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Appellant in Proper Person

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ALEX GHIBAUDO, Appellant, vs. TARA KELLOGG, et al., Respondent.	Docket No.: 82248

APPELLANT'S OPENING BRIEF

NRAP 26.1 Disclosure

The undersigned hereby certifies that there is no such corporation that is associated with Appellant that must be disclosed as described in NRAP 26.1(a). These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

DATED this 10th day of September, 2021

//s//Alex B. Ghibaudo

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ALEX B. GHIBAUDO
Appellant in Proper Person

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JURISDICTIONAL STATEMENT

The Court's appellate jurisdiction over this matter lies in NRAP 3A(b)(1) because, this appeal challenges a district court's final orders concerning a family matter. The order granting Appellant's motion in part and denying it in part 11/10/2020. Notice of Entry was electronically served on 11/20/2021. Appellant filed his notice of appeal on December 14, 2020.

DATED this 10th day of September, 2021

//s//Alex B. Ghibaudo

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ALEX B. GHIBAUDO
Appellant in Proper Person

ROUTING STATEMENT

The Supreme Court should retain this case pursuant to NRAP 17(a)(11) because it involves matters of first impression and violations of due process in a matter of public importance.

DATED this 10th day of September, 2021

//s//Alex B. Ghibaudo

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ALEX B. GHIBAUDO
Appellant in Proper Person

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4)-(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word, 14-point Times New Roman style type.

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 proportionally spaced, has a typeface of 14-points and contains **6497** words.

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, where the matter relied on is to be found.

DATED this 10th day of September, 2021

//s//Alex B. Ghibaudo

ALEX B. GHIBAUDO
Appellant in Proper Person

STATEMENT OF THE ISSUES

I. Whether the district court erred or abused its discretion when it relied on a void order or an order entered contrary to statutory law when it rendered its decision?

II. Did the district court err or abuse its discretion when it failed to apply equitable estoppel to a matter that required it?

III. Did the district court abused its discretion and commit legal error when it failed to undertake an analysis of whether there was some "underlying rationale" for any award of alimony to Respondent?

I. STATEMENT OF THE CASE

This appeal arises from Appellant's a 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.

II. STATEMENT OF FACTS

Respondent Tara Kellogg ("Kellogg") and Appellant Alex Ghibaudo ("Alex") were married on December 30, 2001. Appellant's Appendix (AA) 0001-0003. The parties had one minor child, Nicole Ghibaudo, at the time of these events (Nicole became an adult and graduated high school in 2019). Kellogg filed her Complaint for Divorce on October 1, 2015 through her then counsel, Sigal Chattah, Esq. Alex filed his Answer and Conterclaim in proper person on November 11, 2015. AA 0005.

On May 18, 2016, the parties attended a settlement conference with Senior Judge Kathy Hardcastle. Kellogg was represented during that conference by Ms. Chattah, and Alex appeared in proper person. AA 0006-0007 (an order was never signed and filed from those minutes). During that conference, the parties agreed that they would not be divorced because they were still contemplating reconciliation; at the time Alex had just reinstated his Nevada law license after a five-year suspension. Id. He had little income at that time. Alex was led to believe that Kellogg was then attending CSN toward a degree in psychology, and he anticipated that she would be employed by 2017. His belief was informed in part by his knowledge that Kellogg had taken approximately 21 college units per year from Winter 2011 forward (meanwhile, a decade later, Kellogg has yet to graduate from college, and she remains unemployed).

At the settlement conference, the parties reached an agreement for the terms of a "legal separation" (deemed a "Decree of Separate Maintenance" under Nevada law). AA 0006-0007. That settlement was read into the minutes of the Court on that date. The minutes of that hearing state:

> A Decree of Legal Separation will be entered. At any time either party may seek a termination of the Decree of Legal Separation and pursue a Decree of Divorce.

Id. As part of their agreement for a legal separation, the parties agreed that Alex would pay child support and spousal support to Kellogg. Id. That portion of the minutes reads:

> Defendant will pay Plaintiff the sum of $2,500.00 per month in ALIMONY; this amount includes $819.00 that is attributable towards Child Support.

