

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

JOSEPH RAUL GARCIA  
RODRIGUEZ,

Appellant,

v.

ZOILA LEON-YANEZ,

Respondent.

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Supreme Court No.: 85289

District Court No.: D-20-615905-D

**APPEAL FROM NOTICE OF ENTRY OF ORDER AND ORDER FILED  
ON AUGUST 25, 2022 AND AMENDED DECREE OF DIVORCE FILED  
ON JUNE 21**

Eighth Judicial District Court of the State of Nevada  
In and for the County of Clark  
THE HONORABLE CHARLES J. HOSKINS  
DISTRICT COURT JUDGE

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**RESPONDENT'S ANSWERING 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 by Gayle Nathan, Esq., Nevada Bar # 4917, of Bonanza Legal Group and Respondent was also represented by Romeo Perez, Nevada Bar # 8223, Jennifer Setters, Esq., Nevada Bar # 13126, of Gastelum Law; and by Carmen Avello, Esq., Nevada Bar #: 7257 of Aspire Law Group. These representations are made so that the judges of this court may evaluate possible disqualification or recusal.

DATED this 5<sup>th</sup> day of June, 2023.

### **MCFARLING LAW GROUP**

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### **III. STATEMENT OF ISSUES**

- A.** Whether the District Court erred in refusing to modify child support;
- B.** Whether the District Court erred in awarding spousal support;
- C.** Whether the District Court erred in not expressly awarding the Division St. property to Joseph;
- D.** Whether the District Court erred in awarding Zoila attorney fees and cost; and
- E.** Whether the District Court erred in awarding 420 Pine St. to Zoila.

### **IV. STATEMENT OF THE CASE**

On October 19, 2020, Zoila filed a Complaint for Divorce. 1AA0001. On December 9, 2020, Zoila filed her Affidavit of Attempted Service. 1RA000001.

On January 27, 2021, Zoila filed her Motion for Temporary Orders and Preliminary Attorney's Fees and Costs. On February 15, 2021, Zoila filed her Default regarding her Complaint. 1AA0024.

On February 17, 2021, Zoila filed her General Financial Disclosure Form. 1AA0026.

On February 22, 2021, Joseph filed his Motion to Set Aside Default. 1AA0035.

On March 4, 2021, the court held a motion hearing on Zoila motion's for temporary orders. 1AA0056. On March 30, 2021, the Order from the March 4, 2021 hearing was filed. 1AA0056.

On March 15, 2021, Joseph filed his Answer to Complaint and Counterclaim. 1AA0042.

On April 8, 2021, Joseph filed his Case Management Conference Statement. 1AA0061.

On April 20, 2021, Joseph filed his financial disclosure form. 1AA0070.

On April 28, 2021, the court held a Case Management Conference. 1RA000006.

On May 6, 2021, Joseph filed his Motion to Modify Child Custody and Child Support. 1AA000085. On June 1, 2021, Zoila filed her Opposition to Defendant's Motion to Modify Child Custody and Child Support and Plaintiff's Countermotion for Discovery, For Compliance with NRCP 16.2, for Attorney Fees and Costs and Related Relief. 1AA0090. On June 16, 2021, Joseph filed his Response to Zoila's Oppositions, along with his Motion for Discovery and for Compliance with NRCP 16.2 1AA0105.

On July 20, 2012, the Order from the June 17, 2021 hearing was filed. 1AA0124.

On August 2, 2021, Joseph filed an Ex Parte Motion to Continue Trial and Discovery Deadlines. 1AA0129.

On August 31, 2021, the court held an All Pending Motion hearing. 1AA136.

On April 4, 2022, Zoila filed her PreTrial Memorandum. 1AA0140. On April 12, 2022, Zoila filed her Schedule of Arrears for Child Support. 1AA161.

On April 5, 2022, the Court held a calendar call. 1RA000016.

On April 27, 2022, the Decree of Divorce was filed. 1AA0187.

