motion to Reconsider and Defendant's Opposition**

Seven days following the filed Decree of Divorce, Jose by and through his attorney Rodolfo Gonzalez, Esq. in an unbundled capacity filed a Motion to Reconsider. 1AA000153-0164.

The Motion to Reconsider noted that when evaluating Jose's financial status, the Court looked at his net income after business-related expense and found that he had an adjusted gross monthly income of \$3,635.83. AA000155. However, the

Motion argued that the Court did not do their due diligence in determining the financial situation of Augustina. *Id.* Jose's motion alleged that the Court did not seem to consider the Defendant is employable based on her bachelor's degree. *Id.* Additionally, Jose's Motion to Reconsider noted that the Court relied on his 2018 income for his gross monthly income without considering the financial hardships that Jose and many others suffered in 2020 due to the pandemic and Jose's fire to his truck. 1AA000156.

In dividing the property assets, the Court did not consider the respective debts of Jose when calculating the equity Augustina is entitled to in the Panocha home. 1AA000156. Additionally, following the minute order, Jose has had to pay the rent for the previous rental property at Ardmore because Augustina made no attempt to pay rent or reimburse Jose for the financial burden of paying the rent and mortgage of two properties (Ardmore and Panocha). 1AA000156-0157.

On March 9, 2021, Augustina by and through her attorney Bret O. Whipple, filed and Opposition to Plaintiff's Motion to Reconsider. 1AA000165-0173. The Motion to Reconsider was heard on March 31, 2021, and the Order was filed on May 25, 2021. 1AA000185-0190. The Court denied the Motion to Reconsider in regard to alimony. 1AA000186. The Court granted the Motion to Reconsider the equity owed to Augustina due to a mathematical error. *Id.* The Court ordered that Jose owes Defendant \$38,999.50 to equalize the property interests. *Id.* The Court also ordered



that Augustina shall become responsible for the mortgage at the Ardmore property. 1AA000187. Augustina shall refinance the home in her name or sell the property. *Id.* Jose was ordered to pay the mortgage at the Ardmore property while the home is refinanced or sold. *Id.* The Court also ordered that Jose should have received a credit of \$456.00 per month toward the alimony payment and \$381.00 credit toward the equalization note. *Id.* Finally, Jose was not ordered to pay alimony arrears as he was paying mortgage payments on the Ardmore property. *Id.*

## **IX. SUMMARY OF ARGUMENT**

The District Court erroneously and without sufficient evidence awarded alimony and divided property in this case. First, the District Court erred in calculating Jose's gross monthly income by using old tax returns that do not reflect his current and future financial status. Second, the District Court also erred in calculating Augustina's gross monthly income by failing to include her alimony award in her income as well as relying on verbal testimony about her financial status without proof. The erroneous calculation of her income led to the District Court to erroneously calculate Augustina's child support obligation. As a result of the erroneous calculations of gross monthly income the District Court also erred in calculating the alimony award paid to Augustina. The facts in light of the required alimony factors makes it clear that the court did not properly consider each factor. In addition to the calculation errors of the District Court, the Court also erred in

awarding Jose’s separate property to Augustina as opposed to awarding her a financial property interest from their payments during marriage. In light of all of these factors, the following case should be remanded for a proper review of the facts and conclusions of law.

## **X. ARGUMENT**

### **A. Standard of Review**

In reviewing divorce proceedings on appeal, the Nevada Supreme Court has reversed rulings that were not supported by substantial evidence or were the result of plainly appearing abuse of discretion.”<sup>1</sup> Substantial evidence is evidence which “a reasonable mind might accept as adequate to support a conclusion.”<sup>2</sup>

The district court’s factual findings are given deference and may be reversed if clearly erroneous and if not supported by substantial evidence.<sup>3</sup> This includes factual findings regarding property division and alimony.<sup>4</sup> The United States Supreme Court has defined the clearly erroneous standard as, “A finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the

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<sup>1</sup> *Williams v. Waldman*, 108 Nev. 466, 472 (1992).

<sup>2</sup> *State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, (1986).

<sup>3</sup> *Baker v. Eighth Judicial Dist. Court*, 116 Nev. 527 (2000).

