

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

LARRY SMITH,  
Appellant,  
vs.  
MARTHA SMITH,  
Respondent.

No. 66549

**FILED**

**JAN 20 2016**

TRACIE K. LINDEMAN  
CLERK OF SUPREME COURT  
BY S. Young  
DEPUTY CLERK

*ORDER OF AFFIRMANCE*

This is an appeal from a post-judgment order denying NRCP 60(b) relief and denying a motion to modify spousal support.<sup>1</sup> Second Judicial District Court, Washoe County; Bridget Robb Peck, Judge.

The parties were divorced in 2007. As part of the divorce decree, the district court ordered appellant to pay respondent \$1200 per month, part of which represented respondent's portion of appellant's pension, with the remainder being spousal support. Appellant did not appeal the divorce decree, but instead, filed a series of post-judgment motions in the district court seeking relief from the judgment. All of these motions were denied, but appellant did not appeal the denial of any of

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<sup>1</sup>We grant appellant's November 2, 2015, motion for leave to file a reply, and we direct the clerk of the court to detach and file the reply attached to that motion. As a result, we also deny as moot appellant's September 22, 2015, motion for leave to file a reply, and we take no action on appellant's December 31, 2015, letter regarding his motion for leave to file a reply.

these motions.<sup>2</sup> On August 1, 2014, appellant filed another motion seeking relief from the pension distribution and spousal support provisions in the parties' divorce decree, which the district court also denied. This appeal of that determination followed.

In his civil appeal statement, appellant contends that the pension distribution and spousal support provisions of the divorce decree should have been set aside because they were void insofar as they were obtained by fraud and in violation of appellant's due process rights.<sup>3</sup> Specifically, appellant asserts that he was prevented from attending the hearing underlying the divorce decree when he was transferred to a different prison within the Nevada Department of Corrections. This does

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<sup>2</sup>On one occasion, appellant attempted to appeal an order entered as a result of respondent's motion to enforce the divorce decree, but the Nevada Supreme Court concluded that the challenged order was not appealable and dismissed the appeal for lack of jurisdiction. *See Smith v. Smith*, Docket No. 58884 (Order Dismissing Appeal, October 6, 2011).

<sup>3</sup>To the extent appellant argues that respondent misrepresented to the court that appellant would be receiving social security income, this would, at most, amount to fraud or misrepresentation of an adverse party, which must be raised in an NRCP 60(b) motion within six months after notice of entry of the judgment was served. *See NRCP 60(b)(3); see also NC-DSH, Inc. v. Garner*, 125 Nev. 647, 654, 218 P.3d 853, 858 (2009) (noting that fraud upon the court "cannot mean any conduct of a party or lawyer of which the court disapproves," and defining fraud upon the court as "that species of fraud which does, or attempts to, subvert the integrity of the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases" (quoting *Demjanjuk v. Petrovsky*, 10 F.3d 338, 352 (6th Cir. 1994))). Thus, the motion for relief from the judgment was untimely with regard to this argument.

not, however, set forth a basis for a finding of fraud upon the court.<sup>4</sup> See *Chen v. Nev. State Gaming Control Bd.*, 116 Nev. 282, 284, 994 P.2d 1151, 1152 (2000) (explaining that a fraud claim involves, among other things, “a false representation of a material fact”); see also *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 649-50, 218 P.3d 853, 855-56 (2009) (affirming a district court order granting relief from the judgment based on fraud upon the court where an attorney settled a case without his client’s approval and forged settlement papers). As a result, NRCP 60(b) relief was properly denied as to this argument.

Alternatively, to the extent appellant argues that the pension distribution and spousal support provisions were void for lack of due process, due process requires notice and an opportunity to be heard. See *J.D. Constr., Inc. v. IBEX Int’l Grp., LLC*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010). Here, appellant does not dispute that he was given notice of the relevant hearing, at which he would have had the opportunity to be heard with regard to the divorce issues. And while he argues that

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<sup>4</sup>Although appellant states his argument in terms of extrinsic fraud, whether fraud is intrinsic or extrinsic is not the determining factor in considering whether a judgment may be set aside for fraud more than six months after the judgment was entered. Rather, the question is whether the claim is for fraud of an adverse party, which must be brought within the six-month time limit, or for fraud upon the court, which may be raised after that time has expired. See NRCP 60(b) (providing that motions filed under NRCP 60(b)(3) for fraud of an adverse party, whether intrinsic or extrinsic, must be brought within six months after written notice of entry of an order is served, but further stating that nothing in the rule limits a court’s power to consider an independent action for relief based on fraud upon the court).

the State prevented him from appearing at that hearing, nothing in the record on appeal indicates, and appellant has not asserted, that he took any steps prior to the hearing to ensure that he would be present at the hearing.<sup>5</sup> Moreover, even after the hearing date passed and the district court's order was entered, appellant did not file a motion for reconsideration with the district court or an appeal to the Nevada Supreme Court. Under these circumstances, we conclude that the requirements of due process were met, such that the pension distribution and spousal support provisions of the divorce decree were not void for lack of due process. *See id.* (noting that the due process requirements are flexible and depend on the particular circumstances presented).

Finally, we have reviewed the remainder of appellant's arguments and conclude that none of them provide a basis for setting aside the relevant provisions of the divorce decree. Moreover, appellant makes no argument on appeal with regard to the denial of his motion to modify spousal support, and thus, we conclude that he has waived any such arguments. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156,


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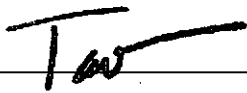
<sup>5</sup>In his reply, appellant asserts that he had previously been produced for hearings without having taken any steps to ensure such appearances. Insofar as this is intended to argue that he did not need to take any such steps, we decline to consider it, as this argument was raised for the first time on appeal in appellant's reply. *See Weaver v. State, Dep't of Motor Vehicles*, 121 Nev. 494, 502, 117 P.3d 193, 198-99 (2005) (explaining that an appellate court need not consider an argument raised for the first time in a reply brief).

161 n.3, 252 P.3d 668, 672 n.3 (2011) (explaining that an issue not raised on appeal is deemed waived).

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Bridget Robb Peck, District Judge  
Larry Eugene Smith  
Jonathan H. King  
Washoe District Court Clerk