On May 10, 2022, Joseph filed his Motion to Set Aside the Decree of Divorce. 1AA0196. On June 10, 2022, Zoila filed her Opposition and Objection to Defendant's Motion to Set Aside the Decree of Divorce and Plaintiff's Countermotion to Amend Decree of Divorce, For a Behavior Order, for Attorney's Fees and Costs and Related Relief. 1AA0216. On June 16, 2022, Joseph filed his Declaration in Reply to Opposition. 1AA0233.

On June 21, 2022, the court held an All Pending Motion hearing. 1RA000019. On that same day, the court filed a Behavior Order. 2AA0248.

On July 14, 2022, Joseph filed his Amended General Financial Disclosure Form. 2AA0250.

On July 15, 2022, Joseph filed her Brief Regarding Financial Issues. 2AA0260. On July 22, 2022, Zoila filed her Brief Regarding Financial Issues. 3AA0466.

On July 20, 2022, the Order from the June 21, 2022 was filed. 2AA0462. On August 4, 2022, the Updated Order from the June 21, 2022, upon submission of briefs was filed. 3AA0659.

On August 18, 2022, an Amended Decree of Divorce was filed. 3AA0660.

This appeal arises from a District Court's *Notice of Entry of Order Resulting From June 21, 2022 Hearing and Amended Decree of Divorce*. 3AA0669.

On August 20, 2022, Joseph filed his Notice of Appeal now appeals. 3AA0669.

## **V. STATEMENT OF THE FACTS**

NRAP 28(b) permits a party to submit a statement of facts if she is dissatisfied with the other party's statement. Here, Appellant's statement is incomplete.

On January 27, 2021, Zoila filed a motion for temporary orders and preliminary attorney's fees and cost. 1AA0010. Zoila stated that the parties had been together for over 20 years where she was the homemaker, taking care of the parties' four (4) minor children while Joseph controlled all the finances. 1AA0012. Zoila finally left the relationship when found out that Joseph had moved in with his mistress and her mother in another state and was 100% supporting them. 1AA0012.

Zoila further stated, that since she had moved to Las Vegas to the filing of that motion, Joseph rarely provided any "child support" payments. 1AA0012. The child support payments ranged anywhere from \$100 to \$200 every few months. 1AA0012. Additionally, she stated to recently learned that Joseph had sold the parties duplex property to one of his friends and then family to pretend he no longer owned said property. 1AA0012-13. Zoila requested that she receive financial assistance as she

struggled to make ends meet, whereas, Joseph made over \$130,000 annually and failed to contribute to her and the children's needs. 1AA0012-13.

On March 4, 2021, Attorney Setters represented that Joseph was a welder for the oil industry. 1AA0056. The District Court also made a temporary child support of \$2,298.00 for Zoila from Joseph, commencing March 2021. 1AA0057.

On April 28, 2021, the Court held a Case Management Conference where *both parties* were present with their attorneys. 1RA000006. During the Case management Conference, Zoila's attorney Setters alleged that Joseph's financial disclosure form only reported income from one employer when he is employed by multiple employers, making upwards of \$100,000 per year. 1RA000006. Additionally, Joseph reported making \$190,000 in 2014 and reported income from the parties' rental property amounting to \$700 per month. 1RA000006. As such, Ms. Setters stated Joseph needed an updated financial disclosure form, along with 16.2 documents. 1RA000006. Joseph's attorney, Ms. Barry, stated that she may file a motion to withdrawal due to not being able to adequately represent her client. 1RA000007. The District Court set a trial to address custody and divorce, along with a calendar call. 1RA000007.

On May 6, 2021, Joseph argued that after being unemployed, he was able to find work for \$16 an hour working 48 hours a week, with an rental property income



of \$700 per month. 1AA0088. As such, Joseph requested the set child support of \$2,298 to \$1,056.16 per month. 1AA0088.