<sup>4</sup> *Lofgren v. Lofgren*, 926 P.2d 296 (1996).

entire evidence is left with the definite and firm conviction that a mistake has been committed.”<sup>5</sup>

**B. The District Court Erred in Calculating the Financial Obligations of both Jose and Augustina.**

The District Court Erred in a multitude of areas regarding the financial obligations to be paid to both Jose and Augustina. First, the District Court erred in calculating Jose’s gross monthly income. holding that Jose should be responsible for paying Augustina monthly alimony payments as they were not held out as a married couple to others for eleven years and to each other for their entire marriage. Second, the District Court did not erred in calculating Augustina’s gross monthly income and earning potential. Third, as a result of the miscalculation of both parties’ gross monthly income, the District Court erred in calculating the child support obligation of Augustina. Finally, the District Court erred in calculating the alimony award to be paid to Augustina by Jose.

**1. The District Court Erred in Calculating Jose’s Gross Monthly Income Monthly Alimony Payments to Augustina.**

Because Jose had negative income at the time of trial due to actual major issues with his business, the District Court erred in awarding alimony. Further, the District Court erred in basing alimony on Jose’s prior income when his work had

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<sup>5</sup> *United States v. Gypsum Co.*, 333 U.S. 364, 395 (1948).

changed significantly as a result of having the children in his primary care and his business income had dropped so significantly that it was negative.

Within Jose's Motion to Reconsider the District Court failed to consider the financial hardships that Jose and many others suffered in 2020 due to the pandemic. 1AA000156. The District Court found that Jose's gross monthly income from his company JOS Trucking was approximately \$3,635.83 after business-related expenses. 1AA000155. Jose owned and operated his own business where he would deliver construction product to different places. 2AA000379. As the sole owner of the business Jose's gross monthly income is calculated after the business expenses are deducted. *Id.* As a result, Jose's take-home profit varies from year to year. *Id.* The deduction includes repairs, fuel, insurance, food, tires, etc. *Id.* The District Court used Jose's prior profits which ranged from \$42,000 to \$43,000 to calculate his gross monthly income. 2AA000380 – 0381. However, in 2020, Jose did not make a profit at all, but instead suffered a loss because of his truck catching on fire. 2AA000382 – 0383. As a result of the fire, Jose had to take out a \$40,000 loan to purchase another truck to continue his business. 2AA000385. The Court's use of Pre-Coronavirus tax returns does not and cannot provide a realistic view of landscape of the working world of today. To obtain an accurate gross monthly income a more current tax return outlining Jose's business earnings and deductions is needed.

An updated Financial Disclosure Form is another factor needed to obtain an accurate gross monthly income. Jose filed his General Financial Disclosure Form on January 20, 2020. 1AA000059. This Financial Disclosure Form contained information regarding Jose's income for 2019. 1AA000067. The Court should not have relied on outdated information when it had up to date information in Jose's Motion and in the testimony at trial.

The District Court failed to acknowledge Jose's full-time shift to a short-haul trucker. The District Court ordered that Jose shall have primary physical custody of the minor children. 1AA000123. Prior to the COVID-19 pandemic Jose would work as both a long-haul trucker and a short-haul truck driver. 2AA000435. During his long hauls he would work 10 to 12 days at a time as long-haul truck driver. 2AA000436. As a result of gaining primary physical custody of his minor children Jose can no longer be gone from the home 10 to 12 days at a time. 2AA000436. His inability to work as a long-haul trucker has impacted his income as long-haul truckers make more than short haul trucking locally.

By failing to consider the impact the COVID-19 pandemic had on the economy, the negative income caused by Jose's work truck catching fire, and Jose's necessary switch to short-haul trucking due to having primary physical custody of the children at issue in this case, the District Court erred in calculating Jose's Gross Monthly Income.

As such, this Court should reverse the award of alimony and either remand for further proceedings or simply leave the award reversed as error.

