**From:** Megen MacKenzie <megen.mackenzie@endurance.com>
**To:** devildog1285 <devildog1285@cs.com>
**Subject:** Constant Contact follow up
**Date:** Mon, Feb 6, 2017 2:18 pm

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Hello Steve,

Our legal department generally does not forward on any legal documents we receive from attorneys because we do not want to get involved in legal disputes. However, I can send you the attorney's contact information and you can request they send you the documents.

Additionally, we also received a formal cease and desist letter on the account this week from Willick Law Group.

The attorneys who have contacted us are:

Carlos A. Morales, Esq.

Willick Law Group

3591 E. Bonanza Road, Ste. 200

Las Vegas, NV 89110-2101

ph. 702/438-4100 x 128

fax 702/438-5311

e-mail: Carlos@willicklawgroup.com

main website: www.willicklawgroup.com

QDRO website: www.qdromasters.com

Marshal S. Willick, Esq.
3591 E. Bonanza Road, Ste. 200
Las Vegas, NV 89110-2101

Fellow, American Academy of Matrimonial Lawyers

Fellow, International Academy of Family Lawyers

Certified Specialist in Family Law, Nevada Board of Legal Specialization & NBTA
ph. 702/438-4100 x 103
fax 702/438-5311

e-mail: marshal@willicklawgroup.com
main website www.willicklawgroup.com

QDRO website: www.qdromasters.com

Jennifer V. Abrams, Esq.

Board Certified Family Law Specialist

Fellow of the American Academy of Matrimonial Lawyers

THE ABRAMS & MAYO LAW FIRM

6252 South Rainbow Blvd., Suite 100

Las Vegas, Nevada 89118

Tel: (702) 222-4021

Fax: (702) 248-9750

www.TheAbramsLawFirm.com

If you have any questions, please contact Patty Andrews, I believe you spoke with her this past week regarding this account. Her direct line is 781-482-7466.

Thank you,

Megen
--

Megen MacKenzie
Legal Compliance Coordinator
Constant Contact
3675 Precision Dr,
Loveland, CO 80538
Email: mmackenzie@constantcontact.com
Phone: (970) 203-7345
Fax: (781) 652-5130
Web: www.constantcontact.com

## Anat Levy

**From:** Veterans In Politics <devildog1285@cs.com>
**Sent:** Friday, February 10, 2017 11:32 PM
**To:** alevy96@aol.com
**Subject:** Fwd: Your video has been removed

-----Original Message-----
From: Vimeo <rights@vimeo.com>
To: devildog1285 <devildog1285@cs.com>
Sent: Tue, Jan 24, 2017 12:45 pm
Subject: Your video has been removed

To ensure delivery, add no-**reply@vimeo.com** to your address book.

vimeo

# Hello Steve Sanson,

Your video "Nevada Attorney Attacks Clark County Family Court Judge in Open Court" has been removed for violating our Guidelines.

Reason: Violating a third party's privacy

For more information on our content and community policies, please visit https://vimeo.com/help/guidelines.

If you believe this was an error, please reply to this message as soon as possible to explain. (Please be aware that Vimeo moderators take action as violations come to our attention. "I see other people do it" is not a valid explanation.)

Sincerely,

Vimeo Staff

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## CERTIFICATE OF SERVICE

I am over the age of 18 and am not a party to the within action.

On this date I requested that a true and correct copy of the document entitled DECLARATION OF STEVE SANSON IN SUPPORT OF ANTI-SLAPP MOTION TO DISMISS be E-served via the Eighth Judicial District Court's wiznet E-file and E-serve online system to the below recipients:

Jennifer Abrams, Esq.
The Abrams & Mayo Law Firm
6252 S. Rainbow Blvd., Ste. 100
Las Vegas, NV 89118
(702) 222-4021
JVAGroup@theabramslawfirm.com

Alex Ghoubado, Esq.
G Law
320 E. Charleston Blvd., Ste. 105
Las Vegas, NV 89104
(702) 217-7442
alex@alexglaw.com

Courtesy Copy:
Maggie McLetchie, Esq.
McLetchie Shell
702 E. Bridger Ave., Ste. 520
Las Vegas, NV 89101
(702) 728-5300
Maggie@nvlitigation.com

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

Executed this 17th day of February 2017, in Las Vegas, NV

MDSM
Anat Levy, Esq. (State Bar No. 12550)
ANAT LEVY & ASSOCIATES, P.C.
5841 E. Charleston Blvd., #230-421
Las Vegas, NV 89142
Phone: (310) 621-1199
E-mail: alevy96@aol.com; Fax: (310) 734-1538
Attorney for: DEFENDANTS VETERANS IN POLITICS INTERNATIONAL, INC. AND STEVE SANSON

DISTRICT COURT
CLARK COUNTY, NEVADA

| | |
|---|---|
| MARSHALL S. WILLICK and WILLICK LAW GROUP,<br><br>Plaintiffs,<br><br>vs.<br><br>STEVE W. SANSON; HEIDI J. HANUSA; CHRISTINA ORTIZ; JOHNNY SPICER; DON WOOLBRIGHTS; VETERNAS IN POLITICS INTERNATIONAL, INC.; SANSON CORPORATION; KAREN STEELMON; and DOES 1 THROUGH X.<br><br>Defendants. | CASE NO. A-17-750171-C<br><br>DEPT. NO.: XIX (19) |

## DECLARATION OF ANAT LEVY

## IN SUPPORT OF ANTI-SLAPP MOTION

I, ANAT LEVY, hereby declare as follows:

1. I am counsel for defendants Veterans in Politics International, Inc. ("VIPI") and its President, Steve Sanson, in the within action. I make this declaration in support of Defendants' anti-SLAPP motion. I make this declaration based on my personal knowledge, except as to matters stated to be based on information and belief. I am competent to testify as to the truth of these statements if called upon to do so.

2. Attached as Exhibit 1 hereto is a true and correct copy of the amended complaint in the Willick v. Jere Beery et. al. case, as I downloaded from the Court's wiznet website.

3. Attached hereto as Ex. 2 is a true and correct copy, as downloaded from the court's website, of Willick's Supreme Court brief in the Holyoak case showing that he attempted to get prior Supreme Court precedent overturned on the issue of pension survivorship.

4. Attached hereto as Ex. 3 is a true and correct copy, as downloaded from the court's website, of Willick's opponent's Reply to the Supreme Court asking it not to consider Willick's argument on survivorship benefits as they were not properly made in the form of a cross-appeal.

5. Attached hereto as Exhibit 4 is a true and correct copy, as downloaded from the court's website, of Willick's motion for limited remand in the Holyoak case.

6. Attached hereto as Exhibit 5 is a true and correct copy, as downloaded from the court's website, of the Supreme Court's denial of Willick's motion for limited remand in the Holyoak case.

7. Attached hereto as Exhibit 6 is, on information and belief, a true and correct copy of Willick's motion for attorney's fees (without exhibits) in the Holyoak case.

8. Attached hereto as Exhibit 7 is, on information and belief, a true and correct copy, of Willick's client's objection to his request for attorneys' fees in the Holyoak case.

9. Attached hereto as Exhibit 8 is a true and correct copy, as downloaded from the Willick Law Group's website, of Marshal Willick's resume.

10. Attached hereto as Exhibit 9 is a true and correct image, as downloaded from the Willick Law Group's website, of 3 books written by Marshal Willick on divorce law, and available for sale to the general public.

11. Attached hereto as Exhibit 10 is a true and correct copy of a *sampling* of articles, from the Las Vegas Review Journal, the Las Vegas Sun, the Elko Daily and the Guardian LV, either featuring or comprising commentary from Marshal Willick on various issues of divorce law.

12. Attached hereto as Exhibit 11 is a true and correct copy, as downloaded from the Willick Law Group's website, of the first page of what purports to be a transcript (which according to the footer, indicates that it may be "edited") that the Willick Law Group created of Marshal Willick's 2015 radio interview with VIPI.

13. Attached hereto as Exhibit 12 is a true and correct copy of a picture that I took showing the large billboard that Willick Law Group has across the street from the family courts in Las Vegas, marketing its services to the public.

I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 17th day of February, 2017 in Las Vegas, NV.

Anat Levy

# EXHIBIT 1

Electronically Filed
05/21/2013 02:36:58 PM

CLERK OF THE COURT

COMP
WILLICK LAW GROUP
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110-2101
(702) 438-4100
Attorneys for Plaintiffs

**DISTRICT COURT,**
**CLARK COUNTY, NEVADA**

| | |
|---|---|
| MARSHAL S. WILLICK AND THE WILLICK LAW GROUP<br><br>Plaintiffs,<br><br>vs.<br><br>JERE BEERY, GENE D. SIMES, MARK BERES, FREDERICK JONES, MICHAEL K. MCKOWN, DON HOLLAND, VETERANS FOR VETERAN CONNECTION, INC., OPERATION FIRING FOR EFFECT, VETERANS TODAY MILITARY & FOREIGN AFFAIRS JOURNAL, JONES & ASSOCIATES, USFSPA LIBERATION SUPPORT GROUP, DOES I THROUGH X, | CASE NO:A12661766-C<br>DEPT NO: XXIII<br><br>DATE OF HEARING: N/A<br>TIME OF HEARING: N/A<br><br>ACTION IN TORT<br><br>ARBITRATION EXEMPTION CLAIMED |

# SECOND AMENDED COMPLAINT FOR DAMAGES

## I

## INTRODUCTION

1. As *Ordered* by this Court on May 14, 2013, Plaintiffs Marshal S. Willick and the Willick Law Group (Plaintiffs) bring this Second Amended action for damages based upon, and to redress, Defendant's Intentional Defamation of the character of the Plaintiffs through libelous writings and speech, for Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, False Light, Business Disparagement, Harassment, Concert of Action, Civil

Conspiracy and violations of RICO, all of which were perpetrated individually and in concert with others by defendants Mr. Jere Beery (Beery), Mr. Gene D. Simes (Simes), Mr. Mark Beres (Beres), Mr. Frederick Jones, Mr. Michael K. McKown, Mr. Don Holland, Jones & Associates, USFSPA Liberation Support Group, Veterans for Veteran Connection, Inc. (VFVC), Operation Firing For Effect (OFFE), Veterans Today Military & Foreign Affairs Journal, and Does I through X (collectively "Defendants").

## II

## VENUE AND JURISDICTION

2. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

3. Jurisdiction is proper in Nevada State court as all alleged claims were transmitted to or performed in Nevada by the Defendants individually or in concert with others.

## III

## PARTIES

4. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

5. Plaintiff Marshal S. Willick, is a natural person and an attorney licensed to practice law in the State of Nevada. He practices exclusively in the field of Domestic Relations and is A/V rated, a peer-reviewed and certified (and re-certified) Fellow of the American Academy of Matrimonial Lawyers, and a Certified Specialist in Family Law.[1]

6. The Willick Law Group is a dba of Marshal S. Willick P.C., a duly formed professional corporation in the State of Nevada.

7. Upon information and belief, Mr. Jere Beery is a natural person and freelance writer and self-professed activist for veteran's rights. He also claims to be the National Public Relations Director for Veterans for Veterans Connection Inc., and Operation Firing For Effect.

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[1] Per direct enactment of the Board of Governors of the Nevada State Bar, and independently by the National Board of Trial Advocacy. Mr. Willick was privileged (and tasked) by the Bar to write the examination that other would-be Nevada Family Law Specialists must pass to attain that status.

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8. Upon information and belief, Mr. Gene Simes is a natural person and the National Chairman of an Organization called Operation Fire for Effect, and the President of Veterans For Veterans Connection, Inc.

9. Upon information and belief, Mark Beres is a natural person and self-professed veteran's rights activist and member of the USFSPA Liberation Support Group, located in the Tucson, Arizona area.

10. Upon information and belief, Frederick Jones is a natural person who purports to be an Attorney at Law with the Law Firm of Jones & Associates, located 105 Jonesboro Street, McDonough, Georgia. Mr. Jones purports to be legal counsel to Veterans for Veterans Connection (VFVC), Inc., Operation Fire for Effect (OFFE), and has provided legal counsel to Gene Simes, the President of VFVC and National Chairman of OFFE, another named defendant.

11. Upon information and belief, Michael K. McKown is a natural person claiming to be the USFSPA Liberation Support Group (ULSG) State Representative for the State of Colorado, located in Broomfield, Colorado.

12. Upon information and belief, Don Holland is a natural person and self-professed veteran's rights activist located at 20313 Nettleton Street, Orlando, Florida 32833.

13. Upon information and belief, the USFSPA Liberation Support Group (ULSG), is a duly formed 501(c)(4) charitable organization whose purpose is the repeal of the federal Uniformed Services Former Spouse Protection Act (USFSPA). ULSG is purportedly located at 20770 U.S. Hwy 281 North, Suite 108, PMB 125, San Antonio, Texas, 78258.

14. Upon information and belief, the Law Firm of Jones & Associates, is a duly formed Professional Corporation located in McDonough, Georgia.

15. Upon information and belief, Veterans For Veterans Connection Inc., (VFVC) is a registered non-profit 501(c)(19) veterans service organization headquartered in Walworth, New York.

16. Upon information and belief, Operation Firing For Effect is associated or affiliated with the VFVC and conducts lobbying efforts in Washington, D.C., and in other jurisdictions as targeted by the VFVC.

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17. Upon information and belief, Veterans Today Military & Foreign Affairs Journal is a web-based magazine that publishes articles and news clips on issues concerning veterans and foreign policy. The web site is accessible through the internet in Nevada.