On June 1, 2021, Zoila argued that Joseph has been a welder for the oil industry for at least 20 years and earns approximately \$130,000 each and every year. 1AA0092. Joseph now attempts to misrepresent his income. 1AA0092. Zoila further argues that Joseph fails to represent that he works for a company that employs him for various contracts. 1AA0092. Joseph further refused to provide his tax filings. 1AA0092. Zoila continued to state that Joseph would often threaten to find a job with minimal income if Zoila were to ask for child support and seeing as he has changed employment, he held true to this threat. 1AA0092. As such, Zoila stated the Court should impute his average income as he is willfully underemployed. 1AA0092.

Zoila stated the parties owned three (3) properties, but one was sold. 1AA0092. Zoila attached the properties estimated values of these properties to her opposition. 1AA0092-104. The opposition stated that since March 30, 2021, Joseph has not given Zoila any child support (note the opposition was filed in June 2021). 1AA0093. On June 16, 2021, Joseph responded by stating he was recently laid off from his job and will be starting to collect unemployment in the amount of \$535 per week. 1AA0106-7. He further states he has been sending the children dinner and that he has always stepped up to make sure the children had what they needed. 1AA0107.

However, he has not made child support payments because he cannot afford it. 1AA0107. Joseph recalculates child support taking into account his unemployment and ask for a further modification of \$700.28 per month. 1AA0107.

On June 17, 2021, the Court held an All Pending Motion hearing. 1AA0124. Attorney Setters stated that Joseph had worked as a welder for over twenty (20) years and each job would give him a W2. 1RA000008. Additionally, there are two (2) rental properties where Joseph receives income. 1RA000008. Attorney Setters further argued that there is no documentation that shows Joseph went from making \$130,000 to being unemployed and that she has yet to see his 2020 tax documents. 1RA000008-9. Further than ordering the children pizza, Joseph has not paid any child support. 1RA000009.

The Court addressed Attorney Barry regarding Joseph's past four (4) financial disclosure forms and that the court can only acknowledge the one filed April 10, 2021. 1RA000009. The Court further notes that it "is disappointed that NO child support has been paid" and that it does not look good for Joseph. 1RA000009. However, the Court modified child support in accordance with the financial disclosure form filed in April 2021 and ordered his monthly child support obligation to be set at \$1,128 per month commencing May 2021.

On April 4, 2022, Zoila filed her pre-trial memorandum. 1AA0140. She stated that Joseph had not paid any child support, despite a downward modification was

made. 1AA0142. Joseph was also misrepresenting his income and had previously threatened to find a job earning minimal income to give Zoila less child support. 1AA0142-153.

Zoila mentioned the two properties located on 420 S. Pine Steet and 103 W. Ashton Ave. 1AA0143. It was/is believed that Joseph sold the property located on 420 S. Pine Street to his friend, without informing Zoila, nor giving her any interest in the property. 1AA0143. Zoila also stated that she has not received her interest in any of the rent collected through the community properties. 1AA0143. She further represented that the residential properties were bought outright with no debt, however, renovations were needed, which were all placed on her credit cards. 1AA0154.

Zoila argued she was entitled to alimony due to Joseph, historically, earning \$130,000 per year and considering she stayed home to care for the parties' minor children. 1AA0144-147. Zoila concluded by stating she was entitled to attorney's fees per NRS 18.010 and *Sargeant v. Sargeant*. 1AA0156.

On April 5, 2022, the Court held a calendar call where Joseph failed to appear. 1RA000016. Attorney Romeo represented that he nor his client had heard from Joseph, nor has he had any contact with his children, nor pay any child support. 1AA0164. The Court conducted a prove up where Zoila testified that she had not received child support in the amount of \$1,128 since it was ordered and that she

would like arrears. 1AA0166. She testified to the properties on 420 Pine St and 103 W Ashton Ave and that significant improvements have been made at her own financial cost. 1AA0167. She further stated that Joseph's annual income varied from \$130,000 to \$190,000. 1AA0169. She indicated that alimony in the amount of \$1,500 for ten (10) years would be appropriate, along with \$5,500 for attorney's fees. 1AA0170.