2. The District Court Erred in Calculating Augustina's Gross Monthly Income for Alimony and Child Support Purposes.

The District Court erred in calculating Augustina's Gross Monthly income when it determined alimony and child support because there was not sufficient evidence for the District Court to determine Augustina's actual income. When she filed her Answer and Counterclaim for Divorce, Augustina her Financial Disclosure Form stated that she had no gross monthly income or other sources of income. 1AA000019.

At trial, Augustina stated that she makes approximately \$800 a monthly in cash. 2AA000319. She earns this money by working Monday through Friday approximately three hours a day cleaning houses. 2AA000309; 2AA000319. Prior to and at trial Augustina did not provide any further documentation to her economic status beyond her Financial Disclosure Form filed out in October of 2019. 1AA000018. This form gave very little relevant of usable information regarding Augustina's economic life. She noted that she had no gross monthly income or other sources of income. 1AA000019. Additionally, that she had no monthly personal expenses or expenses for the children stating that for all categories the "Monthly Amount I Pay" was N/A or Not Applicable. 1AA000021-0022. During trial she stated

that she did not have any bank statement. As a result of her lack of bank statements and being paid in cash Augustina herself agreed that she “can’t identify [her] true financial statements without [her] bank ---- bank statements[sic].” 2AA000319.

Since Augustina’s true income is unknown due to lack of bank statements and inconclusive testimony, the District Court erred in calculating Augustina’s gross monthly income.

As such, this Court should reverse both the alimony and child support orders and remand the child support order for further proceedings to determine the correct amount.

3. The District Court erred in Calculating Augustina’s Child Support Obligation By Not Including Alimony Income

The District Court erred by failing to include Augustina’s alimony award in her gross monthly income. As of February 1, 2020, the definition of Gross Income was amended to include alimony without limitation.<sup>6</sup> As a result of this new amendment, the District Court erred in not including the alimony Jose will pay to Augustina in her gross monthly income. The District Court found that Augustina’s gross monthly income was \$800 as a result of her small job cleaning houses during the week. 1AA000141. However, this was in error because the District Court also

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<sup>6</sup> NAC 425.025(m).

ordered Jose to pay \$600 per month in spousal support for a period of ten years, or 120 months. 1AA000126. In accordance with the Nevada regulation, this additional \$600 a month would place Augustina's gross monthly income at \$1400. Therefore, the District Court erred in calculating Augustina's gross monthly income by not including her alimony award. As a result of the miscalculation of Augustina's gross monthly income, the District Court also erred in calculating Augustina's child support obligation to Jose for their three minor children. 1AA000123. Based on Augustina's gross monthly income of \$800, the Court ordered her to pay Jose \$144 per month in child support. 1AA000141. The District Court did not go into detail on how they arrived at this number, but presumably the \$144 per month derived from the Child Support Obligation of Low-Income Payers for 2020 provided by the Administrative Office of the Courts for the Supreme Court of Nevada. Pursuant to Child Support Regulation R138-18 adopted on October 30, 2019, the Administrative Office of the Courts for Nevada was required to publish annually the Schedule of Child Support Obligations for Low-Income Payers.<sup>7</sup> This schedule indicated that for monthly income up to \$826, child support for three children is \$144.<sup>8</sup>

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<sup>7</sup> nvcourts.gov. 2021. *Presumptive Maximum Amounts of Child Support*. [online] Available at: <[https://nvcourts.gov/AOC/Administration/Budgets\\_and\\_Accounting/News/Presumptive\\_Maximum\\_Amounts\\_of\\_Child\\_Support/](https://nvcourts.gov/AOC/Administration/Budgets_and_Accounting/News/Presumptive_Maximum_Amounts_of_Child_Support/)> [Accessed 21 October 2021].

<sup>8</sup> 2021. Child Support Obligation of Low-Income Payers at 75% to 150% of the 2021 Federal Poverty Guidelines. Administrative Office of the Courts for Nevada, p.1.



However, according to the amended regulation, the District Court should have included Augustina's receipt of alimony payments in her gross monthly income, putting her income at \$1,400 per month. Again, using the Child Support Obligation of Low-Income Payers for 2020 in combination with Augustina's corrected gross monthly income of \$1400, Augustina's child support obligation should total \$343.00 a month to Jose.<sup>9</sup>

The District Court erred in not including Augustina's alimony income in its calculation of her child support obligation. As such, this Court should vacate the child support order retroactive back to the date of trial and direct the District Court to reset child support with Augustina's alimony income included in the calculation.