18. Upon information and belief, additional persons and entities have been working with the above named Defendants either individually or in concert and have been added as Doe Defendants in this action until they are personally identified.

19. Marshal S. Willick and the Willick Law Group are informed and believe, and therefore allege, that each of the Defendants designated herein as Jere Beery, Gene D. Simes, Mark Beres, Frederick Jones, Michael K. McKown, Don Holland, Jones & Associates, USFSPA Liberation Support Group, Veterans for Veterans Connection, Inc., Operation Firing for Effect, Veterans Today Military & Foreign Affairs Journal, and Does I through X inclusive, are in some way legally responsible and liable for the events referred to herein, and directly or proximately caused the damages alleged herein.

20. At all times material hereto, and in doing the acts and omissions alleged herein, the Defendants, and each of them, including Jere Beery, Gene D. Simes, Mark Beres, Frederick Jones, Michael K. McKown, Don Holland, Jones & Associates, USFSPA Liberation Support Group, Veterans for Veterans Connection, Inc., Operation Firing for Effect, Veterans Today Military & Foreign Affairs Journal, and Does I through X inclusive, acted individually and/or through their officers, agents, employees and co-conspirators, each of whom was acting within the purpose and scope of that agency, employment, and conspiracy, and these acts and omissions were known to, and authorized and ratified by, each of the other Defendants.

## IV

## FACTUAL ALLEGATIONS

21. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

22. On or about December 17, 2011, Mr. Jere Beery, claiming to be acting on behalf of Veterans for Veterans Connection, and Operation Firing for Effect, published or caused to be published on a website known as veteranstoday.com, a web site purportedly owned and controlled

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by Veterans Today Military & Foreign Affairs Journal, an article entitled "Veteran Court Conspiracy Exposed."

23. That this same article has been re-published a number of times on different web sites and via email across multiple states, including Beery sending it directly to the Willick Law Group via an email channel intended for use by prospective clients.

24. Within that article, Mr. Beery defames Mr. Willick and his law firm, the Willick Law Group, with a number of false statements.[2]

25. The Defendants have published, or republished, or attributed to one another, or disseminated to third parties across state lines, false and defamatory statements directed against Plaintiffs, including:

a. That Willick has divulged secrets on how to drain every penny possible from a retired military veteran, including any disability compensation the veteran may be receiving.

b. That Willick has made millions of dollars by distorting the facts surrounding veterans' military retirement pay, disability compensation, and Combat Related Special Compensation (CRSC).

c. That Willick intentionally ignores federal protection of veteran's disability compensation.

d. That Willick has claimed that federal law carries absolutely no relevance in dividing veterans' disability compensation in state divorce law.

e. That Willick has said that disability compensation is not protected in any way.

f. That Willick has obtained large alimony and child support awards and then taken a large percentage of those awards for himself.[3]

---

[2] A copy of the published article is attached here.

[3] Current ethical rules in the State of Nevada do not allow contingency agreements in a divorce action. Mr. Willick and his firm have never made a contingency agreement in a divorce action. The allegation addressed here was apparently based upon a deliberately false reading of contracts from the 1980's – close to 30 years ago – for independent actions to partition and recover the spousal share of military retirement benefits silently omitted from decrees of divorce and thus stolen by the military members.

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g. That Willick "routinely has his clients sign a '*contingency agreement*' in which he (Willick) gets 50% of all the moneys he wins."

h. That Willick has used arguments of PTSD to take children away from military members or claiming that a military member has intentionally abandoned his children due to deployments or military service.

i. That Willick has used "underhanded techniques and legal deception designed to illegally strip our veterans of their earned retirement, benefits, and entitlements."

j. Claiming that Willick has argued that veterans are dangerous individuals unfit to care for their children.

k. Claiming that Willick has threatened to expose state and federal politicians and elected judges as "anti-child support" and "anti-alimony" if they do not agree to support his "distorted" interpretation of veterans' benefits.

l. That Willick is directly responsible for the increased number of veterans who are homeless, emotionally distraught, and suicidal.

m. That Willick has violated the Professional Code of Conduct or the "Code of Conduct."[4]

n. That Willick has dismissed federal laws which are protected under the U.S. Constitution.

o. That Willick has forced "(with the threat of jail) disabled veterans to sign a divorce settlement agreement in which their disability compensation is listed as a funding source for alimony and/or child support."

26. That Defendants have published, republished, or attributed to one another, or disseminated to third parties across state lines, additional false and defamatory statements directed against Plaintiffs, including those published by Beery on January 16, 2012, in which he defamed Mr. Willick and the Willick law Group, with a number of false statements, including:

a. Stating that "Veterans Need Skinning."

[4] This was the term used. We believe the intended reference was to the Rules of Professional Conduct.

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b. That Willick "routinely has his client's sign a '*contingency agreement*' in which he (Willick) gets 50% of all the moneys he wins."

c. That Willick has exploited the hardships of vulnerable military spouses, children and the sacrifices of our returning service members.

d. That Willick has used the 'poor spouse' and 'needy child' tactic to get the highest award possible, and then helped himself to half of the awarded money.

e. That Willick is nothing more than a "common crook" in a shark skin suit hiding his self-enrichment motives behind ex-spouses and the veteran's children to pad his own bank account.

f. That Willick is ripping off combat disabled veterans.

g. That Willick is stealing from the spouse and child of the combat disabled veteran.

27. Beery incited veterans that have never had any dealings with Willick or the Willick Law Group to file spurious complaints with the Nevada State Bar.

a. Beery caused at least one complaint to be filed with the State Bar of Nevada which was investigated at significant cost to the State Bar and to Mr. Willick and the Willick Law Group. That complaint was found to be meritless.[5]

28. Mr. Mark Beres has sent many false and defamatory emails across state lines, including:

a. Calling Willick a "scumbag lowlife".

b. Claiming that Willick has "written the book on how to plunder a disabled veteran in the family court system."

c. Claiming that Willick has compared veteran's advocates to Adolph Hitler.

d. Claiming that Willick is a "miscreant" who has "worked tirelessly to create a legal environment in which wounded veterans are sitting ducks and lambs to the slaughter."

[5] We are not aware of any other complaints filed with the State Bar of Nevada, but presuming they are all based on the same arguments, they are being dismissed by the State Bar as also meritless.

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e. Claiming that Willick is personally responsible for a "holocaust" inflicted on wounded veterans.

29. The false and defamatory statements by Defendants were intended to incite violence and constitute actionable hate speech.

30. The false and defamatory statements by Defendants have resulted in numerous death threats and threats in general to be directed against Mr. Willick, sent by Defendants directly or caused by their false and defamatory statements:

a. Beery himself published and caused to be re-published a direct threat against Willick by saying, "Any attorneys who target our combat disabled veterans and strip them of their earned disability compensation in a divorce settlement should be lined up and shot with a military grade weapon in order to experience firsthand the pain and agony associated with disfiguring and disabling combat related injuries. And you, Mr. Willick should be first in line."

b. Beery also sent an email on December 13, 2011, with the subject line "Merry Christmas MARSHAL WILLICK - From You [*sic*] Worst Nightmare." This email included a bolded Shakespeare quote, "The first thing we do, let's kill all the lawyers."

c. Don Holland supposedly from Orlando, Florida sent an email that stated, "If the courts had not been corrupted by the judicial alchemy concocted by Willick, and if everyone were to receive the justice they deserve then Willick should wake up with a Horse's head in bed with him!!"

d. A "John Rose" sent an email that stated, "When you publish anything it had better have the right facts, when those facts are used in a Court Room, they better be verifiable! I have waste (sic) enough time with you. I promise you will not be forgetting my name. The 'Rose'."

e. An email from a person only identified as "Bill" stated, "Marshal Willick you are really a piece of shit. A well deserved bullet between your eyes would be waste of a perfectly good bullet. Hope you rot in Hell with my ex-wife."

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f. A person identified only as "Al Garcia" sent an email that said, "I just read your piece on USFSPA dated DEC 5, 2011. Great piece of writing for someone who equivalent to the Taliban and Nazis. You are a disgrace to this country and make a living off of stealing from honorable service member. Try to sue me. I'm already bankrupt and have a house in foreclosure because of guys like you."

g. A letter was received from St. Petersburg, Florida, that stated, "I read your recent "legal note" on alimony received by former spouses of military with great interest. It strikes me that the greatest accomplishment of these women's lives was to spread their legs for a man in uniform. Then they divorce these patriots and the US Government awards them a lifetime of welfare payments from his hard and dangerous work. They are whores and you, sir, are their pimp. You should take into consideration the fact that you are picking a fight with hundreds of thousands of men who were trained by their country to kill. You are siding with the lazy ticks that suck the blood from the men who put their lives on the line for your freedom. You are a moron who enables them. Just because something is legal, that doesn't make it right. We are coming for you, soon."

31. Mr. Gene Simes has been quoted in a number of articles – mostly written by Beery – repeating or attributing to Simes the same false and defamatory statements recounted above.

32. Simes has also posted to a Google Groups web page in response to a warning from legal counsel and others that they were possibly defaming Willick, "No! No! No! Michael, we are going to the root of this hold [*sic*] issue, and there's no turning back for no one do we get this clear! A mission is just what a mission is and on this one we will make our stand!!!!! None of you out there have seen nothing YET! Get ready for Operation White House 2012 and Operation D O J 2012 about three months from now. There's no retreat forecast for OFFE! I will fire everything that I have to accomplish this mission, now! let me get my job done, do we all understand, thank [*sic*]."

33. Simes also posted on this same Google Groups web page defamatory statements about Willick, specifically, Nevada Attorney at Law Marshal Willick no Friend Of our Military, Operation Fire for Effect, and Marshal S. Willick Anti-Military Anti-Veteran Anti-American.

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34. Defendants organized, publicized, and participated in a boisterous assembly at Plaintiffs' place of business, with the intent and effect of interfering with Plaintiffs' business and placing Plaintiffs and Plaintiffs' employees in fear of their personal safety.

## V

## FIRST CLAIM FOR RELIEF

(DEFAMATION)

35. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

36. Defendants, and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, published one or more oral or written false statements which were intended to impugn Mr. Willick's honesty, integrity, virtue and/or personal and professional reputation.

37. Willick and the Willick Law Group are not public figures, as some or all of Defendants have acknowledged in writing, or been notified of in writing.

38. The statements imputed by Defendants to Willick and published by Defendants are slurs on Willick's character including his honesty, integrity, virtue, and/or reputation.

39. The referenced false and defamatory statements would tend to lower the subject in the estimation of the community, excite derogatory opinions about the subject, and hold the subject up to contempt.

40. The referenced false and defamatory statements were unprivileged.

41. The referenced false and defamatory statements were published to at least one third party.

42. The referenced false and defamatory statements were published or republished deliberately or negligently by one or more of each of the Defendants.

43. Some or all of the referenced false and defamatory statements constitute defamation *per se*, making them actionable irrespective of special harm.

44. Publication of some or all of the referenced false and defamatory statements caused special harm in the form of damages to Willick and the Willick Law Group.

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WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

## VI

## SECOND CLAIM FOR RELIEF

(INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS)

45. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

46. Defendants and/or Defendants' agents, representatives, and/or/ employees, either individually, or in concert with others, intentionally and deliberately inflicted emotional distress on Plaintiffs by defaming them to many people, including but not limited to the following: several of Willick's friends, co-workers, colleagues, clients, and an unknown number of persons that were subjected to the defamatory comments on the internet.

47. As a result of Defendants' extreme and outrageous conduct, Willick and the Willick Law Group was, is, and, with a high degree of likelihood, will continue to be emotionally distressed due to the defamation.

48. As a result of Defendants' extreme and outrageous conduct, Willick and the Willick Law Group have suffered and will continue to suffer mental pain and anguish, and unjustifiable emotional trauma.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed by this Court to be just and fair and appropriate, in an amount in excess of $10,000.

## VII

## THIRD CLAIM FOR RELIEF

(NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS)

49. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

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50. To whatever extent the infliction of emotional distress asserted in the preceding cause of action was not deliberate, it was a result of the reckless and wanton actions of the Defendants, either individually, or in concert with others.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed by this Court to be just and fair and appropriate, in an amount in excess of $10,000.

**VIII**

**FOURTH CLAIM FOR RELIEF**

(FALSE LIGHT)

51. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

52. Defendants and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, intentionally made and published false statements about Mr. Willick and the Willick Law Group.

53. The statements made by the Defendants against Mr. Willick were made with the specific intent to cause harm to Plaintiffs and their pecuniary interests, or, in the alternative, the Defendants published the false statements knowing its falsity or with reckless disregard for the truth.

54. The statements made the Defendants place Mr. Willick and the Willick Law Group in a false light and are highly offensive and inflammatory, and thus actionable.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

**IX**

**FIFTH CLAIM FOR RELIEF**

(BUSINESS DISPARAGEMENT)

55. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

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56. Defendants and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, intentionally made false and disparaging statements about Willick and the Willick Law Group and disparaged Mr. Willick's and the Willick law Group's business.

57. The referenced statements and actions were specifically directed towards the quality of Mr. Willick and the Willick Law Group's services, and were so extreme and outrageous as to affect the ability of Willick and the Willick Law Group to conduct business.

58. The Defendants intended, in publishing the false and defamatory statements and participating in the boisterous assembly, to cause harm to Plaintiffs and its pecuniary interests, or, in the alternative, the Defendants published the disparaging statements knowing their falsity or with reckless disregard for the truth.