Attorney Perez clarified that the two properties are one building and that Zoila was requesting she receive the two properties and that Joseph would keep the rental income he had received for months, in lieu of the properties. 1AA01723-4. Zoila was able to testify that this was a fair and equal distribution of the assets and debts. 1AA0174. The Court ordered that the prior child support obligation of \$1,128 stand, granted Zoila child support arrears back to June 2021, attorney's fees in the amount of \$5,500 (as a result of Joseph's failure to participate and Sergeant) and the properties located on 420 Pine and 104 W. Ashton. 1AA0174-5. The Court denied Zoila's request for reimbursement of the cost of the improvements on the homes as she was being granted the properties. 1AA0176. On April 27, 2022, a decree of divorce was filed. 1AA0187.

On May 5, 2022, Joseph filed his motion to set aside arguing that he simply made a mistake by not thinking he had to appear at the calendar call. 1AA0196-202. On June 10, 2022, Zoila filed her opposition arguing Joseph was well aware of all

pending court dates and that pursuant to EDCR 2.69, the court can take evidence to resolve the issue if a party does not appear for the calendar call. 1AA0216-221. She further argues that child support was based on the financial disclosure form that Joseph himself filed and since the order, he has made no attempts to challenge the order. 1AA0221. Furthermore, Joseph now wants to represent that he only makes \$1,932 per month as an uber driver, thereby he is willfully underemployed. 1AA0221-2. The opposition concluded that no relief can be given under NRCP Rule 60 as there was no mistake, inadvertence, excusable neglect, or fraud as he knew about the court dates and even admits so in his motion. 1AA0223.

On June 21, 2022, Judge Hoskin noted that Joseph's credibility is questionable, and that Joseph did receive notification of the Calendar Call from the department and still failed to appear. 2AA0463. The Judge noted that Joseph provides no information regarding his claim that the division of property was unequitable. 2AA0463-4. While the Court did not agree on Joseph's argument that the Decree was entered as a result of NRCP 60(b)(1), the court gave the parties time to brief the financial issues to show whether there was good cause to set aside the default judgment. 2AA0464. The Court also ordered that Joseph was to follow a behavior order. 2AA0464.

Joseph claims that the property referred to as 104 W. Ashton is actually 621 E. Division St. 2AA0261. Zoila clarifies that the two properties involved in this case

are 420 S. Pine St., and 104 W. Ashton. 3AA0467. Zoila also noted that this is the same property, it is just two sides of the same building so it has two addresses. 3AA0467. Zoila further stated that 621 E. Division St was not ever mentioned in the Decree, so presumably, it was kept by the Joseph since it was not disclosed. 3AA0468.

Joseph claims that he spent \$45,822 on the properties but yet provides no proof. 3AA0469. Zoila stated that she was left with \$101,900 of debt for the improvements of the properties and attached her 16.2 production of documents that contain receipts regarding this debt. 3AA0469. Additionally, Zoila's briefing argues that Joseph is not being honest regarding his income, and he fails to list the rental income he receives from his properties. 3AA0470. At this point, Joseph's credibility is at risk and he should not be trusted. 3AA0470. Zoila noted that Joseph comes back to this matter with unclean hands as he has not paid any child support, has not made any effort to see the children, and has abandoned the case. 3AA0471.

After having read the briefs, the Court filed an order regarding Joseph's motion. 3AA0659. The court addressed Joseph's concern that the property located on 621 E. Division St was not distributed but stated that since the residence is purportedly in Joseph's name, the same would be awarded to him. 3AA0659. The Court continued by stating it was Joseph's burden to demonstrate that the division was not fair and

equitable, and he failed to provide sufficient information to indicate so. 3AA0660. As such, the Court denied his request to set aside. 3AA0460.