Id. The minutes then reflect rather confusing terms that link Alex's alimony obligation to his "GMI" (gross monthly income). Id. Those provisions may make sense when the parties were contemplating reconciliation, which would presumably made both parties' incomes community property, but they made little sense for a divorce. Id.

The parties did not reconcile. In or about June of 2016, Kellogg's counsel, Sigal Chattah, Esq., provided a draft Decree of Separate Maintenance, a tacit acknowledgement that the parties had never agreed to the terms of a Decree of Divorce. Shortly after doing so, Ms, Chattah began making demands that were

inconsistent with the terms agreed in the settlement conference. Alex advised Ms. Chattah that if the parties were not going to agree to the terms contained in the record at the settlement confence, they should set aside the agreement and set the matter for trial, an obvious request to proceed forward on divorce.

Kellogg then changed counsel to Trevor Creel, Esq. who sent Alex a letter proposing a draft Decree of Divorce, not a Decree of Separate Maintenance. AA 145-146. Alex responded by letter indicating that he did not agree with the terms of the proposed Decree, and specifically did not agree with the terms of the support obligation. AA 148. Without citing any evidence of an agreement for a divorce, or any agreement for support terms upon divorce, Kellogg's counsel nevertheless sough the summary entry of a Decree of Divorce containing the terms that had only been agreed as part of "Legal Separation." See, Motion for Entry of a Decree of Divorce, filed November 15, 2016. AA 008-021.

On November 29, 2016, Alex filed his Opposition and Countermotion, asking to set aside the "legal separation", in which he objected to the summary filing of the Decree by the court and demanded trial. The court, after hearing, entered a Decree of Divorce without Alex's consent or signature, without a trial, and over his objection. The Decree was filed on February 1, 2017, with Notice of Entry served on February 3, 2017. AA 022-047.

Alex filed motions to set aside the terms agreed to at the settlement conference (pursuant to EDCR 7.50) that Judge Brown denied. Regardless of that legal status, the question arose whether Judge Ritchie, the Judge that issued the order now being challenged, may modify the existing order, when doing so, is the court obligated to recognize the "agreement" of the parties regarding support. As discussed below, there never was any cognizable agreement regarding post-divorce spousal support, either in term or amount.

The agreement that Judge Brown relied upon to enter a Decree without trial was only an agreement regarding the terms of a legal separation, and then Judge Brown failed to incorporate that agreement into the decree of divorce. AA 006-007.

Thus, Alex asserts. the district court here, Judge Ritchie, is not bound by that agreement as a contract, because whatever agreement the court used was not incorporated in the Divorce Decree. AA 79-80; lines 26 (79) to lines 1-2 (80). Alex objected to entry of that decree, which he never signed, on February 2, 2017. AA 107-109. Further, as stated below, the basis for the terms in the Decree of Divorce are contrary to clear statutory law and entered absent any sort of evidentiary hearing, and are thus void, primarily for violating Alex's due process rights but also for disregarding Nevada law entirely.

Even if the court were to ignore the defects in both procedure, law and contract that are the basis of the current order being challenged, Kellogg should be estopped from enforcing the terms of the agreement because of her violation of those terms both expressly, and by her violation of the implied covenant of good faith and fair dealing. Furthermore, the existing order, now being challenged, is based on an order that Alex asserts is void (the decree of divorce), and that this court should not give it any consideration.

On May 30, 2019, Alex filed his motion asserting the following: 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. AA 110-124. Here, Alex will focus on the 1st, 2nd, and 4th claims made in his moving papers. Alex also challenges the district court's award of alimony in violation of *Kogod v. Cioffi-Kogod*, 439 P.3d 397, 405 (Nev. 2019).

In his decision, the district court awarded Kellogg substantial sums of money based on the provisions of the decree of divorce, which Alex alleges is void

and not entitled to any consideration. AA 445-446. The district court indicated that the amounts awarded represent non-payment of family support between October 2017 and April 2019. In awarding Kellogg those sums, the district court stated:

> Both parties understand that the provisions in the decree is untenable with an unknown amount each month. And I'll be describing the context of that since the theme of this case was presented that this case was settled on these terms; and that the divorce decree is clear; and – and that there's a dispute as to how much the support should be and – and whether the duration should be modified. So I'm going to explain all that.