59. The false and defamatory statements and boisterous assembly by the Defendants resulted in damages to Mr. Willick and the Willick Law Group.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

**X**

**SIXTH CLAIM FOR RELIEF**

(HARASSMENT)

60. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

61. Defendants and/or Defendants' agents, representatives, and/or employees in concert with one another, have threatened bodily injury to the Plaintiffs or caused such threats to be made.

62. Defendants' making of false and defamatory statements and then inviting the recipients of those statements to a boisterous assembly at Plaintiffs' place of business were specifically intended to interfere with Plaintiffs' business, and to cause the apprehension or actuality of economic or personal harm to Plaintiffs and Plaintiffs' employees.

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63. Defendants' efforts to cause persons with no personal knowledge whatsoever of any violations of the Rules of Professional Conduct to nevertheless file spurious complaints with the Nevada Bar was intended to cause economic and personal harm to Plaintiffs.

64. Defendants' actions were intended to result in substantial harm to the Plaintiffs with respect to their physical or mental health or safety, and to cause physical or economic damage to Plaintiffs.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

**XI**

**SEVENTH CLAIM FOR RELIEF**

(CONCERT OF ACTION)

65. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

66. Defendants and/or Defendants' agents, representatives, and/or employees in concert with one another, based upon an explicit or tacit agreement, intentionally committed a tort against Willick.

67. Defendants' concert of action resulted in damages to Willick and the Willick Law Group.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

**XII**

**EIGHTH CLAIM FOR RELIEF**

(CIVIL CONSPIRACY)

68. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

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69. Defendants and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, based upon an explicit or tacit agreement, intended to accomplish an unlawful objective for the specific purposes of harming Mr. Willick and the Willick Law Group's pecuniary interests and Marshal S. Willick's physical well-being.

70. Defendants' civil conspiracy resulted in damages to Mr. Willick and the Willick Law Group.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group demand judgment against named Defendants for actual, special, compensatory, and punitive damages in an amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

## XIII

## NINTH CLAIM FOR RELIEF

(RICO VIOLATIONS)

71. Plaintiffs incorporate and re-allege all preceding paragraphs as if fully stated herein.

72. Defendants and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, engaged in at least two crimes related to racketeering pursuant to NRS 207.360 that have the same or similar pattern, intents, results, accomplices, victims or methods of commission or are otherwise interrelated by distinguishing characteristics and are not isolated incidents.

73. Here, Defendants[6] have all either committed, conspired to commit, or have attempted to commit the following crime(s):

a. Taking property from another under circumstances not amounting to robbery.

b. Perjury or subornation of perjury.

c. Extortion.

d. Offering False Evidence.

[6] The named Defendants – and others – constitute a criminal syndicate as defined in NRS 207.370.

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e. Multiple transactions involving fraud or deceit in the course of an enterprise. (NRS 205.377)

74. Defendants comprise a criminal syndicate: Any combination of persons, so structured that the organization will continue its operation even if individual members enter or leave the organization, which engages in or has the purpose of engaging in racketeering activity.

Here, OFFE, ULSG, Jones & Associates, and VFVC are organizations that have members – headed by Defendants Gene Simes, Michael McKown, Mark Beres, Frederick Jones, and Jere Beery – that do come and go and the organization continues on, and these organizations and their principals have conspired to engage in and have engaged in racketeering activity.

This group also meets the statutory definition – NRS 207.380 – as an enterprise:

> Any natural person, sole proprietorship, partnership, corporation, business trust or other legal entity; and, Any union, association or other group of persons associated in fact although not a legal entity.

Here VFVC is a registered not for profit business and OFFE is sub unit of VFVC. Both can and should be considered individual legal entities.[7]

Jones & Associates is a for profit law firm in Georgia and is definitionally a separate legal entity.[8]

ULSG is also an organization with members and is a registered LLC.

On information and belief, not all Defendants are members of VFVC , OFFE, Jones & Associates, and ULSG, but meet the "association or other group of persons associated in fact" requirements under the statue as an enterprise. The statute explicitly includes both licit and illicit enterprises.

75. Racketeering is the engaging in at least two crimes related to racketeering that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or are otherwise interrelated by distinguishing characteristics and are not isolated incidents, if at least one

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[7] OFFE and VFVC operate numerous web sites where the defamation continues. Some of these web sites include: www.offe.org; www.anamericanpromise.org; www.jerebeery.com; www.vfvc.org.

[8] Mr. Jones admitted at the October 9, 2012, hearing that his law practice is a sole proprietorship.

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of the incidents occurred after July 1, 1983, and the last of the incidents occurred within 5 years after a prior commission of a crime related to racketeering.

a. Taking property from another under circumstances not amounting to robbery. (A minimum of four counts and maximum of 12 counts.)

Here, Jere Beery and Gene Simes and other members of the Defaulted organizations – through these organizations – encouraged members and non-members of VFVC, OFFE, and ULSG to file formal complaints with the State Bar of Nevada, even providing a ghost-written letter for the members use, that falsely allege criminal, ethical, and violations of professional conduct by Marshal S. Willick, Esq. The Exhibits that prove this claim have already been admitted by the Court.

Other exhibits admitted by the Court show at least four of these complaints, but the organization boasts the submission of over a dozen.

None of these people filing complaints have ever had any relationship with Willick or his law practice. Willick does not know any of these persons and to the best of his knowledge has never met any of them. He certainly has never represented any of them. None of these persons has or ever had any first hand knowledge of Willick's practice.

Second, the State Bar of Nevada has determined that none of the allegations have any truth. The Court has admitted exhibits in this case that show the State Bar of Nevada found no wrong doing by Willick.

The State Bar was forced to open an investigation based on these complaints, and Willick was forced to respond to the State Bar as to these allegations. The amount of time dedicated by the State Bar to this matter is unknown, but must have been substantial as the Bar was required to respond to each and every complaint. Willick's time is far more quantifiable. He spent over 5 hours gathering documents and drafting the response to the Bar to prove that the allegations were not only unsupported, but were false. The total value of time expended by Willick was over $3,000 and this does not include the costs of missed opportunities or time that should have been spent working on cases for paying clients.

These actions are a direct violation of NRS 205.377 – Multiple transactions involving fraud or deceit in course of enterprise or occupation. The statute states:

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> A person shall not, in the course of an enterprise (VFVC, OFFE, Jones & Associates and ULSG), knowingly and with the intent to defraud (The State Bar of Nevada and Willick), engage in an act (filing fraudulent Bar Complaints), practice or course of business or employ a device, scheme or artifice which operates or would operate as a fraud or deceit upon a person by means of a false representation or omission of a material fact that:
> The person knows to be false or omitted;
> The person intends another to rely on; and
> Results in a loss to any person who relied on the false representation or omission.
> In at least two transactions that have the same or similar pattern, intents, results, accomplices, victims or methods of commission, or otherwise interrelated by distinguishing characteristics and are not isolated incidents within 4 years and in which the aggregate loss or intended loss is more than $650.

It is clear that it was the intent of the Defendants to cause harm to both the State Bar of Nevada and Willick and the aggregate costs far exceed the $650 threshold. Each act (letter sent to the Bar) which violates subsection one constitutes a separate offense and a person who violates subsection one is guilty of a category B felony.

Additionally, NRS 205.0832 defines the actions which constitute theft as including that which:

> Obtains real, personal or ***intangible property or the services of another person***, by a material misrepresentation with intent to deprive that person of the property or services. As used in this paragraph, "material misrepresentation" means the use of any pretense, or the making of any promise, representation or statement of present, past or future fact which is fraudulent and which, when used or made, is instrumental in causing the wrongful control or transfer of property or services. The pretense may be verbal or it may be a physical act.

Additionally the statute goes on to define the theft as a person or entity that "Takes, destroys, conceals or disposes of property in which another person has a security interest, with intent to defraud that person."

Here, as Abraham Lincoln famously pointed out 150 years ago, time is a lawyer's stock in trade. Defendants – with malice – stole valuable time from Willick. Also, the theft of Willick's and Willick Law Group's "good will" by the making of false and defamatory comments and placing both Willick and Willick Law Group in a false light has diminished the value of the business. These are intangible thefts, but thefts nonetheless.[9]

Defendants have sent emails that specifically agree that attacking Willick and the State Bar is perfectly fine.

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[9] Goodwill – A business's reputation, patronage, and other intangible assets that are considered when appraising the business, especially for purchase. *Black's Law Dictionary* 279 (Bryan A. Garner ed., Pocket ed., West 1996).

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> I see nothing wrong with attacking Marshall Willick and the Nevada Bar. In fact I know of no one better to attack than them... He is as responsible for this debacle as any one individual including Pat Schroeder and Doris Mozley!!

This same Defendant also wrote, "If the courts had not been corrupted by the judicial alchemy concocted by Willick, and everyone were to receive the justice they deserve then Willick should wake up with a Horse's Head in bed with him!!"

These same communications, insofar as they were formal complaints to a Nevada State licensing authority, constitute perjury, and their active solicitation constituted suborning perjury. Additionally, Gene Simes has filed his discovery responses in this action and perjures himself as to his and his organization's relationship with web sites such as An American Promise which lists his phone number as the point of contact for the web site.

b. Extortion

Defendants attempted to extort a particular ruling from the State Bar through a veiled threat. In a letter to the State Bar of Nevada they wrote:

> I strongly suggest you consider your response to my complaint very carefully, as I have seen the canned form letter responses you have sent to other individuals who have submitted complaints against Willick, and I am not impressed.

The letter goes on to make outrageous claims of criminal activity by Willick, violations of constitutional rights, violations of civil rights, violations of federal codes and regulations, and ethical violations, all of which have been proven to be untrue under the law.

A similar letter was sent by another Defendant which makes similar unfounded and false testimony as to Willick's ethical and legal conduct. Again, none of these Defendant's has any first hand knowledge as to Willick's practice and the intent was to do damage to Willick and his business.

Members of this enterprise sent emails admitting that their intent was a "suicide mission." They went on to say that it was their intent to "get under Willick's skin" and that they were "successful". Gene Simes sent an email dated April 6, 2012, where – discussing the planned picket of Willick and his offices – that "a mission is just what a mission is and on this one we will make our stand!!!!!" He goes on to say, "None of you out there have seen nothing YET!

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Lastly, Jere Beery publishes the intent of "Operation Sin City" to all members of the organization/enterprise saying that:

> Our objective is to bring public and media attention to Attorney at Law Marshal Willick and his 25 year long efforts to strip disabled veterans of their disability compensation and retirement pay. Some of us have been working on the 5301 issue for 10 years, and I can tell you with a great deal of certainty that Marshal Willick is directly responsible for the attack on our disability benefits. In fact, 25 years ago Willick wrote the first handbook on how to get the most money out of out (sic) disabled Veterans. Willick was also directly involved with the development and passage of USFSPA. Willick is the Grand Dragon of the attack on disability compensation and retirement pay.[10]

c. Giving False Evidence

The Defendants and others provided false testimony to the State Bar of Nevada and each of the Defendants has repeated the same in fugitive documents filed with this Court as to alleged "violations of constitutional rights", "violations of civil rights", "violations of federal codes and regulations", "criminal activity", and "ethical violations", all of which have been proven to be untrue under the law. Exhibits already admitted in this case document this false testimony.

The Defendants participated in racketeering as defined by Nevada Statute. They ***could*** all be found to be guilty of a category B felony and imprisoned for their actions, but this is a civil action.

These are not the only crimes that Defendants have been involved in. They also meet the elements for violation of criminal libel, criminal harassment, stalking with an aggravating factor of using the internet to further the crime, criminal publishing matter inciting breach of peace or other crime, criminal syndicalism, and threatening or obscene letters or writings.[11] However, these crimes are not specifically enumerated in the statute concerning RICO.

Defendants' illegal conduct resulted in damages to Mr. Willick and the Willick Law Group.

WHEREFORE, Plaintiffs Marshal S. Willick and the Willick Law Group, pursuant to NRS 207.470, are entitled to treble damages as a result of Defendants' criminal conduct in the form of actual, special, compensatory, and punitive damages in amount deemed at the time of trial to be just, fair, and appropriate in an amount in excess of $10,000.

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[10] The USFSPA was enacted by the 97th Congress in September 1982, with an effective date of 25 June 1981. Mr. Willick graduated from Law School on May 31, 1982. He would have been a busy law student to have been "directly involved in the passage of the USFSPA."

[11] See NRS 207.180.



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## XIV

## TENTH CLAIM FOR RELIEF
(INJUNCTION)

76. Marshal S. Willick and the Willick Law Group incorporate and re-allege all preceding paragraphs as if fully stated herein.

77. Defendants and/or Defendants' agents, representatives, and/or employees, either individually, or in concert with others, engaged in acts that were so outrageous that injunctive relief is necessary to effectuate justice. WHEREFORE, Plaintiffs request the following injunctive relief:

a. That all named defendants and members of the listed organizations be enjoined from approaching within 1000 feet, of the person of Marshal S. Willick, his vehicle, his home, The Willick law Group and all of its employees, and their places of residence or vehicles.

b. That all defamatory writings, video, postings, or any other documents or public display of the same, concerning Willick, the Willick Law Group, and the employees of the same, be removed from public view within 10 days of the issuance of the injunction.

c. That all innuendo of illegal, immoral, or unethical conduct that has already been attributed by defendants to Willick, must never be repeated by any named Defendant or any member of any of the named organizations. Generalities toward lawyers in general will constitute an offense of this relief.

d. That Mr. Frederick Jones be reported to the State Bar of Georgia for his complicity in the actions of the defendants.