## **VI. SUMMARY OF ARGUMENT**

EDCR 2.67 governs pretrial conferences and pretrial memorandums. EDCR 2.67(c) stated parties without an attorney must comply with NRCP 2.67. The rule continues to state that failure to comply with the rule can result in a “judgment of dismissal or default or other appropriate judgment may be entered, or other sanction imposed.”<sup>1</sup>

EDCR 2.69(c)(2) stated that failure to attend calendar call can result in a default judgment. Additionally, EDRC 2.70(a) states that during the application for a judgment by default, the court can request presentation of the proposed judgment via oral testimony as said facts will be admissible in evidence.

The Nevada Supreme Court has stated that a pro se litigant is not excused from following the rules because they are proceeding without an attorney.<sup>2</sup>

As such, if a party fails to provide a pretrial memorandum per court orders and fails to appear at a calendar call, the court can take default judgment. The Nevada Supreme Court has held that where a fault is entered by the lower court, the court may conduct a prove-up hearing to determine the amount of damages.<sup>3</sup> Additionally,

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<sup>1</sup> EDCR 2.67(c)

<sup>2</sup> *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 258-59 (2018)

<sup>3</sup> *Hamlett v. Reynold*, 114 Nev. 863, 866-867, 963 P.2d 457, 459 (1998)

when the lower court enters a default judgment, the facts alleged in the pleadings will generally be deemed as admitted.<sup>4</sup>

NRCP 55(c) stated that a court may set aside an entry of default for good cause or under Rule 60(b).

Joseph's appeal relies heavily on the argument that there was not sufficient evidence providing for the court to enter the Decree of Divorce. This simply is false. Joseph had all the information he needed to appear to his calendar call but he refused to participate. As a result of his failure to participate, the court conducted a prove up where Zoila testified on various issues. She testified as to his income, child support, alimony, the debt, the properties, and attorney's fees. Her testimony is substantial evidence needed for the Decree to be entered.

Joseph argues that her testimony was not enough. However, he had his chance to participate in his matter to give his testimony, but he refused to do so. The court did have evidence regarding the properties, the debts incurred, the rental income retained solely by Joseph, etc through Zoila's testimony and prior pleadings. Nevertheless, the court allowed additional briefing for Joseph to show there was good cause to set aside the Decree. Joseph did not and cannot show there was good cause to set aside the Decree. The court took a look at the parties' community assets and debts and

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<sup>4</sup> *Foster v. Dingwall*, 126 Nev. 56, 57, 227 P.3d 1042, 4049 (2010).



entered into a Decree. As Joseph could not present sufficient evidence to support his argument, the court accurately denied his motion.

## **VII. ARGUMENT**

### **A. STANDARD OF REVIEW**

The district court's factual findings are given deference and should be upheld if not clearly erroneous and if supported by substantial evidence.<sup>5</sup> A finding of fact may not be put aside unless it is clearly erroneous, and the reviewing court must be give due regard to the trial court's opportunity to judge the witnesses' credibility.<sup>6</sup>

The United States Supreme Court has held that “[a] finding is ‘clearly erroneous’ when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.”<sup>7</sup> Substantial evidence is evidence which “a reasonable mind might accept as adequate evidence to support a conclusion.”<sup>8</sup>

Lastly, a district court's decision in a divorce decree is reviewed for an abuse of discretion.<sup>9</sup> In reviewing divorce proceedings on appeal, the Nevada Supreme Court has “generally upheld district court's rulings that were supported by

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<sup>5</sup> *Baker v. Eighth Judicial District Court*, 161 Nev. 527, 999 P.2d 1020 (2000).

<sup>6</sup> *Kockos v. Bank of Nevada*, 90 Nev. 140, 520 P.2d 1359 (1974); NRCp 52(a).

<sup>7</sup> *United States v. Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct. 525, 542 (1948).

<sup>8</sup> *State Emp. Security v. Hilton Hotels*, 102 Nev. 606, 608, 729 P.2d 487, 498 (1986).