AA 439, lines 2-9. The district court then stated that:

> We had a decree of divorce that was filed on February 1st, 2017. And that is the final judgment in this case. It's enforceable, that gives the Court jurisdiction, it's a starting point for all of our discussions concerning what those obligations are. And the Court, you know, heard evidence about the parties' feelings about their settlement conference. That was sort of the seminal agreement that went into the divorce decree. And – the Court wants to make some specific findings since it's been discussed and we're going to have to making a record concerning, you know, how we – how that was created and how that affects the review of – these issues. And I want to take the time to do it since we have the hour set.

AA 440, lines 9-21. Later, the district court stated the following:

> This was an agreement for a legal separation. The terms were incorporated into the decree, there litigation concerning the request for a judgment. They both agreed that a divorce decree could be entered and the decree of divorce adopted the agreements that were part of the settlement agreement and that judgment is the law of the case. That is the judgment that is under the continuing jurisdiction of the Court. It's modifiable as spousal support…So, there was a question about whether there was an agreement and a binding order for the parties to share income. And the Court concludes that there was. The actual obligation

> pursuant to the decree was not $2,500.00. It was the difference between the Plaintiff's earning potential and the Defendant's actual earnings divided by two.

AA 439, lines 2-3. As to Kellogg, the Court made the following findings:

> The Court finds that the Plaintiff is not employed; that she obtained an Associates degree in 2017; and that she doesn't have income. But the Court further concludes that Kellogg did not present sufficient proof to support any kind of finding that she's disabled….The Court finds that she can work and that her true earning capacity is at least $2,000.00 a month or $24,000.00 a year. She talks about trying to get her Bachelor's degree and hopes to have a job of 30- to 40,000 but does not have her Bachelor's degree at this time. **The Court finds that Kellogg is willfully underemployed to maximize the spousal support claim**; that the income should be imputed to her for this period time between October 2017 and the present; so that the Court can appropriately calculate the net support that is due during this time; and the amount based on the evidence that was presented is at least $2,000 a month. So, $2,000.00 a month will be the number that the Court used.

AA 443-444. After calculating Alex's income, the Court made the following statement:

> Now, this agreement that was incorporated into the divorce decree, it was; but there was no trial on this matter. While it makes some sense after looking at the settlement conference that the decision to share income while they're still married made some sense. Certainly spousal support is what someone pays from their separate property to their former spouse…and so in evaluating whether or not to modify the spousal support award from May 2019 forward, the Court is going to consider the required factors relevant in determining the award of alimony and the amount of such award.

AA 446, lines 20-24; AA 447, lines 1-6. Thereafter, after acknowledging that Alex got no trial, and thus was deprived of due process, the district court

conducts the required analysis based on factors and income earned AFTER the parties were finally divorced. AA 446, lines 20-21.

Later, the Court offered Alex's attorney the opportunity to ask any questions he might have or make any comments he may think appropriate. Radford Smith, Esq., Alex's attorney, then made the following statement:

> Mr. Smith: I – I do believe, Your Honor, there are – we had argued in our motion that we filed in May of 2019 that 1 – NRS 123.080 prevents the parties from entering into any contract or agreement that would address support beyond the parties' separation if it was contemplated that the agreement was a separation agreement. As the Court has indicated and I think is borne out by the – from what I could hear from the – tape that was entered and the minutes of the Court, this was clearly a contemplated to be a separation…So, whether the Cou – the parties or not ultimately ended up with the decree, they clearly did not reach a valid agreement regarding the term of the alimony –
>
> The Court: No, wait, you –
>
> Mr. Smith: -- they could not do that.
>
> The Court: -- **that argument isn't for me, it's for down the street, okay?** The – the fact of the matter is, is that the – the time to fight about that was when there was a request to enter a divorce decree and have the decree then. They entered into an agreement. They entered into a legal separation agreement. They also entered into an agreement the exact same day that either party could get a divorce. There was a request for a divorce. There was a hearing regarding the en – the entry of the divorce. The divorce decree was entered. There was notice of entry…That order is a valid order. I adjudicated obligations under that order in 2017. Those judgments are final orders. They are not appealable either. And so now the Court has issued judgments since October 2017 on that decree. And I suppose to the extent that you think the court has either erred or abused discretion in that – those findings and orders, this order will give your client rights to be able to raise that