## XV
## CONCLUSION

78. Marshal S. Willick and the Willick Law Group incorporate and re-allege all preceding paragraphs as if fully stated herein.

**WHEREFORE**, Marshal S. Willick and the Willick Law Group respectfully prays that judgment be entered against Defendants, and each of them individually, as follows:

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a. General damages in an amount in excess of $10,000 for each and every claim for relief.

b. Compensatory damages in an amount in excess of $10,000 for each and every claim for relief.

c. Punitive damages in an amount in excess of $10,000 for each and every claim for relief.

d. Treble damages for Defendants' RICO violations pursuant to NRS 207.470 in the form of general, compensatory, and/or punitive damages in an amount in excess of $10,000.

e. All attorney's fees and costs that have and/or may be incurred by Marshal S. Willick and the Willick Law Group in pursuing this action.

f. For such other and further relief this Court may deem just and proper.

**DATED** this 21st day of May, 2013.

Respectfully submitted:

WILLICK LAW GROUP

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
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Attorney for Plaintiffs

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# VERIFICATION

STATE OF NEVADA )
)
COUNTY OF CLARK )

MARSHAL S. WILLICK, principal of WILLICK LAW GROUP first being duly sworn, deposes and says:

That his business is the Plaintiff in the above-entitled action; that he has read the above and foregoing ***SECOND AMENDED COMPLAINT FOR DAMAGES*** and knows the contents thereof and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters, he believes them to be true.

MARSHAL S. WILLICK

SUBSCRIBED and SWORN to before me
this 21 day of MAY, 2013

NOTARY PUBLIC in and for said
County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
LEONARD H. FOWLER III
Appt. No. 01-66951-1
My Appt. Expires Jan. 16, 2017

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# EXHIBIT 2

IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ERIC HOLYOAK,

Appellant,

vs.

TONI HOLYOAK,

Respondent.

S.C. NO. 67490
D.C. NO: D-08-395301-Z

Electronically Filed
Sep 14 2015 03:28 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

# RESPONDENT'S ANSWERING BRIEF

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Docket 67490 Document 2015-27801 

## NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. In the course of these proceedings leading up to this appeal, Respondent has been represented by the following attorneys:

a. Christy Brad Escobar, Esq.
ESCOBAR AND ASSOCIATES LAW FIRM, LTD.

b. Marshal S. Willick, Esq. and Trevor M. Creel, Esq.
WILLICK LAW GROUP

There are no corporations, entities, or publicly-held companies that own 10% or more of Respondent's stock, or business interests.

We note that Appellant's NRAP 26.1 disclosure is deficient for failure to name all attorneys representing Eric in the district court, which included James A. Fontano, Esq., of NITZ, WALTON & HEATON, LTD.

**DATED** this 14th day of September, 2015.

Respectfully Submitted By:
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## ROUTING STATEMENT[1]

This case is presumptively assigned to the Court of Appeals per NRAP 17(b)(5), as the issues concern community property rights relating to divorce. However, under NRAP 17(a)(14), this appeal includes issues as to which there is inconsistency between published opinions of the Nevada Supreme Court, which are raised and identified in this brief as counsel has been previously directed to do by members of this Court. If this Court elects to reach and address those issues, the Supreme Court should retain this appeal, as the Court of Appeals would not have jurisdiction to resolve them.

## STATEMENT OF THE ISSUES

1. Whether Judge Ochoa's decision to order payments to Toni at Eric's first eligibility for retirement, under a statute that says he may do so or not, should be reviewed under the "abuse of discretion" standard.
2. Whether Nevada law calls for pension divisions under the "time rule."
3. Whether the district court correctly determined that Toni was entitled to receive her share of the pension benefits upon Eric's first eligibility for retirement.
4. Whether the second holding in *Henson* conflicts with the holdings in *Wolff* and *Blanco* and with the statutory requirement of equal division of community property, and therefore should be overturned.

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[1] NRAP 28(b) states that a Respondent may file a routing statement if "dissatisfied" with that of the Appellant. The Opening Brief did not include such a statement, so one is provided here.



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## STATEMENT OF CASE

Appeal from *Decision* and *Order* finding that a non-employee spouse (Toni) is entitled to begin receiving her time-rule share of the retirement benefits of the employee (Eric) upon his eligibility for retirement, but denying survivorship security for that interest; Hon. Vincent Ochoa, District Court Judge, Department S, presiding.

## STATEMENT OF THE FACTS[2]

The parties were married on June 5, 1982, and divorced 26 years later by way of a Nevada *Decree* filed August 14, 2008.[3] At the time of divorce, they had one minor child, who is now emancipated. During the marriage, Eric worked as a police officer and participated in the Nevada Public Employees'

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[2] NRAP 28(b) provides that Respondent may provide a Statement of Facts if "dissatisfied" with that of the Appellant. The "Statement of Facts" in Eric's *Opening Brief* ("AOB") is largely correct, except for various errors identified below for the convenience of the Court, but it is incomplete as to the issues actually presented, so we request that the Court refer to this Statement of Facts instead.

AOB page 5, line 21, refers to Appellant's Appendix ["AA"] 181, line 16 to 189, line 17. The reference should be to AA 189, line 12 to line 17.

AOB page 5, line 27 to page 6, line 1, refers to AA 333-338. The reference should be to AA 324-332.

AOB page 6, line 8, refers to AA 359-356. The reference should be to AA 350-356.

Contrary to the assertion on page 6, line 15, Eric has appealed from ***two*** orders: the *Decision* of January 27, 2015 (AA 344-349), and the *Order* of May 7, 2015 (AA 401-409); the notices of appeal were not included in Appellant's Appendix, but are supplied in Respondent's Appendix ["RA"] at 9-17.

[3] AA 60-67.



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Retirement System (PERS). At the time of divorce, he was not yet eligible to retire, as he was 47 years old and had about 19 years of service credit.[4]

Neither party was represented by counsel during their divorce. They amended their joint petition filing several times, and divided their community property through a five-page *Memorandum of Understanding* ("MOU") that they mediated with the assistance of former family court judge Robert Gaston, Esq.[5] The MOU was merged into the *Divorce Decree*.[6]

Regarding the PERS retirement, the MOU provided in its entirety:

> The parties agree to split the costs of the preparation of a QDRO. The QDRO will direct the trustee of PERS to pay to each party their proportionate share of the account at the time Eric retires.[7]

Upon divorce, Toni and the parties' minor child moved to Utah. In 2012, Toni had Utah attorney Stan Beutler prepare a QDRO for the division of the PERS benefits and submitted it for filing. The district court signed and filed the QDRO on December 4, 2012.[8]

That QDRO provided that Toni would be the survivor beneficiary under Option 1,[9] although she was not actually eligible to be an Option 1

---

[4] *See* AA 353.

[5] The five-page *Memorandum of Understanding* was attached to the parties' *Amended Joint Petition for Summary Decree of Divorce* filed July 17, 2008. AA 19-41. It was referenced as an attachment to the *Second Amended Joint Petition*, but was apparently not actually attached to that filing. AA 42-59.

[6] AA 63.

[7] AA 38.

[8] AA 68-75.

[9] AA 70.



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beneficiary.[10] It also contained the standard language reserving jurisdiction to "enforce, revise, modify or amend" the QDRO as necessary.[11]

Toni eventually realized that the filed QDRO did not actually provide her with survivor benefit protection, so she had Mr. Beutler prepare an Amended QDRO changing the survivorship selection to Option 2, for which she ***was*** eligible.[12] Again unable to get Eric's signature, Toni direct-submitted it for entry, but this time was advised to submit a *Motion* for its entry, and did so.[13]

Eric submitted an untimely *Opposition* through attorney James Fontano, asserting: that the proposed QDRO was defective because Eric did not agree with its provisions; that "no court" had authority to order a survivorship provision; and that a former spouse could not be a survivor beneficiary.[14]

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[10] Exhibit 1 (CLE materials) at 45-48, explaining that Option 1 for police/fire employees of PERS provides survivorship benefits to a spouse, but only if the spouse is married to the employee at the time of the employee's retirement.

[11] AA 72.

[12] AA 91-96.

[13] AA76-83.

[14] AA 101-105; see also AA 167 (transcript of argument). Mr. Fontano was apparently confused by PERS' use of the term "survivor's benefit" to describe ***both*** post-retirement survivorship benefits under an option selection and the statutory death benefits that are available only to current spouses. *See* Exhibit 1 at 43 & n. 165.



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Toni hired attorney Christy Escobar, who replied, asserting that Toni was entitled to the property awarded to her in the divorce for her lifetime, just as Eric was entitled to the property awarded to him for his lifetime.[15]

The parties first appeared before the district court on October 16, 2013.[16] Eric's primary argument was that Toni was not entitled to either payments at Eric's eligibility or for any survivorship benefits, based on his construction of the three-line term in the MOU.[17] Toni's position was that, as the spouse during the decades that the pension accrued, she was entitled to survivorship protection from divestment of her share of the retirement benefits.[18]

After hearing argument, the district court made an interim determination that Toni was entitled to her time-rule percentage of Eric's retirement benefits both during his life and after his death,[19] but directed the parties to "confer and prepare a new QDRO" and set a return date.[20]

At the return hearing on December 16, 2013, the district court indicated that the matter should have been resolved by the prior rulings, and gave the parties and prior counsel another couple of months to submit a joint order.[21]

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[15] AA 106-136.

[16] AA 151-174 (transcript).

[17] AA 155.

[18] AA 165-66.

[19] AA 168.

[20] RA 1-3.

[21] AA 175-184 (transcript).



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When prior counsel were unable to do so, Toni hired this office in late January, 2014, to bring the matter to a conclusion. We contacted Mr. Fontano in an attempt to resolve the outstanding issues raised by Eric's objections, and prepared a slightly amended QDRO on our letterhead for his review.[22]

When Mr. Fontano finally sent us a response months later, it was merely a rehash of his prior, already-rejected argument that despite the district court's orders, Eric did not ***want*** retirement benefits to be divided pursuant to the time-rule, did not want Toni to have any survivor benefit protection, and did not want to pay Toni her share at his first eligibility for retirement.[23]

We replied, noting that Mr. Fontano's requests did not comport with the *Decree*, the Court's *Order* filed December 16, 2013, or with Nevada law.[24] Since Eric refused to allow his counsel to sign a QDRO comporting with Judge Ochoa's orders, we requested a hearing in an attempt to conclude the matter.

On April 21, 2014, the Court heard limited argument at a telephonic hearing.[25] During that hearing, counsel discussed the prior CLE sessions and materials on the subject of PERS divisions which included in-depth

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[22] AA 214, 228-235; AA 187-88 (transcript).

[23] AA 214, 236-239.

[24] AA 214-215, 240-243.

[25] AA 185-199.



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discussions of the *Hedlund* case[26] and its briefing, amicus participation, and decision.[27] Some members of this Court were present at those CLE sessions.

During the telephonic hearing, the district court observed that the parties had made their deal five years earlier and that Eric was not free to change his agreement; Eric's lawyer responded that the MOU provision was just "a one-sentence agreement" and that "what the two parties agreed to may have been completely different between the two of them in their minds as to what they were agreeing to."[28] Ultimately, the district court set a briefing schedule.[29]

Upon direct inquiry, Mr. Fontano also promised that Eric would not retire until the issues before the Court were resolved, since his retirement would make some of the benefits at issue unavailable to the district court to distribute.[30]

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[26] *Hedlund v. Hedlund*, No. 48944, *Order of Reversal and Remand* (Sept. 25, 2009); AA 245-249.

[27] No one in this case has suggested use of the *Hedlund* decision as binding precedent in violation of SCR 123 – see AA 219 & fn. 26, and we do not do so here. But the CLE materials and annual Ely Seminar discussions including discussion of that *Order* were part of the argument and record below; the awkwardness of non-reference to materials in which such cases are discussed was part of the basis for now-pending ADKT 504 to amend NRAP 36 to allow unlimited citation to unpublished decisions of the Nevada Supreme Court and the Court of Appeals and amend SCR 123.

[28] AA 195.

[29] AA 196-199. At the district court's request, the briefing was to include the *Hedlund* amicus brief and *Order*.

[30] AA 197.



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Three days before his *Brief* was due, Eric fired Mr. Fontano and retained his present counsel, Neil J. Beller, Esq.[31] We supplied Mr. Beller with extensive background materials, citations, and precedents to make his review of the law and issues easier; we agreed to a further extension of time to get his already-overdue *Brief* on file on the continued explicit promise that Eric would not retire before all issues were resolved.[32]

Mr. Beller filed a brief, which reversed the assertion by Mr. Fontano; instead of saying that the MOU language was vague and the parties might have had different understandings, Mr. Beller argued that the one sentence in the MOU was an unambiguous "contract" that superseded the relevant statutes and all cases decided by this Court as to how retirement benefits are to be divided.[33]

We filed a *Response* noting that Eric's "new" argument had already been rejected by the district court and that, per Nevada law, Toni was entitled to her time-rule portion of the retirement benefits and to have those payments begin at Eric's first eligibility for retirement.[34]

At the district court's specific request,[35] the filing included the *Hedlund Order of Reversal and Remand*[36] and the *Amicus Brief*[37] filed during litigation

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[31] AA 200.