<sup>9</sup> *Devries v. Gallio*, 128 Nev. 706, 709, 290 P.3d 260, 263 (2012).

substantial evidence and were otherwise free of a plainly appearing abuse of discretion.”<sup>10</sup> “Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment.”<sup>11</sup>

**B. THE DISTRICT COURT PROPERLY DENIED THE REQUEST  
TO SET ASIDE THE DECREE OF DIVORCEE UNDER NRCP  
60(B)**

Nevada Rules of Civil Procedure allow for an order to be set aside due to surprise, mistake or inadvertence.<sup>12</sup> A district court has broad discretion in deciding whether to grant or deny a motion to set aside a judgment under NRCP 60(b) and its determination will not be disturbed on appeal, absent an abuse of discretion.<sup>13</sup> The district court has wide discretion in determining what constitutes excusable neglect.<sup>14</sup> Motions under NRCP 60(b) are addressed to the sound discretion of the trial court and the exercise of discretion by the trial court in granting or denying such motions is not to be disturbed on appeal absent an abuse of discretion.<sup>15</sup>

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<sup>10</sup> *Williams v. Waldman*, 108 Nev. 466, 472, 836 P.2d 614, 617 (1992).

<sup>11</sup> *Devries* at 709, 290 P.3d at 263 (quoting *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004)).

<sup>12</sup> NRCP 60(b)

<sup>13</sup> *Britz v. Consolidated Casinos Corp.*, 87 Nev. 441, 445, 488 P.2d 911, 914-15 (1971); *Union Petrochemical Corp. V. Scott*, 96 Nev. 337, 609 P.2d 323 (1980);

<sup>14</sup> *Cicerchia v. Cicerchia* 77 Nev. 158, 161- 62; 360 P.2d 839, 841 (1961).

<sup>15</sup> *Heard v. Fisher’s & Cobb Sales & Distribs., Inc.*, 88 Nev. 566, 502 P.2d 104 (1972).

Even the denial of set aside of a default decree of divorce has been upheld on appeal when the husband did not show mistake, inadvertence, surprise, or excusable neglect.<sup>16</sup> When a motion to set aside a judgment is decided, the decision of the district court will be affirmed if there is sufficient evidence contained in the record to support that decision.<sup>17</sup> In this case, the district court held there was no support for the decree of divorce to be set aside under NRCP 60(b). The District Court properly denied Joseph's request to set aside as he had not alleged any adequate basis for a set aside. As such, the District Court's order should be affirmed.

### **C. THE DISTRICT COURT DID NOT ERR BY REFUSING TO MODIFY CHILD SUPPORT**

EDCR 5.507 requires a financial disclosure form for motions that establish or modify child support. Joseph filed a motion to set aside the Decree that was the result of a default judgment. In Joseph's motion to set aside, he requests that the lower court modify child support without submitting the proper motion or filing a Financial Disclosure Form. As such, Joseph's request to modify is inappropriate for the motion that was before the lower court and is a result of this appeal.

As stated above, facts alleged in prior pleadings will be generally admitted in a default judgment.<sup>18</sup> Throughout all of Zoila's prior pleadings, she alleges that

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<sup>16</sup> *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003).

<sup>17</sup> *Smith v. Smith*, 102 Nev. 110, 706 P.2d 229 (1986).

<sup>18</sup> *Barry v. Lindner*, 119 Nev. 661, 81 P.3d 537 (2003).

Joseph was willfully underemployed. Zoila previous pleadings state that Joseph had previously threatened her that if she pursued child support, he would quit his job. As the Decree was a result of a default judgment, these facts are deemed as admitted. As such, even if Joseph's request was appropriate before the lower court, Joseph's credibility is now in question. The lower court even noted that his credibility was questionable during the June 21, 2022 hearing.

Therefore, the lower court did not abuse its discretion by refusing to modify child support as the motion before this court was a motion to set aside which was properly denied and Joseph did not file a Financial Disclosure Form which is required for the District Court to entertain a request to modify child support. As such, this court should uphold the child support order and denial of the set aside request.