> issue…but I'm not persuaded that – that he's relieved from these responsibilities otherwise I wouldn't have issued the order the way I did. [Emphasis Added].
>
> AA 445-446, lines 1-9.

As stated above, at no time did the district court enter a ruling or even discuss the remaining claims by Alex.

III. LEGAL ANALYSIS

a. <u>The decree relied upon by the district court in the current challenged order is a nullity and void, having no force or effect because it was entered in violation of Lofgren v. Meyer, and it violated Alex's due process rights, among other things more fully discussed below.</u>

Under NRS 123.080(4):

> If a contract executed by a married couple, or a copy thereof, be introduced in evidence as an exhibit in any divorce action, and the court shall by decree or judgment ratify or adopt or approve the contract by reference thereto, the decree or judgment shall have the same force and effect and legal consequences as though the contract were copied into the decree, or attached thereto.

First, as indicated above, there was no trial in this matter and so no competent evidence could have, nor was there, presented for the district court's consideration. Secondly, in her moving papers, Kellogg fails to even attach the minutes from the settlement conference, because she was actually trying to modify the terms entered into at that conference. Finally, nor does the decree of divorce, executed by Judge Brown over Alex's objection, contain any language whatsoever that evidences words suggesting a merger, such as "adopt, incorporate, approve and ratify." The decree also fails to directly state that the "agreement" survives the

decree. The only reference to the fact that an agreement even existed is paragraph 11 in the decree of divorce. In *Lofgren*, the Nevada Supreme Court held that:

> An agreement merges with the decree when the district court uses words of merger such as adopt, incorporate, approve, and ratify. *Day v. Day*, 80 Nev. 386, 390, 395 P.2d 321, 323 (1964). For an agreement to survive a decree, the decree must "specifically direct[ ] survival" of that agreement. *Id*. at 389, 395 P.2d at 322-23. Merger does not destroy the enforceability or significance of an agreement; it only effects *how* the agreement is enforced. *Compare Hildahl v. Hildahl*, 95 Nev. 657, 663, 601 P.2d 58, 62 (1979) (concluding that a divorce decree that incorporated a settlement agreement was a court order enforceable by the district court's contempt power) *with Renshaw v. Renshaw*, 96 Nev. 541, 543, 611 P.2d 1070, 1071 (1980) (determining that because an "agreement was neither incorporated in nor merged in the judgment and decree of the trial court. Therefore, this is clearly a breach of contract action.").

Lofgren v. Meyer, No. 70845, at *3-4 (Nev. App. July 27, 2018).

> All that the decree at issue states is the following:
>
> "The parties reached a global settlement on all issues pending before the Court as a result of a settlement conference [for legal separation] held with Senior Judge Kathy Hardcastle and May 18, 2016, and the following Decree correctly recites their agreement as follows:"

AA 079, lines 26-27; and AA 080 lines 1-2. There is nothing in that language or anywhere else where the district court actually adopts, incorporates, approves or ratifies that "agreement", which was never reduced to a writing or made an order of the district court. As the Lofgren Court held, "for an agreement to survive a decree, the decree must "specifically direct[] survival" of that agreement.

Having failed to incorporate any agreement to the decree of divorce at issue, a trial should have been held, as Alex demanded, to make the proper findings upon competent evidence. Instead, a decree of divorce was entered with no findings of fact whatsoever and no recitation incorporating any agreement from the settlement conference (for a legal separation) to the decree of divorce.