[32] AA 215.

[33] AA 203-209.

[34] AA 212-323.

[35] AA 194.

[36] AA 245-249.

[37] AA 251-307.



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of that appeal, both of which rejected exactly the same arguments that Eric was making, explaining why the time rule is the correct distribution of retirement benefits and that a former spouse is entitled to payment upon the worker's first eligibility for retirement.

The *Amicus Brief* included an exhaustive review of all Nevada cases involving retirement distribution,[38] the legislative history of the PERS statutes,[39] and the history and meaning of NRS 125.155,[40] explaining why there was no conflict between the statutes and this Court's holdings that a spouse is entitled to payments beginning at eligibility for retirement.[41]

Eric opposed the request for fees, stating that he should not have to pay attorney's fees no matter how incorrect his legal arguments were, based on his assertion that the request was "procedurally improper."[42] We replied.[43]

The district court took the matter under advisement for several months. When this Court issued its *Opinion* in *Henson*,[44] Judge Ochoa requested further briefing and we complied.[45] Eric did not file anything in response. After

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[38] AA 264-270.

[39] AA 270-274.

[40] AA 274-281.

[41] AA 281-296.

[42] AA 324-332.

[43] AA 333-338.

[44] *See Henson v. Henson*, 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, Oct. 2, 2014).

[45] RA 4-8 (*Supplement Addressing Recent New Authority*, filed October 6, 2014).



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another several months, the district court issued its *Decision* on January 27, 2015,[46] starting with a number of finding of facts central to this appeal:

> The parties were married for 26 years.
>
> Eric remarried and named his new wife as his survivor beneficiary.
>
> During divorce mediation, the parties agreed to the one sentence in the MOU about the PERS pension, and "Neither the [MOU], nor the Decree, nor any of the paperwork in the record, indicates any intention on the part of any person involved to do anything other than what the law provides and divide the community portion of all assets equally," including the PERS pension.
>
> Division of a "proportionate share" of a pension indicated intent to comply with Nevada law and make a time-rule division.
>
> The parties disagreed about survivorship benefits, with Toni indicating it was the only way to actually provide her property interest, and Eric claiming that there was no specific agreement to name her as a survivor beneficiary, and doing so would interfere with his desire to name his new wife as his survivor.

The district court then set out "principles of law" that it considered to mandate its rulings, starting with an extensive quote from this Court's *Opinion* in *Henson*, and directly leading to its conclusions of law:

> Because the MOU and *Decree* did not explicitly provide Toni with any survivorship protection, she was not entitled to

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[46] AA 344-349.



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any, because (quoting *Henson*) "the only pension the nonemployee spouse is guaranteed to receive is [the] community property interest in the unmodified service retirement allowance . . . payable through the life of the employee spouse."

The term "proportionate share" means a time rule division, Nevada case law provides for payment at first eligibility, and NRS 125.155 is permissive in nature and does not prohibit such payments, so Toni is entitled to her time-rule share of the PERS pension upon filing a motion asking for it.

We immediately filed a motion to have payments to Toni begin, in accordance with Judge Ochoa's *Decision*.[47] Eric opposed the request, seeking to reargue the entire case, essentially ignoring Judge Ochoa's *Decision* resolving exactly those points.[48] We replied.[49]

At the resulting hearing on April 23, 2015, the district court identified Eric's opposition as a motion for reconsideration and denied it.[50] Observing that Eric had appealed from the *Decision* but never filed a motion for stay, the district court stated that "there's no pre-decision on a motion to stay and a

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[47] AA 350-356.

[48] AA 357-365.

[49] AA 367-378.

[50] AA 390-391, 395-396.



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motion for bond" and inviting the filing of such a motion.[51] The *Order* requiring payments to Toni to begin was entered on May 7.[52]

Eric never filed the motion for stay in the district court as he said he would, and he never complied with the order to begin making payments, either. He simply ignored the rulings until we sought to hold him in contempt for doing so; then he filed a motion in this Court seeking to prevent the order to show cause from going forward.[53]

That most recent filing revealed that Eric has resigned from Metro, and presumably gone into pay status with PERS, thus rendering moot his appeal with the exception of his obligation to pay arrears, as he conceded (at 5-6).[54]

## ARGUMENT

### I. SUMMARY OF ARGUMENT

The parties both informed the district court that it must construe a vague one-sentence provision of the MOU that was incorporated into their *Decree*. The district court found that it must be interpreted, absent other evidence, as intended to conform to Nevada law; the standard of review of that decision is abuse of discretion.

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[51] AA 391-392, 397-399.

[52] AA 401-409.

[53] Filed September 4, 2015.

[54] Eric's motion mentions the prior failure of this office to file this *Answering Brief*. He is correct; due to an error in this office, there was no calendaring of this brief until receipt of this Court's order issued September 1, graciously extending the time to file it until September 12.



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Nevada law provides for a time-rule division of defined benefit plan pensions, and that the nonemployee spouse is entitled to begin receiving her share at the employee's eligibility for retirement.[55]

The recitation of the (correct) statement that the PERS system would not pay out any funds until the employee retired had no effect on the right of the spouse to payments upon eligibility for retirement, or on the obligation of the employee spouse to make those payments when requested. Nothing in the record provided a hint that Toni's right to those payments had been waived or "contracted" away.

The holding in *Wolff*[56] that a community property division of retirement benefits creates sole and separate property interests in each spouse was correct, but PERS refuses to enforce the Court's holding, leading to disproportionate division of assets and a violation of NRS 125.150(1)(b). The *Wolff* holding is contradicted by the secondary holding in *Henson*, which was based upon an incorrect "fact" about retirement benefit divisions.

Actually, survivorship interests are ***part*** of the property interests and must be divided to effect the equal property mandate of NRS 125.150. In accordance with a recent statutory amendment, omission of a survivorship interest from a decree can and should be corrected by way of post-decree motion practice.

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[55] *See Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[56] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).



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## II. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION

Mis-citing the holding of a 1950 case,[57] Eric asserts (at 7) that the standard of review in this appeal is *de novo*. He is incorrect.

Most decisions of family law issues are reviewed for an abuse of discretion.[58] Generally, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous."[59] An open and obvious error of law can also be an abuse of discretion,[60] as can a court's failure to ***exercise*** discretion when required to do so.[61] Also, a court can err in the exercise of personal judgment and does so to a level meriting appellate intervention when ***no*** reasonable judge could reach the conclusion reached under the particular circumstances.[62] A court does ***not***

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[57] *Ormachea v. Ormachea*, 67 Nev. 273, 217 P.2d 355 (1950). Actually, that opinion largely addressed the discretion of the trial court; the referenced pages (67 Nev. at 291-292) concerned whether or not the earlier of two orders rendered were appealable ("If we concede that appellant's rights under the original decision are uncertain, we find no such defect in the final judgment of the trial court.")

[58] *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996).

[59] *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982).

[60] *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979).

[61] *Massey v. Sunrise Hospital*, 102 Nev. 367, 724 P.2d 208 (1986).

[62] *Franklin v. Bartsas Realty, Inc., supra*; *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942).



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abuse its discretion, however, when it reaches a result which could be found by a reasonable judge.[63]

Here, both parties admitted that the language used in their MOU was vague; Eric's counsel asserted that "what the two parties agreed to may have been completely different between the two of them in their minds as to what they were agreeing to"[64] and so asked the district court to construe the language of the MOU incorporated in their *Decree*.

A trial court has inherent authority to construe and interpret its own orders.[65] In doing so, a trial court is to construe agreements incorporated in an order "as meaning what it may reasonably be inferred the parties intended."[66] Reviews of what is "reasonable" are definitionally addressed to discretion and abuse of discretion, which will not be found if the rulings are "supported by substantial evidence."[67] And "substantial evidence" exists whenever the

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[63] *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).

[64] AA 195.

[65] *See Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428 (2007) (a trial court has the inherent authority to enforce its decrees); *Grenz v. Grenz*, 78 Nev. 394, 274 P.2d 891 (1962) (a trial court has the inherent power to construe its judgments and decrees and remove ambiguities in them); *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947); *Lindsay v. Lindsay*, 52 Nev. 26, 280 P. 95 (1929).

[66] *Murphy, supra*, 64 Nev. at 453.

[67] *Ellis v. Carucci*, 123 Nev. 145, 161 P.3d 239 (2007); *Shydler v. Shydler*, 114 Nev. 192, 196, 954 P.2d 37, 39 (1998).



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evidence before the trial court was that which a "sensible person"[68] or "reasonable person"[69] may "accept as adequate to sustain a judgment."

The determination of the parties' intent was entrusted to the discretion of the district court, and the validity of the ruling made is reviewed in accordance with the "abuse of discretion" standard.

## III. NEVADA LAW REQUIRES A TIME RULE DIVISION OF PENSIONS

Eric argues (at 11-12) that NRS 125.155 "overrides the 'time rule' formula defined in *Gemma* and *Fondi*." He is wrong.

In *Wolff*[70] – another PERS case – this Court rejected a similar attack on the *Gemma/Fondi* holdings, and explicitly reaffirmed its holdings in *Gemma*, *Fondi*, and *Sertic*. Contrary to Eric's assertion (at 11-12), and as this Court correctly noted in *Henson*,[71] the time rule does not "estimate" anything, and does not conflict with NRS 125.155 or any other statute.

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[68] *See Schmanski v. Schmanski*, 115 Nev. 247, 251, 984 P.2d 752, 755 (1999); *Williams v. Williams*, 120 Nev. 559, 97 P.3d 1124 (2004).

[69] *Ellis v. Carucci*, 123 Nev. 145, 149,161 P.3d 239, 242 (2007).

[70] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[71] "[N]either the divorce decree nor the QDRO here based its award on an 'estimated increase in value.' The divorce decree . . . specified that the pension would be 'divided in accordance with the "time rule"' . . . ."



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## IV. NEVADA LAW REQUIRES PAYMENT OF THE SPOUSAL SHARE AT FIRST ELIGIBILITY FOR RETIREMENT

The heart of Eric's appeal (at 7-11) is the contention that the one sentence in the parties' MOU about PERS benefits, incorporated in their *Decree*, was an "unambiguous contract" constituting Toni's waiver of her right to receive pension payments from Eric upon his eligibility to retire. Eric is incorrect.

First, Eric only adopted that argument after his original position – that the MOU sentence was vague and ambiguous and required construction by the district court[72] – resulted in that court finding that there was no evidence in the record that anyone involved in the mediated agreement had any intention to do anything but comply with the case law mandating distribution upon eligibility for retirement.[73] And there is no "independent contract" – the MOU was merged into the *Decree*.[74]

The MOU language correctly states only that the "trustee of Nevada PERS" will make payment to both parties when Eric retires. That terse statement conforms to Chapter 286 of the Nevada Revised Statutes – PERS itself will not pay out any retirement proceeds to ***anyone*** until the employee

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[72] AA 195.

[73] AA 344-345. That included the mediator, former family court judge Robert Gaston, who would not have distributed property contrary to the direction of NRS 125.150 without getting detailed agreement from both parties to do so, as was discussed below. See AA 357 & n. 3, AA 387-388; notably, either Eric never asked Mr. Gaston to verify Eric's retroactive recharacterization of what was mediated, or he did ask and Mr. Gaston told him that the agreement was intended to comply with Nevada law.

[74] AA 63.



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actually retires. The MOU said nothing about Toni receiving a portion of Eric's retirement at his first eligibility from him directly (the only way such pre-retirement payments are *ever* made), or the requirement in the case law that he begin making payments to Toni of her share upon his eligibility for retirement.

As this Court set out in *Sertic*, clarifying the holdings in both *Gemma* and *Fondi*, the normal distribution of a spousal share of a pension is upon the employee spouse's first eligibility for retirement, and if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker ***did*** retire at that time.[75] This is the rule in all community property states, and many other states around the country.[76]

Eric does not even suggest the existence of any contrary authority. Instead, he contends that the parties had a "contract" which somehow made Eric immune from the law. Judge Ochoa noted that while people could decide

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[75] *See* discussion and explanation in Exhibit 1 at 7, 10-11, 15, 21, 25, 35, 68 & fn. 240.

[76] *See, e.g., In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received "or at least until the earner is eligible to retire"); *see also* AA 295-303; discussion in Exhibit 1 at 20-21.



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to divide property other than as provided by law, they had to be very specific in doing so.[77]

The judge was correct – the requirement of equal division of community property is stated right on the face of the statute[78] and has been acknowledged by this Court in at least two recent opinions.[79] As this Court has directed, any language in a divorce decree that could be interpreted more than one way should be construed to conform to the law unless there is extremely clear proof of an intention to do otherwise.[80] This Court has been very critical of attempted "contracts" to avoid requirements under law, particularly when the assertion is of some "implied" contract.[81]

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[77] AA 395-396.

[78] NRS 125.150(1)(b).

[79] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013). Those are the opinions that were (apparently accidentally) undercut by the second *Henson* holding, creating a conflict, as discussed in the fifth section of this brief.

[80] *See, e.g., Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988) (in the absence of express language specifying otherwise, the phrase "one-half of [James'] pension with the United States Government" was construed as referencing the pension ***earned during marriage***).

[81] *See, e.g., Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002); *Vaile v. Porsboll*, 128 Nev. ___, 268 P.3d 1272 (Adv. Opn. Number 3, Jan. 26, 2012); *Friedman v. Dist. Ct.*, 127 Nev. ___, 264 P.3d 1161 (Adv. Opn. 75, Nov. 23, 2011).