**D. THE DISTRICT COURT DID NOT ERR IN AWARDING  
SPOUSAL SUPPORT**

Under NRS 125.150(1)(a), the court can award "just and equitable" alimony at the conclusion of a divorce case and 125.150(9) provides factors for consideration in determining whether to award alimony and the amount of such award. Nevada has consistently held that two of the primary purposes of alimony "are to narrow any large gaps between the post-divorce earning capabilities of the parties, and to allow the recipient spouse "to live as nearly as fairly possible to the station in life enjoyed before the divorce." *Shydler v. Shydler*, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998)

(quoting *Sprenger v. Sprenger*, 110 Nev. 855, 860, 878 P.2d 284, 278-88 (1994)).

Based on Nevada's view of alimony awards, the district courts are bestowed with wide discretion in determining the amount and duration of alimony payments. *Fick v. Fick*, 109 Nev. 458, 464, 851 P.2d 445, 450 (1993).

Pursuant to NRS 125.150(9), the court may consider any relevant factor in determining whether to award alimony and the amount of such award. In addition, the court shall 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 skills attained by each spouse during the marriage;
- (i) The contribution of either spouse as homemaker;
- (j) The award of property granted by the court in the divorce, 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.

In considering the factors enunciated by NRS 125.150(9)(a-k), and Zoila's testimony during the prove up surrounding the factors above, it is readily apparent the district court did not err in awarding spousal support to Zoila. Additionally, Joseph filed a motion to set aside the Decree that was the result of a default judgment.

Despite Joseph's motion to set aside, he requests that the lower court modify alimony without submitting the proper motion or a Financial Disclosure Form. As such, Joseph's request to modify alimony is inappropriate for the motion that was before the lower court and is a result of this appeal.

As such, this Court should uphold the alimony award and denial of Joseph's set aside request.

**E. THE DISTRICT COURT DID NOT ERR BY AWARDING ATTORNEY'S FEES**

Generally, this Court reviews an award or denial of attorney's fees for an abuse of discretion. *Mack-Manley v. Manley*, 122 Nev. 849, 860, 138 P.3d 525, 532-33 (2006).

The lower court found it appropriate to grant attorney's fees upon Joseph's "failure to participate," and under *Sargeant*. 1AA0175. During the prove up, Zoila testified that prior to the parties separation, Joseph would make \$130,000 to \$190,000 annually. 1AA0169. Additionally, EDCR 2.69(c)(3) allows the court to award monetary sanctions for failure to appear at the calendar call. EDCR 5.102(m)(2) stated that sanctions include an award of attorney fees.

Due to the evidence provided during the prove up hearing regarding Joseph's annual income and his failure to appear to the calendar call, the court did not abuse its discretion by award Zoila attorney's fees. Further, the District Court did not err

in refusing to set aside the attorney's fees award. As such, this Court should uphold the attorney's fees award and denial of Joseph's request to set aside.

**F. THE DISTRICT COURT DID NOT ERR BY EXPRESSLY  
AWARDING THE DIVISION ST. PROPERTY TO JOSEPH.**

Joseph's appeal wants to argue that there is an additional property, 621 E. Division St, involved in this matter that was left outside the Decree. However, 621 E. Division St was only first mentioned in Joseph's briefing regarding financial issues. 420 S. Pine and 104 W. Ashton were the only properties listed in the parties' financial disclosure form, prior pleadings and the only two properties Zoila was aware of. While Joseph provided Zillow pages with the address 621 E. Division St., he provides no proof regarding the property, no deed, no loan mortgage paperwork, etc.

Zoila has clarified many times that 420 S. Pine and 104 W. Ashton are two duplexes in one building, but each faces a different street, hence the different addresses. As such, Zoila was awarded with two pieces of property but only one building.

To the extent that there is a third property involved in another building, the court did not abuse its discretion by awarding the third property located on 621 E. Division St. to Joseph as it is property in his name.

**G. THE DISTRICT COURT DID NOT ERR BY AWARDING 420  
PINE ST TO ZOILA**

Joseph's appeals argues that the court erred in awarding 420 Pine St to Zoila stating this allowed for an unequal division of property. He continues to argue that the lower court did not consider trial exhibits. He submits that Zoila's testimony was not substantial evidence to show that she incurred credit card debt to remodel the properties at hand and that the division of property was an equitable division of property considering the debt Zoila was keeping and the community property rent Joseph received.