Thus, the order, which the district court relied on here, in its decision to adhere to this decree of divorce, and award Kellogg massive judgments in accordance with it, abused its discretion and violated Alex's fourteenth amendment right to due process of law. Furthermore, any term of alimony awarded to Kellogg is void and cannot be relied on by the district court to render the decision now challenged because it was entered without an opportunity to be heard, as the 14th Amendment requires, among other reasons cited below.

It is axiomatic that an order entered without personal or subject matter jurisdiction is void ab initio. That being said, **there are also cases that stand for the proposition that an order is void where a court enters orders without the inherent power to do so, as when a district court enters orders violating state law or a persons due process rights**. See *Vallely v. Northern Fire Ins. Co.*, 254 U.S. 348, 353-54 (1920) (Courts are constituted by authority and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities.

They are not voidable, but simply void, and this even prior to reversal); *Tandy Computer Leasing v. Terina's Pizza*, 105 Nev. 841, 844 (Nev. 1989) (Without due process , the judgment is void).

See also, *State v. Commissioners*, 22 Nev. 71, 75 (Nev. 1893) (a judgment is void because it is not such a judgment as the court was authorized to render or enter); *Rawson v. Ninth Judicial Dist. Court of State*, 396 P.3d 842, 845 (Nev. 2017) (a judgment which subjects to execution the interest of a person who has had no opportunity to be heard in the action [ ] cannot be upheld without violating [due process] principles.; *Long v. Shorebank Development Corp.*, 182 F.3d 548 (C.A. 7 Ill. 1999) (A void judgment which includes judgment entered by a court which lacks jurisdiction over the parties or the subject matter, or lacks inherent power to enter the particular judgment, or an order procured by fraud, can be attacked at any time, in any court, either directly or collaterally, provided that the party is properly before the court); U.S.C.A. Const. Amend. 5 - *Triad Energy Corp. v. McNell* 110 F.R.D. 382 (S.D.N.Y. 1986) (Void judgment is one where court lacked personal or subject matter jurisdiction or entry of order violated due process); Fed. Rules Civ. Proc., Rule 60(b)(4), 28 U.S.C.A., U.S.C.A. Const. Amend. 5 - *Klugh v. U.S.*, 620 F.Supp. 892 (D.S.C. 1985) (Judgment is a void judgment if court that rendered judgment lacked jurisdiction of the subject matter, or of the parties, or acted in a manner inconsistent with due process); *Davidson Chevrolet, Inc. v. City and*

County of Denver, 330 P.2d 1116, certiorari denied 79 S.Ct. 609, 359 U.S. 926, 3 L.Ed. 2d 629 (Colo. 1958) (A void judgment is a simulated judgment devoid of any potency because of jurisdictional defects only, in the court rendering it and defect of jurisdiction may relate to a party or parties, the subject matter, the cause of action, the question to be determined, or relief to be granted); .S.C.A. Const. Amends. 5, 14 *Matter of Marriage of Hampshire*, 869 P.2d 58 (Kan. 1997) (Void judgment is one rendered by court which lacked personal or subject matter jurisdiction or acted in manner inconsistent with due process); *Graff v. Kelly*, 814 P.2d 489 (Okl. 1991) (Void judgment, such as may be vacated at any time is one whose invalidity appears on face of judgment roll); *State ex rel. Dawson v. Bomar*, 354 S.W. 2d 763, certiorari denied, (Tenn. 1962) (Void judgment is one which shows upon face of record want of jurisdiction in court assuming to render judgment, and want of jurisdiction may be either of person, subject matter generally, particular question to be decided or relief assumed to be given); *State ex rel. Turner v. Briggs*, 971 P.2d 581 (Wash. App. Div. 1999) (A void judgment is a judgment, decree, or order entered by a court which lacks jurisdiction of the parties or of the subject matter, or which lacks the inherent power to make or enter the particular order involved).

Here, the district court, Judge Brown, in entering the decree of divorce, acted outside of her inherent grant of power (to interpret and enforce the laws

promulgated by the legislature) and violated Alex's right to due process of law by refusing to provide him an evidentiary hearing as he continuously demanded. Thus, the decree of divorce entered by Judge Brown is void ab initio, at least with respect to the "family support" provisions (there are also custody provisions in the decree and other provisions that may apply). The district court also acted outside its grant of power, provided by the Nevada legislature, by refusing to follow the laws it set forth to resolve and adjudicate these matters.