4. The District Court Erred When It Awarded Alimony Payments to Augustina.

As a result of the District Court erring in calculating Jose's gross monthly income and Augustina's gross monthly income, the District Court also abused its discretion in calculating the alimony award to Augustina. Further, because the Parties were not living together as a married couple for almost the entire marriage, with Augustina living together as husband and wife with another man, raising the Parties' children as the other man's children, the District Court erred in awarding alimony.

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<sup>9</sup> *Id.*

“Alimony is financial support paid from one spouse to the other whenever justice and equity require it.”<sup>10</sup> In a divorce suit, the district court may award alimony for a specified period of time or in a lump sum.<sup>11</sup> When awarding alimony, district courts 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;
- she not credible during 1AA000123

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<sup>10</sup> *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000); *see also* NRS 125.150(1)(a) (the alimony award must be "just and equitable).

<sup>11</sup> NRS 125.150(1)(a).

(j) The award of property granted by the court in the divorce, other than child support and alimony, 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.”<sup>12</sup>

"After considering these factors, and any other relevant circumstance, the district court may award alimony under NRS 125.150(1)(a) to compensate a spouse for non-monetary contributions to the marriage and economic losses from the early termination of the marriage, such as lost income-earning potential or a decreased standard of living.”<sup>13</sup>

When awarding or refusing alimony awards, the trial court’s discretion is limited.<sup>14</sup> Using specific fact based factors, district courts must consider among other things, “[t]he income, earning capacity, age and health of each spouse.”<sup>15</sup> When there is evidence that the trial court does not indicate in either the judgment or the decree that it gave adequate consideration to the appropriate factor in awarding alimony, the Appeals court shall remand for reconsideration of the issue.<sup>16</sup> To determine adequate consideration the District Court should depend on express facts

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<sup>12</sup> NRS 125.150(9)(a)-(k).

<sup>13</sup> *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 71-72, 439 P.3d 397, 404 (2019).

<sup>14</sup> *Forrest v. Forrest*, 99 Nev. 602, 606, (1983).

<sup>15</sup> NRS 125.150(1)(a)(e).

<sup>16</sup> *Forrest*, 99 Nev. at 606.

and conclusions of law, and in their absence “this court must rely on an examination of the record to see if the trial court's decision constitutes an abuse of discretion.”<sup>17</sup>

The District Court abused its discretion when evaluating the necessary factors for alimony.

**a) Financial Condition of Each Spouse**

First, the District Court abused its discretion when determining the financial condition of each spouse. As discussed above, the District Court erred in calculating both Jose’s and Augustina’s gross monthly income so the Court’s findings of Jose’s gross monthly income of \$3,635.83 and Augustina’s gross monthly income of \$800 were improperly considered in the alimony calculation.

**b) The duration of the marriage.**

Second, the District Court abused its discretion when calculating the duration of the marriage. The District Court found that Jose and Augustina had been married for 19 years. 1AA000116. While they were married in name for that duration of time, the facts show their true relationship did not span that long.

Through testimony given at trial from both Jose and Augustina, it becomes clear the true extent of their relation. After only a few months of being married, Augustina was deported to Mexico in late 2001. 2AA000330. After getting deported,

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<sup>17</sup> *Schouweiler v. Yancey Co.*, 101 Nev. 827, 831, (1985).

Augustina engaged in a relationship with a man name Pedro Castelan and the two lived together holding themselves out as husband and wife and the parents of Jose and Augustina's minor children. 2AA000331. During the eleven years she lived in Mexico, Jose only visited once a year for about a week at a time. 2AA000330. To hide her involvement with Pedro, these visits all took place in outside cities instead of the town where Augustina's residence was at Augustina's insistence. 2AA000376. Despite the short visits, Augustina gave birth to three children Mellyarive, Maybel, and Jormy, all fathered by Jose. 2AA000375.