The court did not abuse its discretion when they held a prove up and entered a default judgment as a result of Jose's failure to appear to his calendar call. Joseph is clearly confused on the preceding law when it comes to calendar calls and prove up hearings. Despite being informed of the deadlines and hearings, Joseph failed to file a pre-trial memorandum and even appear at the Calendar Call. He complains that the court did not consider any trial exhibits, however, he never filed a pre-trial memorandum to assert nor submit the exhibits he would use during the evidentiary hearing.

EDCR 2.67, EDCR 2.69 and EDCR 2.70 allows the Court to enter a default judgment upon failure to submit a pre-trial memorandum and attend the calendar call. EDCR 2.70(a) allows the court to take oral testimony that will be admissible in



evidence. Additionally, facts alleged in pleadings are generally deemed as admitted when the court enters a default judgment.<sup>19</sup> This is exactly what the Court did here. During the prove up, Zoila testified to the same facts that she had alleged in all her prior pleadings. As Joseph refused to participate in the case, the Court was forced to solely rely on Zoila testimony. Based on Zoila's testimony, the Court found there was substantial evidence and granted Zoila 420 Pine St as a global decree that was deemed an equal division of community assets and debts.

The Court granted Joseph a second chance to show that that the global decree was not an equitable division of the community property assets and debts when the court ordered the parties to submit additional briefing on financial issues. Despite Joseph's briefing, the court held that it was Joseph's burden to show the Decree was not a equitable division and he *failed* to meet his burden.

Joseph's appeal argues that because the lower court stated that he failed to provide sufficient information, the court should have set an evidentiary hearing. Joseph simply seeks a redo as he refused to participate in the calendar call and did not like the results. Joseph cannot do this. He submitted his motion to set aside, which was his right to do so. The court gave him another chance to show there was good cause to set aside the decree. Joseph failed to meet his burden and his motion got denied. He does not get another bite of the apple.

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<sup>19</sup> *Foster v. Dingwall*, 126 Nev. 56, 57, 227 P.3d 1042, 4049 (2010).

The Court accurately held a prove up and relied on Zoila's testimony to order the Decree of Divorce as an equitable division of property. The Court did not abuse its discretion by awarding Zoila the 420 Pine St property as a global decree.

### **VIII. CONCLUSION**

The district court did not abuse its discretion by refusing to modify child support, awarding spousal support, awarding Zoila attorney fees, and awarding 420 Pine St. This court should remand this matter for the purpose of resetting alimony back to \$1,500 because the downward modification was inappropriate through a motion to set aside and to amend the Decree to state the real property located on 621 E. Division St is awarded to Joseph if that is indeed his property.

Despite being well informed, Joseph decided to not appear to his calendar call. Due to his failure to appear, the court conducted a prove up and entered into a Decree of Divorce. Joseph then filed a motion to set aside under the ground of NRCP 60(b)(1) and good cause. The Court did not agree on the motion to set aside under NRCP 60(b)(1) grounds but gave Joseph a second chance to show good cause. Despite his second chance, Joseph was unable to meet his burden and his motion got denied. Joseph simply cannot show that there is good cause to set aside the Decree because the division of community assets and debts is an equitable division of community property and debts.

For these reasons, the District Court's *Order Resulting From June 21, 2022 Hearing and Amended Decree of Divorce* filed on August 4, 2022 and August 18, 2022, respectively should be the affirmed and reversed in part.

DATED this 5<sup>th</sup> day of June, 2023.

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**IX. 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 5,692 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 5<sup>th</sup> day of June, 2023.

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**X. CERTIFICATE OF SERVICE**

I, an employee of McFarling Law Group, hereby certify that on the 5<sup>th</sup> day of June, 2023, I served a true and correct copy of this Respondent's Answering Brief as follows:

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

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/s/ Alex Aguilar  
Alex Aguilar