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*Any* "contract" requires an offer and acceptance, meeting of the minds, and consideration.[82] A "meeting of the minds" requires parties to agree "upon the contract's essential terms."[83] What constitutes "essential terms" varies case-by-case,[84] but if a waiver of rights was intended, that term was missing from the MOU. As Eric acknowledged below, "any waiver of a right must be explicit and clearly intended as a waiver."[85]

The determination of whether there is a contractual agreement is left to the sound discretion of the trial court. If the court determines that an essential term was not included, there is no contract on that term.[86] Here, Judge Ochoa found ***no*** evidence that Toni agreed to waive her right to payment upon Eric's first eligibility for retirement.

Grasping for a rationale under which to deny Toni her share of the property, Eric asserts (at 8-9) that NRS 125.155 requires no payments until actual retirement, but that is simply not so, and Eric's entirely unsupported

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[82] *May v. Anderson*, 121 Nev. 668, 672 n.1, 119 P.3d 1254, 1257 (2005), citing *M & D Balloons, Inc. v. Courtaulds, PLC*, 1990 U.S. Dist. LEXIS 15652, No. 90-C-834, 1990 WL 186077 at 3 (N.D. Ill., Nov. 21, 1990).

[83] *See In re Zappos, Inc.*, ___ Fed. Supp. ___, 2015 U.S. Dist LEXIS 39479 (D. Nev., March 27, 2015); *Certified Fire Prot. Inc. v. Precision Constr.*, 128 Nev. ____, ____, 283 P.3d 250, 255 (Adv. Opn. No. 35, Aug. 9, 2012).

[84] *May v. Anderson*, 121 Nev. 668, 672 n.1, 119 P.3d 1254, 1257 (2005); *see also Johnson v. BP Exploration & Prod. (In re Horizon)*, 786 F.3d 344 (5th Cir. 2015).

[85] AA 140.

[86] The issue of whether the parties had actually entered into a binding contract as claimed by Eric, is reviewed by this Court using an abuse of discretion standard.



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sloppy cut-and-paste from his trial court submission[87] does not demonstrate any conflict between that statute and this Court's decisions.

The rest of Eric's argument (at 9-11) is simply irrelevant. The district court found that there ***was*** no "contract" to evade Nevada law regarding payment upon eligibility, and Eric presented no evidence except his years-after-the-fact recollection stating that any such thing existed. Eric's quotation (at 10) from NRS 286.6703 is meaningless; as detailed in the *Hedlund Amicus Brief*:

> The provision in question, NRS 286.6703(3)(e), states that an order that will be approved for direct payment by the system, must, among other things, "not require the payment of an allowance or benefit to an alternate payee before the retirement of a member or the distribution to or withdrawal of contributions by a member."
>
> As discussed at length above, the provision in question was adapted from a piece of ERISA, governing private retirements, but without all of the surrounding provisions which collectively permit the splitting off of a spousal share into a separate interest payable based on the life expectancy, etc., of the spouse. As explained by Deputy Attorney General Ray in 1993, the purpose of adopting the language was only to state clearly what PERS would and would not do, not substantively alter divorce law. That interpretation would be consistent with what courts have done regarding "payment at eligibility" case law applied to other retirement systems.[88]

No case, article, or commentary has ever suggested that the statutory language in question – which mirrors that of the statutes governing the Civil Service, and the military – has any greater effect in PERS cases than it does in those cases (i.e., no effect of any kind). The statutory language is simply irrelevant to the case law requiring payment ***by the employee*** to the former

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[87] *Cf.* AOB at 8-9 *with* AA 358. The references to "this court" in the *Opening Brief* were actually directed to the district court.

[88] *See* AA 287.



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spouse upon the employee's eligibility for retirement, and Eric has not suggested the existence of any authority saying otherwise.

Eric's citation (at 11-12) of NRS 125.155 is similarly unavailing. As detailed in the *Hedlund Amicus Brief*,[89] the statute is ***permissive***, not mandatory. The district court in this case so held, because the statute merely states that a court ***may*** order distribution of benefits to a spouse other than at first eligibility (if the court then provides adequate security).[90] Obviously, if a court "may" do something, it can just as easily not do it. Eric's assertion (at 11) that the word "may" in the statute somehow dictates an order simply makes no sense.[91]

Eric's claim (at 9-10) that Toni waived her rights in the MOU is baseless. "Waiver" requires ***proof*** of the unequivocal "intentional relinquishment of a known right."[92] As the district court observed,[93] there is zero evidence in the record to suggest that Toni waived her right to begin receiving her share of the pension upon Eric's eligibility for retirement.

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[89] *See* AA 268-70, 278, 281.

[90] AA 348. As discussed in the CLE materials, this Court noted the same observation in *Hedlund*. *See* AA 247.

[91] See *Butler v. State*, 120 Nev, 879, 102 P.3d 71 (2004) ("May," as used in legislative enactments, is a permissive grant of authority); *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994); *Libro v. Walls*, 103 Nev. 540, 746 P.2d 632 (1987) (use of term "may" in NRS 125.180 created an equitable defense to a support arrearages claim in the discretion of the trial court).

[92] *See, e.g., Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990).

[93] AA 396.



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In short, there is nothing in the record, in the statutes, in any case, or in any other authority from anywhere stating that Toni was not entitled to begin receiving her share of the pension upon Eric's eligibility for retirement.

## V. ERRORS AND CONFLICTS IN NEVADA CASE LAW REGARDING PERS RETIREMENT AND SURVIVORSHIP BENEFITS

As noted above, multiple members of this Court have attended CLE sessions in which this Court's published and unpublished decisions relating to PERS benefits have been closely analyzed, and in which certain outright errors of fact and law have been noted.[94] Usually, those errors were the result of the advocates presenting the cases simply not understanding – or not properly informing the Court – about the nuances of the retirement benefit programs at issue in the cases.[95]

On several occasions, members of this Court have instructed that the next time an appeal involving PERS retirement and survivorship benefits is

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[94] Including *Retirement Plan Division: What Every Nevada Divorce Lawyer Needs to Know* (State Bar of Nevada, Ely, Nevada, March, 2013); *Qualified Domestic Relations Orders Under ERISA and Nevada PERS: An Update and Guide for Family Lawyers and Family Court Judges* (State Bar of Nevada, Ely, Nevada, March, 2010).

[95] As noted in CLE materials for years, "The law governing division of retirement benefits is complex, and even many of those litigating retirement benefits cases, or forming legislation governing retirement benefit law, are often uninformed or confused as to what benefits exist, or how they are administered." *See* Exhibit 1 at 7; AA 263.



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before the Court, I should remind the Court of the errors and conflicts identified in the CLE sessions so they could be addressed and corrected.[96]

Apparently, the fact that the noted errors and conflicts have been addressed in unpublished orders has been the result of the misperception that these conflicts and problems are rare. They are not – there are ***many*** such cases – but most of the people involved do not have the resources to litigate them at the district court level, nevertheless bring them to the attention of this Court on appeal.[97] Accordingly, they are identified below.

### A. The *Wolff* Error as to Establishment of a Sole and Separate Ownership Interest by a Former Spouse in PERS Retirement Benefits

This Court construed the 1993 revision of NRS 125.150 in *Lofgren*,[98] and concluded that the statute ***required*** an equal division of community property unless compelling reasons to do otherwise existed and were expressly provided by the trial court in writing. Retirement benefits earned during a

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[96] As such a request was made following presentation of the 2013 CLE on these subjects, the materials from that seminar are attached as Exhibit 1 for the convenience of the Court.

[97] In this case, for example, Toni has an income of some $2,500 per month (see *Opposition to Motion to Stay* filed in this Court on September 11, 2015, at 5), and as the record shows in part, we are owed tens of thousands of dollars for years of litigation at the district court level, and costs and fees on appeal. *See* AA 315-323; Eric's *Motion to Stay* filed in this Court at Exhibit 5.

[98] *Lofgren v. Lofgren*, 112 Nev.1282, 926 P.2d 296 (1996).



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marriage are specifically included in the category of community property required to be equally divided.[99]

In *Wolff*[100] this Court affirmed the lower court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests,[101] so that even if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.

The holding was entirely correct as a matter of community property theory, but as this Court has been informed, it is simply ***not*** true in fact, as to either ***pre***-retirement survivorship (i.e., the employee spouse dies before retiring) or ***post***-retirement survivorship (i.e., the employee spouse dies after retiring).

### 1. Pensions Are Community Property

Retirement benefits fall under the general definition of community property in NRS 123.220: "all property" acquired after marriage, with certain exceptions. All such property is divided under NRS 125.150 – the key statute governing division of property upon divorce. It mandates an equal distribution

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[99] *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[100] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). *See also Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013) (reiterating statutory mandate of equal division of community property absent a written statement of compelling reasons to do otherwise).

[101] *Citing* 15A Am. Jur. 2d *Community Property* § 101 (1976).



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of community property in the absence written findings of a "compelling reason" for an unequal disposition.[102]

Nevada case law has long held that property acquired during marriage is presumed to be community property, and that the presumption can only be overcome by clear and convincing evidence.[103] The first Nevada case explicitly noting that retirement benefits earned during a marriage are divisible community property was *Ellett*.[104]

In *Forrest* ,[105] relying on the line of California opinions dividing the gross sum of all retirement benefits,[106] this Court held that "retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable."[107] In other words, the Court held that all forms of retirement benefits, whether or not vested, and whether or not matured, are community property subject to division.

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[102] NRS 125.150(1)(b). The statute also contains an exception to the statutory mandate of equal division where "otherwise provided" by either a premarital agreement or NRS 125.155, but as discussed above and detailed in the CLE materials, there is no mandate in that statute for an unequal distribution of PERS benefits.

[103] See, *e.g.*, *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[104] *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

[105] *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

[106] See *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976).

[107] *Forrest*, 99 Nev. at 607, 668 P.2d at 279.



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As discussed above and in Exhibit 1, this Court adopted the time rule, the "wait and see" approach, and the rule of payments to the spouse at first eligibility for retirement, following the California line of authorities, in *Gemma*, *Fondi*, and *Sertic*.

### 2. How PERS Retirement and Survivorship Benefits Actually Work

In every system like PERS – in which the payments (but not the retirement itself) can be divided – the structure of the plan determines what happens to the ***former spouse's*** portion of the payment stream if the spouse dies first: the payments revert to the employee, no matter ***what*** the court order distributing retirement benefits says.

The employee thus has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the ***full amount of the spouse's share*** of the benefit if she should die before him. If the former spouse dies first, the employee not only continues to get ***his*** share of the benefits, but he will ***also*** get ***her*** share, for as long as he lives, despite the community property principle stated in the *Wolff* opinion.

Where the ***employee*** dies first, however, various results are possible. For a former spouse to continue receiving money after death of the employee, there must be specific provision made by way of a separate, survivorship interest payable to the former spouse upon the death of the employee. Otherwise, payments being made to the former spouse simply stop; the spouse gets nothing, unless an option with a survivorship provision is selected.

This is just one of the ways in which the employee's rights are superior to those of the non-employee, even when benefits are "equally" divided, and



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is an unequal distribution of benefits, despite the mandate in NRS 125.150 that courts equally divide property upon divorce.

*Any* pension plan with an automatic reversion of the spousal share to the employee should the spouse die first[108] creates a problem in a state like Nevada, in which the marriage and divorce laws provide that the parties have present, existing, and equal interests in property acquired during marriage,[109] and that property is to be divided equally upon divorce.[110]

A former spouse who will be the recipient of retirement benefit payments if the employee spouse lives, but will not get such money if he dies, ***definitionally*** has an "insurable interest" in the life of the employee (this is true for PERS and non-PERS cases). The matter is one of fact, not a matter of discretion, award, or debate, as to any person who has a valid financial interest in the continued life of another.[111]

### 3. What this Court Attempted to Order in *Wolff*

As stated above, in *Wolff* this Court found that the PERS pension division created entirely separate property retirement interests in the spouses

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[108] This includes Nevada PERS and military retirement, but does not include private pensions under ERISA, where the pension itself can be divided. Civil Service benefits can be made to work one way or the other, either with reversion of the spousal share, or inheritance of that share to the spouse's heirs.

[109] NRS 123.225 provides that the "respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests, subject to the provisions of NRS 123.230."

[110] NRS 125.150(1)(b).

[111] *See, e.g.*, 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. § 1450(a)(4).



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so that the spouse's share would not revert to the employee if she died first, but PERS refuses to enforce that holding as not permitted by the structure of the retirement system.

The Court also reviewed NRS 286.6703 and surmised that if the employee died before retirement, a former spouse alternate payee would nevertheless receive "a refund of the contribution account."[112] On that basis, the Court reversed the order for the employee to obtain a private life insurance policy, finding that it would require an "unequal distribution of debt." This too was an attempted enforcement of the NRS 125.150 obligation to divide community property and debt equally.

However, the Court's surmise was incorrect. Under the PERS system, ***there is no pre-retirement survivorship benefit for a former spouse.*** There are very limited ***death*** benefits that can flow to a surviving current spouse or child, but ***not*** to a former spouse.[113] When a divorce occurs while the employee is still working, the ***only*** way to secure the former spouse's insurable interest in the retirement benefits is through a policy of private life insurance.[114]

The law, legislative history, and public policy considerations at play as to pre-retirement survivor annuities were discussed in the *Hedlund Amicus*

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[112] *Wolff v. Wolff*, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996).