In addition to the US birth certification, all three children also obtained birth certificates from Mexico in order for them to be baptized in Mexico. 2AA000352. On Maybel's Mexico birth certificate, the father is listed Pedro Castelan and not Jose. 2AA000354. In 2009, Augustina took the children to be baptized and on the baptism certificates again Pedro was listed as the father of not only Maybel, but also Mellyarive and Jormy. *Id.* The children even referred to Pedro's sister as "Aunt." AA000354. In 2011, after Pedro's death, once the children found out Jose was their biological father and not Pedro, the children were confused and traumatized. 2AA000377.

Finally, in 2012, after nearly 11 years living in Mexico and with Pedro, Augustina returned to Las Vegas and lived with Jose for the sake of the children beginning in 2012. 2AA000439. In his own words, Jose stated that, "[They] had an

agreement that we were going to stay together so that or be together so that the children could see us, but there was no more marriage in itself.” [sic] *Id.*

The forementioned facts corroborated by both Jose and Augustina, show that the duration of their marriage was not 19 years as found by the Court. The couple lived apart for 11 years with only yearly visits of once a week. Augustina lived with another man and held him out to be her husband to the church, the people who attended the baptism, and even worse to her own children. Pedro and Augustina’s life as married was so extreme that Jose’s children believed Pedro to be their father and believed Augustina to be married to Pedro. And finally, upon her return to Las Vegas, while they lived together, they remained “married” in name only. Therefore, the District Court abused its discretion in using the fact that the two had been married for 19 years to determine that alimony was appropriate in this case.

**c) The income, earning capacity, age and health of each spouse.**

Second, the District Court abused its discretion when evaluating the income, earning capacity, age and health of each spouse. In reviewing the record there is no adequate findings regarding Augustina’s disabled status to the effect that she cannot work. In the Decree of Divorce and the Order, the Court found that Augustina “is 49 years of age, with a bachelor of arts college degree but allegedly unable to work due to an auto injury which resulted in severe back injuries.” 1AA000125.

Here, Augustina asserted at trial that in 2015 she was in a car accident resulting in a back injury where three discs were removed in her back. 2AA000322. She also made similar remarks on her Financial Disclosure Form. AA000018. On this form she indicated that she was disabled but failed to indicate a credible agency that made her disabled classification. *Id.* When asked about medical records that would corroborate her disabled status, Augustina admitted that she did not provide any medical records that would confirm her disabled status and her inability to work. AA000312. No exhibits were given regarding this disability finding as well. *Id.*

Additionally, Augustina's claims were directly refuted by Jose while at trial. He state that "She is not disabled. She can work" not once, but twice. AA000437. The District Court's complete disregard of Jose's testimony in favor of Augustina's was an abuse of discretion especially because the Trial Court itself stated that Augustina was not generally credible during trial. AA000115. The Trial Court in the minute order from December 21, 2021 did not know how to classify Augustina's disability status stating that she "was permanently or partially disabled as a result of a car accident." AA000116. The Court then went on to say that her asserted injuries "may impact her ability to continue to work n a field requiring physical exertion" but with a bachelors degree, the jobs available that do not require physical exertion are plentiful. 1AA000117. The confirmed confusion over Augustina's disability and

earning capacity is evidence enough the District Court abused its discretion in determining that Augustina could not work.

**C. The District Court Erred In Awarding the Ardmore Property As Augustina's Sole And Separate Property.**

The District Court erred in awarding Jose's separate property as Augustina's sole and separate property and in including Jose's separate property interest in an equal division of property (separate and community). The NRS clearly states that "all property of a spouse owned by him or her before marriage ... is his or her separate property."<sup>18</sup> However, the community can have a property interest in a separate property home upon marriage when payment are made with community funds on property.<sup>19</sup> Community funds can include "earnings of either spouse during the marriage ... regardless of which spouse earns the greater income or which spouse supports the community."<sup>20</sup> The Nevada Courts have recognized that "the community is entitled to a pro rata ownership share in property which community funds have helped to acquire."<sup>21</sup>

Here, Jose stated and Augustina confirmed that the 1600 Ardmore St. home was purchased in 1999. 2AA000281. At the time of the purchase of the home

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<sup>18</sup> NRS 123.130

<sup>19</sup> *Robison v. Robison*, 100 Nev. 668, 670 (1984).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*



Augustina was married to another man and not married to Jose. 2AA000390. As such, the home was Jose's separate property and should not have been awarded to Augustina in the divorce.