As such, the decree of divorce should be considered void and a nullity, especially those provisions having to do with alimony or "family" support (the decree also provides custody orders, which need not be disturbed as the child is now an adult). That being said, "The dissolution of the marriage relation extinguishes the subject matter which forms the basis of an action or proceeding for separate maintenance." *Herrick v. Herrick*, 55 Nev. 59, 68 (Nev. 1933); see also *Summers v. Summers*, 69 Nev. 83, 92 (Nev. 1952) (a decree for separate maintenance cannot survive a subsequent decree of divorce. We have no quarrel with that proposition. It is the rule in this state); citing *Harrison v. Harrison*, 20 Ala. 629, 56 Am.Dec. 227; *McCullough v. McCullough*, 203 Mich. 288, 168 N.W. 929; *Shaw v. Shaw*, 332 Ill. App. 442, 75 N.E.2d 411; *Rosa v. Rosa*, 296 Mass. 271, 5 N.E.2d 417; and *Bloedorn v. Bloedorn*, 64 App. D.C. 199, 76 F.2d 812.

Thus, even if the decree of divorce is void, the "settlement agreement" is similarly void and without force or effect. As such, the district court, in the order being challenged in this matter, abused its discretion and committed clear legal error when it relied on a void order to render its judgment, especially since it declined to rule on the issue at all, punting the matter to this Court.

b. Even if this Court should find that the terms of the decree are enforceable, Kellogg should be estopped from enforcing the decree regarding alimony because she refuses to comply with those terms.

The terms of the legal separation, which were improperly incorporated into the decree of divorce, Kellogg has refused to comply with those terms. The terms of the agreement and decree contemplate that Kellogg would complete her decree and that her income would act as an offset to Alex's obligation. At trial, Kellogg testified that 1) she has not, and does not, intend to finish her degree and 2) she has not sought employment in four (4) years, save for one job which she rejected because she feared Alex would appear there. The following is the relevant testimony:

Mr. Smith: Okay. The – you have been – since 2016, you have been employed certain – I mean, you've had a job, correct?
Kellogg: In 2016?
Mr. Smith: Since that time.
Kellogg: No.
Mr. Smith: So you've not made any income in 2016 for – or further since from any kinds of employment, correct?
Kellogg: That is correct.
Mr. Smith: You've completed a certain amount of college, correct?

Kellogg: I have.
Mr. Smith: What is the amount of college that you've completed?
Kellogg: I now have an associates degree, and I am seven classes away from obtaining a bachelor's in psychology.
Mr. Smith: And you're still attending college for that purpose?
Kellogg: Well, unfortunately –
Mr. Smith: Is the answer yes or no, ma'am?
Kellogg: I am not. (108-109)

AA 286, lines 8-24; 287, lines 1-2. Her bad faith failure to pursue her degree or seek employment is a violation of the covenant of good faith and fair dealing applicable to the terms of the decree.

A stipulated decree[1] is reviewed through the application of contract law. *Grisham v. Grisham*, 128 Nev. 679, 685 (2012). It is well established within Nevada that ever contract imposes upon the contracting parties the duty of good faith and fair dealing. Moreover, it is recognized that a wrongful act which is committed during the course of a contractual relationship may give rise to both tort and contractual remedies. *Hilton Hotels Corp. v. Butch Lewis Productions*, 109 Nev. 1043, 1046-47 (1991); citing, *A.C. Shaw Construction v. Washoe County*, 105 Nev. 913 (1989).

[1] Alex does not assert, admit or agree that the Decree properly states any stipulated terms for a Decree of Divorce, but instead only argues this position for the purpose of an analysis of the issues of estoppel and Kellogg's breach of the implied covenant of good faith and fair dealing.