[113] As noted above, Mr. Fontano had the same confusion between statutory death and post-retirement survivorship benefits, but they are two very different things.

[114] In "pension-speak," the PERS plan has no "pre-retirement survivor annuity." Other plans – such as all ERISA-based private retirement plans – ***do*** have such benefits as part of their required structure.



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*Brief*.[115] The *Wolff* holding reversing the order to provide private insurance for the spousal interest was error, since the benefit simply gave to the wife what the husband had "free" by the structure of the system – a survivorship interest in all funds paid to the wife, which reverted to him automatically if the former spouse died first.[116]

That *Amicus Brief* went over the same considerations relating to ***post***-retirement survivorship interests.[117] The Court's conclusion in *Wolff* about how the PERS system worked was incorrect as a matter of fact, but no one involved in *Henson* had a sufficient grasp of the issue to remind the Court of that error in briefing or at oral argument, leading to the error in *Henson* discussed below.

It is simply not true in a "divided payment stream" sort of retirement system (like PERS or military retirement) that a divorce simply awarding each party an interest in the benefits by percentage can create equal "separate property of each former spouse." That is why PERS refuses to enforce the *Wolff* holding, even refusing to honor any order that recites it.[118]

Rather, the structure of the plan itself creates ***unequal*** interests, requiring the court to enter further orders to actually give meaning to the *Wolff* and *Blanco* holdings – ***and*** the mandate of NRS 125.150 – to equally divide community property and debt. As Ms. DiFranza pointed out in her 2010 Ely

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[115] *See* AA 44-45.

[116] *See* Exhibit 1 at 45-48 & fn. 178.

[117] AA 40-44.

[118] *See* Exhibit 1 at 12, 47-48 & fn. 182 & 184; AA 38-40.



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materials,[119] the value of the survivorship component of the retirement benefits can be a quarter or half of the value of the pension, or more.

Any divorce judgment distributing a survivorship interest to one party but not to the other is ***inherently*** unequal.[120] This requires the divorce court to address and distribute survivorship interests as ***part*** of the pension division in order to make an equal division of a community property pension.

What this Court ***attempted*** to do in *Wolff* was entirely correct, but simply declaring the distribution equal did not make it so -- for the holding to have actual effect in the real world, distribution of the survivorship components is required.

### B. The *Henson* Contradiction of the *Wolff* Holding

*Henson* had two primary holdings. The first was that a non-employee spouse gives notice of her intention to obtain payment of her share of the pension after the employee's eligibility for retirement by filing a motion for those payments. The second was that if the survivorship component of the retirement was not specifically recited on the face of the underlying decree, it is lost to the non-employee spouse.

The *Wolff* holding (community property pensions are to be equally divided) is contradicted by the second holding in *Henson*, which was based upon recitation of a false "fact" about PERS pension divisions. This Court

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[119] *Qualified Domestic Relations Orders Under ERISA and Nevada PERS*, *supra*, posted at http://www.willicklawgroup.com/ely-2010-advanced-track-materials/.

[120] It is the equivalent of a decree awarding a new Mercedes to one party and a 30-year old Yugo to the other and declaring the distribution equal since both "got a car."



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found that the "pension" provision in the decree did not include a survivor beneficiary interest since "neither the employee nor the nonemployee spouse automatically receives a survivor beneficiary interest."[121]

That recitation is just not true because, as detailed above, the employee in any system like PERS ***does*** have an ***automatic*** survivorship interest in the non-employee spouse's benefits. Survivorship interests are ***necessarily*** implicated in any pension division, especially for a system like PERS. But on the basis of the false "fact," the Court concluded that only a lifetime series of payments was at issue.

In *Henson*, this Court also declared: "We are in agreement with California's approach to the distribution of a nonemployee spouse's portion of his or her community interest in an employee spouse's pension plan benefits." The California cases have long held that the survivorship interest of a pension plan is a ***component*** of the community property value of the asset, and is to be divided in any pension distribution.[122] Those holdings were later formalized in legislation.[123]

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[121] *Henson* slip op. at 9.

[122] *See In re Marriage of Nice*, 281 Cal. Rptr. 415, 230 Cal. App. 3d 444 (Ct. App. 1991); *see also In re Marriage of Becker*, 207 Cal. Rptr. 392, 161 Cal. App. 3d 65 (Ct. App. 1984); *In re Marriage of Carnall*, 265 Cal. Rptr. 271, 216 Cal. App. 3d 1010 (Ct. App. 1984); *In re Marriage of Sonne*, 225 P.3d 546, 105 Cal. Rptr. 3d 414 (Cal. 2010), as completed on remand with *In re Marriage of Sonne* [*Sonne II*], 111 Cal. Rptr. 3d 506, 185 Cal. App. 4th 1564 (Ct. App. 2010). There are many more such cases.

[123] California Family Code Section 2610:
(a) Except as provided in subdivision (b), the court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether



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NRS 125.150 contains a mandate to distribute benefits and burdens between spouses equally to the degree possible, absent written findings of compelling reasons to do otherwise. It is incumbent on the divorce courts to do so with ***whatever*** assets the couple has – including pension plans with terms that accord disparate rights between the employee and the spouse.

Adoption in Nevada of the California approach to pension division would be appropriate – the California and Nevada community property systems have the ***same*** directive of presumptive equal division of community property, and California has well-thought-out pension division case law that seeks to make division of retirement benefits ***actually*** "equal."

Accordingly, this Court in *Henson* ***should*** have found that any pension division ***inherently*** incorporates a survivorship interest, since the survivorship component is a large part of the value of the retirement benefits. That ***is*** the California rule, which this Court stated that it was adopting, but apparently no counsel involved in the *Henson* briefing or argument realized it.

*Henson* did not actually do what the opinion said it was doing; instead, it did nearly the opposite, essentially redefining the spousal share of a PERS pension from community property into a life estate based on the employee's life. If the decree of divorce is silent as to survivor benefits, those benefits are lost to the spouse, dispossessing the spouse if the employee pre-deceases her.

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> public or private, including all survivor and death benefits, including, but not limited to, any of the following:
>
> . . . .
>
> (2) Order a party to elect a survivor benefit annuity or other similar election for the benefit of the other party, as specified by the court, in any case in which a retirement plan provides for such an election, provided that no court shall order a retirement plan to provide increased benefits determined on the basis of actuarial value.



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This sets up a system in which every PERS division is grossly *un*equal unless the original divorce counsel is sufficiently skilled and knowledgeable to ensure that the decree formally recites the distribution of every part of the property being divided (specifically, the survivorship component of the retirement benefits).

And that presumes that there ***are*** lawyers involved. The majority of divorces in Nevada are between proper person litigants -- as these parties were – the overwhelming majority of whom have no idea how retirement or survivorship interests work, or what to recite in a divorce decree to properly distribute those interests.

To illustrate the conflict between community property theory and the mandate of NRS 125.150 to equally divide all property, and the second *Henson* holding, just apply it to any other assets that might be distributed – for instance, cars. The *Henson* holding, applied to those assets, would mean that –unless the decree specifically recited otherwise – if the non-employee spouse dies first, the employee spouse gets to keep his own car, and receives her car too; but if the employee spouse dies first, the non-employee spouse's car is taken away.

That result would not be tolerated as to any other item of community property, as a violation of the statutory mandate to provide each spouse with an equal share. Mandating the post-divorce destruction of a property interest whenever survivor benefit language is not specifically recited is just as much a violation of community property theory, as the California courts (and many others) have repeatedly held.



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### C. Omitted Property Is Now Subject to Partition

As detailed above, the survivorship component of a pension is simply one part of the retirement benefits, which are required to be divided equally. With the recent passage of AB 362, the Nevada Legislature accepted this Court's invitation in *Doan*[124] to permit partition of any such omitted property. The digest language states:

> Under existing law, in granting a divorce, a court must, to the extent practicable, make an equal disposition of the community property of the parties, unless the action is contrary to a valid premarital agreement between the parties or the court makes written findings setting forth a compelling reason for making an unequal disposition of the community property. (NRS 125.150) The Nevada Supreme Court has held that under Rule 60(b) of the Nevada Rules of Civil Procedure, relief from a divorce decree dividing community property between the parties may be obtained by: (1) filing within 6 months after the final decree a motion for relief or modification from the decree because of mistake, newly discovered evidence or fraud; or (2) showing exceptional circumstances justifying equitable relief in an independent civil action. (Kramer v. Kramer, 96 Nev. 759, 762 (1980); Amie v. Amie, 106 Nev. 541, 542 (1990)) In Doan v. Wilkerson, 130 Nev. Adv. Op. 48, 328 P.3d 498 (2014), the Nevada Supreme Court held that exceptional circumstances justifying equitable relief do not exist when a particular item of community property was disclosed and considered in a divorce action but omitted from the divorce decree. This bill authorizes a party in an action for divorce, separate maintenance or annulment to file a postjudgment motion to obtain an adjudication of any community property or liability that was omitted from the final decree or judgment as the result of fraud or mistake. Under this bill, such a motion must be filed within 3 years after the aggrieved party discovers the facts constituting the fraud or mistake. This bill further provides that the court has continuing jurisdiction to hear such a motion and must make an equal disposition of the omitted community property or liability unless the court finds that certain exceptions apply.

Addressing footnote 5 of *Henson*, a court order resulting from such a partition motion satisfies the requirement for "[a]n order of the court [that]

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[124] *Doan v. Wilkerson*, 130 Nev. ___, 328 P.3d 498 (Adv. Opn. No. 48, June 26, 2014).



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provides an alternative to an unmodified service retirement allowance" under NRS 125.155(3)(a)-(b).

The legislature saw that there was a problem with courts not actually distributing community property omitted either by fraud or mistake from a decree, since Nevada law ***requires*** the equal division of all such property absent findings of a compelling reason to do otherwise. The survivor benefit interests in a pension are ***property*** interests requiring partition; the intent of the statutory change is to prevent a party to a divorce from being denied an equal share of community property without recourse.

### D. Resolution of the *Wolff/Henson* Contradiction

As detailed above, the *Wolff* and *Blanco* holdings are consistent with both community property theory and the statutory mandate of NRS 125.150. But the second *Henson* holding directly undercuts that statutory mandate; it causes divorce decrees dividing pensions to be interpreted as not including one of their most valuable components, and thus causes an ***unequal*** distribution of retirement benefits between parties to a divorce whenever (as is typical) the language used is general, vague, or incomplete.

Respectfully, it would be poor public policy to not include the survivorship component of retirement benefits in the definition of "property" that must be divided upon divorce. Doing so directly contradicts this Court's holding in *Wolff* and *Blanco*, and is certain to cause both unjust enrichment and wrongful deprivation in violation of the mandate of NRS 125.150 – all without ***any*** valid purpose being served.[125]

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[125] Unfortunately, the decisional law of Nevada is widely perceived in other community property states as seeking to find rationalizations for unequal



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As many courts have observed, ensuring that ***both*** spouses get a survivorship interest securing their respective shares of a pension being divided between them simply provides the non-employee spouse a right already enjoyed by the employee: "the right to receive her share of the marital property awarded to her."[126]

The cost of the survivorship benefit should be divided as well. Unless upon divorce one party is entitled to a greater share of the benefits and a lesser share of the burdens accrued during marriage, it is necessary to deal with the structure of any pension being divided so that the parties benefit, and are burdened, as nearly equally as may be made true.

In a PERS case, that requires dividing the burden of the only survivorship benefit that ***has*** a cost – the one for the benefit of the spouse – between the parties, just as the parties share the zero cost of the employee's survivorship interest in the spouse's life.[127] Otherwise one of them gets a survivorship benefit for free, and the other gets a survivorship benefit at significant cost – which would violate the statutory requirement to equally divide property and debt.

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and inequitable distributions of community property despite the Nevada statutory mandate of presumptive equal division. *See Everything You Wanted to Know About Retirement Benefits But Were Afraid to Ask* (Council of Community Property States & State Bar of Idaho, Coeur d'Alene, Idaho, 2003 annual Symposium).

[126] *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995). *See* AA 298-303 & fn. 144 for a detailed explanation of the case law and public policy considerations relating to providing a survivorship interest with ***every*** allocation to a spouse of an interest in a pension.

[127] *See* Exhibit 1 at 46-47.



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Accordingly, the second *Henson* holding should be overturned – the spouse has an inherent survivorship interest in her share of the pension, because it is a valuable component of the retirement benefits and omitting it from distribution would violate the statutory mandate to equally divide community property.

### E. Application to this Case

As detailed above, the district court in this case originally found that Toni was entitled to her share of the PERS pension benefits both during life and after Eric's death,[128] just as he is entitled to (and has) his share of the PERS benefits during life and after Toni's death. That ruling was the law of the case,[129] but the district court reversed it based on *Henson*.[130]

If this Court revisits and overturns the second *Henson* holding as requested above, based on either community property theory and an understanding of how PERS actually works, ***or*** on the new partition statute, then it should remand this case for distribution to Toni of a survivorship interest in her share of the PERS pension.[131]

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[128] AA 168; RA 2.

[129] *See, e.g., Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 807 P.2d 208 (1991); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 766 P.2d 1322 (1988); Black's Law Dictionary 893, (7th ed. 1999).

[130] AA 346-347.

[131] To the degree Eric's retirement during the pendency of this appeal makes it impossible for PERS to honor such an award, the proceedings on remand will be restricted to compensation to Toni for the value of that property interest.