During their marriage Jose continued to make the mortgage payments from his own salary. 2AA000390. If his salary and mortgage payments were community property, then Augustina would have a pro rata financial interest in this home. Augustina was entitled to a financial share in the Ardmore property using a Malmquist equation, not the home in its entirety. No such calculation was done. Further, because Augustina lived as husband and wife with another man throughout the majority of the marriage, Jose's income should not have been considered community property.

The pertinent facts we know regarding the home is that it was purchased in 1999, the home was in Jose's name, and he made the payments throughout the marriage and during divorce proceedings. The District Court erred in awarding the Ardmore property to Augustina as her sole and separate property. As such, the order awarding Augustina the Ardmore property should be reversed along with the entire property division and the property division should be remanded to the District Court for an equal division of only the community property, not Jose's separate property interest in the house. Further, the District Court should be directed to take evidence

on Jose's claim that community property did not accrue due to Augustina living as husband and wife with another man.

## **XI. CONCLUSION**

The District Court erroneously and without sufficient evidence awarded alimony, child custody, and property in this case. First, the District Court erred in calculating Jose's gross monthly income by using old tax returns that do not reflect his current and future financial status. Jose's business was not spare financial as a result of the COVID-19 pandemic's impact on US commerce and the failure to consider this fact was erroneous. Additionally, Jose's new status of primary caregiver of his three children impacted his income as he must now work as a short-haul trucker as opposed to a long-haul truck driver.

Second, the District Court also erred in calculating Augustina's gross monthly income by failing to include her alimony award in her income as well as relying on verbal testimony about her financial status without proof. Augustina works for cash and as a result of this does not know her true financial situation. If she did not know her financial status, the District Court could not and should not take her testimony without evidence as a starting point to make gross monthly income calculations.

Third, the court simply failed to follow the Nevada statute which states that when calculating child support alimony must be included.

Fourth, the District Court erred in calculating the alimony award paid to Augustina. The Court again, did not take their due diligence when weighing the factors to consider the alimony award including: the financial condition of each spouse, the duration of the marriage, and the earning capacity of Augustina. The two did not live as a married couple for the entirety of their marriage, and in fact Augustina held herself out to be married and having children with another man which the District Court failed to consider in the alimony allocation. The District Court also failed to fully consider the earning capacity of Augustina, but instead chose to believe testimony without facts about her disability status.

Fifth, and finally, the Court also erred in awarding Jose's separate property to Augustina as opposed to awarding her a financial property interest in the Ardmore home from their payments during marriage.

For these reasons, the District Court's Decree of Divorce filed February 11, 2021 and Plaintiff's Motion to Reconsider and Defendant Opposition filed March 26, 2021 should be remanded.

DATED this 28th day of October, 2021.

/s/ Emily McFarling

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## **XII. 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 in a proportionally spaced typeface using Microsoft Word–Office 365 Business in font type Times New Roman size 14.

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 either:

☒ Proportionately spaced, has a typeface of 14 points or more and contains 6,454 words; or

☐ Monospaced, has 10.5 or fewer characters per inch, and contains \_\_\_\_ words or \_\_\_\_ lines of text; or

☐ Does not exceed \_\_\_\_ pages.

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 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 not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 28th day of October, 2021.

MCFARLING LAW GROUP

*/s/ Emily McFarling*

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**CERTIFICATE OF SERVICE**

I, an employee of McFarling Law Group, hereby certify that on the 28<sup>th</sup> day of October, 2021, I served a true and correct copy of this Appellant's Opening Brief as follows:

☒ by United States mail in Las Vegas, Nevada, with First-Class postage prepaid and addressed as follows:

Agustina Cervantes Landa  
1600 Ardmore St.  
Las Vegas, NV 89104

☒ via the Supreme Court's electronic filing and service system (eFlex):

Agustina Cervantes Landa

/s/ Alex Aguilar

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Alex Aguilar