Here, Kellogg should be estopped from enforcing the parties' stipulated decree based upon her breach of its terms. Her breach was made even though she was knowledgeable of its terms (her attorney prepared the Decree), and the intentional breach had the effect of undermining and disrupting the Decree's terms resulting in damage to Alex. This Court should find that the district court, Judge Ritchie, abused his discretion in refusing to enforce the Decree as a result of her violation of the covenant of good faith and fair dealing.

""Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."" *A.C. Shaw Construction v. Washoe County*, 105 Nev. 913, 914 (Nev. 1989). The Court further held that:

> [t]he covenant of good faith and fair dealing is *implied into every commercial contract*. . . ." (Emphasis added.) Moreover, in K Mart Corporation v. Ponsock, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987), this court stated that "[t]he bad faith discharge case finds its origins in the so-called covenant of good faith and fair dealing *implied in law in every contract*. . . ." (Emphasis added.) *See also* U.S. Fidelity v. Peterson, 91 Nev. 617, 540 P.2d 1070 (1975) (imposing duty on insurers). **Thus, pursuant to the plain language of these cases, we have previously recognized that an implied covenant of good faith and fair dealing exists in *all* contracts.** [Emphasis Added].

A.C. Shaw Construction v. Washoe County, 105 Nev. 913, 914 (Nev. 1989).

"Equitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct." This

court has previously established the four elements of equitable estoppel:" *In re Harrison Living Trust*, 121 Nev. 217, 223 (Nev. 2005)

Those elements are:

> (1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped.

In re Harrison Living Trust, 121 Nev. 217, 223 (Nev. 2005)

Here, 1) Kellogg 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) Kellogg admitted that she never finished school and did not provide an adequate reason why she did not, though she testified she was seven (7) 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. As such, Kellogg should be estopped from further asserting that she is in need of more and more alimony.

It should be noted that the district court, Judge Ritchie, did not even address this claim in his decision and it is missing from the final order as a result, though Judge Ritchie did make a specific finding that Kellogg is willfully unemployed for

purposes of increasing her alimony payments. As a result, Judge Ritchie abused his discretion in not rendering a decision on this claim and in not ruling in Alex's favor.

c. The district court abused its discretion and committed legal error when it failed to undertake an analysis of whether there was some "underlying rationale" for any award of alimony to Kellogg

In *Kogod v. Cioffi-Kogod*, this Court held that:

> Under these cases, alimony to achieve parity in income must further some underlying rationale for alimony such as economic need, the receiving spouse's inability to maintain the marital standard of living, or the receiving spouse's decreased income-earning potential as a result of the marriage. The district court did not have discretion to award alimony solely to achieve income parity between Dennis and Gabrielle following the divorce.

Kogod v. Cioffi-Kogod, 439 P.3d 397, 405 (Nev. 2019).

Here, the district court took no steps to make such a determination, even though this was the first trial Alex had on the issue. Instead, the district court assumed the fact, then used Alex's post-marriage income to justify awarding Kellogg any alimony at all. This is clear legal error and an abuse of the district court's discretion. Indeed, the entire decision hinged on Alex's income and the value of his company, though the district court found that Kellogg was willfully unemployed in order to increase her alimony award. As such, the award of alimony to Kellogg should be reversed due to clear legal error and an abuse of discretion.

IV. CONCLUSION

The decree relied upon by the district court in the current challenged order is a nullity and void, having no force or effect because it was entered in violation of *Lofgren v. Meyer*, and it violated Alex's due process rights, among other things. Even if this Court should find that the terms of the decree are enforceable, Kellogg should be estopped from enforcing the decree regarding alimony because she refuses to comply with those terms. Furthermore, the district court abused its discretion and committed legal error when it failed to undertake an analysis of whether there was some "underlying rationale" for any award of alimony to Kellogg. For those reasons, Alex asks this Court to reverse the district court's decision and reverse and remand for further proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 10th day of September, 2021, I served a true and correct copy of the foregoing *Appellant's Opening Brief*, via the Court designated electronic service and/or U.S. Mail, first class postage prepaid, addressed to the following:

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

By: *//s//Alex B. Ghibaudo.*
_____
Appellant in Proper Person