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## VI. CONCLUSION

Eric's position that he has greater rights than Toni to the community property acquired during the parties' 26-year marriage is unsupported and unsupportable. Toni is entitled to her time rule interest in the PERS pension benefits upon Eric's eligibility for retirement, and the district court acted well within its discretion in so holding.

Survivorship benefits are a valuable component of a pension, and providing them to only one party upon divorce makes a division of the pension inherently unequal. This Court should therefore revisit the second holding of *Henson* and overturn it as a violation of community property principles and for contradiction of the holdings of *Wolff*, *Blanco*, and the equal-distribution mandate of NRS 125.150. In any event, the Court should recognize that omitted survivorship benefits are property rights subject to partition upon discovery of the omission.

On remand, Toni should receive the same security for her portion of the pension benefits that Eric has for his.

Respectfully submitted,
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## 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:

[ **X** ] This brief has been prepared in a proportionally spaced typeface using Corel WordPerfect Office X6, Standard Edition in font size 14, and the type style of Times New Roman; or

[ ] This brief has been prepared in a monospaced typeface using [*state name and version of word processing program*] with [*state number of characters per inch and name of type style*].

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:

[ **X** ] Proportionately spaced, has a typeface of 14 points or more and contains 10,503 words; or

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[ ] 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



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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 14th day of September, 2015.

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## CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I certify that I am an employee of the WILLICK LAW GROUP and that on this 14 day of September, 2015, documents entitled *RESPONDENT'S ANSWERING BRIEF* and *RESPONDENT'S APPENDIX* were e-mailed, and were filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list, to the attorney listed below at the address, email address, and/or facsimile number indicated below:

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Attorney for Appellant

That there is regular communication between this office and the place so addressed.

An Employee of the WILLICK LAW GROUP

P:\wp16\HOLYOAK,T\SCPLEADINGS\00099421.WPD

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# EXHIBIT 3

Electronically Filed
Oct 13 2015 10:17 a.m.
Tracie K. Lindeman
Clerk of Supreme Court

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

| | |
|---|---|
| ERIC HOLYOAK,<br><br>Appellant,<br><br>v.<br><br>TONI HOLYOAK,<br><br>Respondent. | Docket No. 67490<br><br>District Court Case No.: D-08-395501-Z<br><br>**APPELLANT'S REPLY BRIEF** |

NEIL J. BELLER, LTD.
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Attorney for Appellant



Docket 67490 Document 2015-31045

## NRAP 26.1 DISCLOSURE STATEMENT

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

Neil J. Beller, Esq.

Neil J. Beller, Ltd.

Prior to the time Mr. Beller represented Appellant Eric Holyoak, James A. Fontano, Esq., Nitz, Walton & Heaton, Ltd. represented Appellant.

NEIL J. BELLER, LTD.

/s/ Neil J. Beller
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**STATUTES AND RULES**

## I. ARGUMENT

Pursuant to NRAP 28 [c], which provides that a reply Brief is limited to answering any new matter set forth in the opposing brief, Appellant Eric will only respond to the new matter asserted by Respondent Toni in her Answering Brief.

### I. Respondent's New Matter

Respondent's Errors and Conflicts in Nevada Case Law Regarding PERS Retirement and Survivorship Benefits should not be considered by this Court with regard to the issue of survivorship interest. The issue of "survivorship interest" is not relevant to this appeal.

If Respondent wanted to argue regarding a survivorship interest, then, Respondent had the opportunity to appeal that portion of the Order and Decision of January 27, 2015. AA339, AA342-347. Respondent did not file any notice of appeal within the required time period. Nor did Respondent file a cross-appeal when Appellant filed this Appeal. Thus, Respondent cannot now put forth the statement that this Court should remand this case for distribution to Toni of a survivorship interest in her share of the PERS pension. Survivorship interest is not on appeal in this instant appeal.

It appears Respondent's counsel, Mr. Willick is attempting to again convince this Court that based on public policy, the survivorship component of retirement benefits should be included in the definition of property divided upon divorce. This Court was presented with a Petition for Rehearing in *Henson v. Henson*, 130 Nev., 334 P.3d 933 (Adv.Op. 79, 2014). Said Petition was denied by this Court. This Court has already denied the rehearing in *Henson*. There is no good reason for this Court to again revisit the matter of survivor benefits. Further, as noted in the preceding, if Mr. Willick wanted the matter of survivor benefits pursued further, Respondent should have filed an appeal or cross appeal on that particular issue.

Further, in his Amended Notice of Appeal regarding the May 7, 2015 Order, Eric

specifically stated that order provides that Plaintiff (Toni) is entitled to begin immediately receiving her share of Defendant's (Eric) retirement benefits. That is the only issue relating to Eric's appeal: the time when Toni is entitled to receive those benefits.

## II. CONCLUSION

The Divorce Decree and the incorporated MOU, which is a binding contract and agreed upon and signed by both Eric and Toni in 2008, control the issue of when Toni receives her proportionate share of Eric's retirement account. Toni is not entitled to receive any PERS benefits until the time Eric actually retires.

Eric requests this Honorable Court to reverse the May 7, 2015 Court Order that is based on the District Court's Decision of January 27, 2015, and order that Toni is not eligible to receive her proportionate share of Eric's PERS benefits until Eric actually retires.

Eric has now retired from METRO. Thus, Toni is now eligible to receive her proportionate share of Eric's PERS benefits. The only issues before this Court are the four Statement of Issues Eric presented in his Opening Brief. This Court's decision on these issues will impact whether or not Eric will be forced to pay Toni any benefit amounts prior to the point in time (August 7, 2015) that Eric retired.

DATED this 13th day of October, 2015.

NEIL J. BELLER, LTD.

/s/Neil J Beller

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Attorney for Appellant
Eric Holyoak

## 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 Word Perfect X3 in font size 14 and type style Times New Roman.

2. I further certify that this Brief complies with the page or type volume limitation 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 or more and contains 1133 words, and does not exceed 15 pages.

Finally, I hereby certify that I have read this **APPELLANT'S REPLY 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 28(e), which requires every section of the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relief 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.

NEIL J. BELLER, LTD.

/s/ Neil J. Beller

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Attorney for Appellant

**CERTIFICATE OF SERVICE**

I certify that I am an employee of NEIL J. BELLER, LTD., and that on the 13th day of October, 2015, I caused the foregoing **APPELLANT'S REPLY BRIEF** to be served by e-service and also by hand delivering same to the following:

Marshall S. Willick, Esq.
Trevor M. Creel, Esq.
Willick Las Group
3591 E. Bonanza Rd., #200
Las Vegas, NV 89110

An Employee of NEIL J. BELLER, LTD.

# EXHIBIT 4

# IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * * * * * * * *

ERIC HOLYOAK,

Petitioner,

vs.

TONI HOLYOAK,

Respondent.

SC NO: 67490
DC NO: D-08-389501-Z

Electronically Filed
Jan 11 2016 01:14 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

## MOTION FOR ORDER OF LIMITED REMAND TO THE DISTRICT COURT

During enforcement motions pursued in the district court, the issues of fees was raised. The trial court judge (Judge Ritchie) expressed concern that the issue might not be entirely collateral, even though the fees concerned only the enforcement proceedings in district court, because fees are also at issue on appeal in this Court, as to earlier proceedings at the district court level.[1]

Accordingly, out of an abundance of caution, the district court has indicated that it would be inclined to enter an order awarding Toni her reasonable attorney's fees and costs incurred at the district court level regarding her requests for enforcement of the underlying orders.

This *Motion* is based upon the pleadings and papers on file herein and the points and authorities provided below.

[1] Remaining pending in the appeal are fees relating to earlier proceedings heard by Judge Ochoa, including Toni's *Motion for Immediate Election of Defendant's (Eric) Nevada PERS Benefits*, filed on February 4, 2015.

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## I. FACTS LEADING TO THE FILING OF THIS MOTION

The parties were married on June 5, 1982, and divorced 26 years later by way of a Nevada *Decree* filed August 14, 2008.[2] At the time of divorce, they had one minor child, who is now emancipated. During the marriage, Eric worked as a police officer and participated in the Nevada Public Employees' Retirement System (PERS).

The *Decree* provided that Toni was to receive her proportionate share of the Eric's Nevada PERS retirement. When Toni attempted to implement a Qualified Domestic Relations Order (QDRO) reflecting the parties' agreed upon division, Eric resisted and that action spawned substantial post-divorce litigation.

Ultimately, the district court, issued a *Decision* and *Order* on January 27, 2015.[3] We immediately filed a *Motion* to have retirement payments to Toni begin, as Eric was eligible to retire at the time of the Court's *Decision.*[4] Eric opposed the request, seeking to reargue the entire case, essentially ignoring Judge Ochoa's *Decision* resolving exactly those points.[5] We replied.[6]

At the resulting hearing on April 23, 2015, the district court identified Eric's opposition as a motion for reconsideration and denied it.[7] Observing that Eric had appealed from the *Decision* on February 25, 2015, but never filed a motion for stay, the district court stated that "there's no pre-decision on a motion to stay and a motion for bond" and inviting the filing of such a motion.[8] The *Order* requiring payments

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[2] AA 60-67.

[3] AA 339-349.

[4] AA 350-356.

[5] AA 357-365.

[6] AA 367-378.

[7] AA 390-391, 395-396.

[8] AA 391-392, 397-399.

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to Toni to begin was entered on May 7.[9] Eric subsequently filed an *Amended Notice of Appeal* regarding that *Order* on June 3, 2015.

Since the filing of Eric's original *Notice of Appeal*, substantial attorney's fees and costs and costs have been incurred by Toni at the lower court level seeking enforcement of the underlying district court orders. In light of these expenses, Toni submitted a request to the district court for an award of all of her fees and costs incurred in the enforcement motions. On December 8, 2015, the district court made the following findings:

> 10. The Court also understands that because a judgment has been entered relating to the amounts owed – miscellaneous fees have been incurred in having an appropriate QDRO entered with the Court that is consistent with the law of the case, and that a request for sanctions has been made – fees regarding those issues could be considered under the collateral jurisdiction of the Court, with the understanding that they may not be considered collateral in light of case law, including the *Mack-Manley v. Mack* decision.[10] [time index 11:38:19]. However, in an abundance of caution, the Court is going to certify that it would consider relief for the Plaintiff in this regard as it relates to a judgment for attorney's fees in enforcing the terms of the Court's orders and any contempt proceedings from the date the appeal was filed, coupled with any other appropriate financial relief. [time index 11:38:54].
>
> 11. Whether or not the Court grants attorney's fees or other financial relief to the Plaintiff is up to the Nevada Supreme Court upon a remand after a decision, or upon a procedure to issue an order during the pendency of the appeal approved by the Nevada Supreme Court pursuant to *Huneycutt*.[11] [time index 11:39:22].

Given the above findings, in which the district court indicated that it would consider an award of attorney's fees and costs once an *Order of Limited Remand* was entered permitting the district court do so, this *Motion* follows.

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[9] AA 401-409.

[10] 112 Nev. 849, 138 P.3d 525 (2006).

[11] *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978).



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## POINTS AND AUTHORITIES

## II. LEGAL ANALYSIS

This Court has held that:

> when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, [but] the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits.[12]

In *Huneycutt*, this Court adopted a procedure providing that if a party to an appeal believes a basis exists to alter, vacate, or otherwise modify or change an order or judgment challenged on appeal after an appeal from the order or judgment has been perfected in this Court, the party can seek to have the district court certify its intent to grant the requested relief, and the party may then move this Court for remand of the matter to the district court for entry of an order granting the requested relief.[13]

We believe that Toni's request for enforcement of the Court's underlying orders does not constitute a request to alter, vacate, or otherwise modify or change the orders challenged on appeal – quite the opposite, actually. Frankly, we believe these proceedings to be unnecessary, since the fees in question relate solely to post-notice-of-appeal enforcement, and an order awarding them would be independently appealable, and so are definitionally collateral.[14]

However, we acknowledge the district's court's desire to proceed cautiously, and in light of the order entered by the district court, ask this Court to formally remand the portion of the case necessary to permit the district court to enter an order for fees incurred since Eric's filing of his original *Notice of Appeal* relating to the enforcement hearings.

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[12] *Mack-Manley*, 112 Nev. at 855, 138 P.3d at 529-30.

[13] *Huneycutt*, 94 Nev. at 79-81, 575 P. 2d at 585-86.

[14] *Campos-Garcia v. Johnson*, 130 Nev. ___, 331 P.3d 890 (Adv. Opn. No. 64, Aug 7, 2014).



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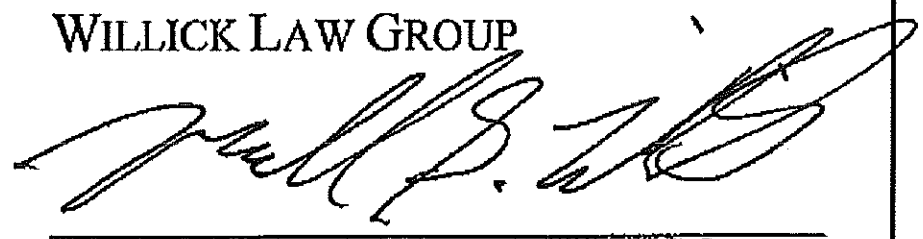
## III. CONCLUSION

The fees being requested relate to post-notice-of-appeal enforcement of the district court's orders; we respectfully request this Court enter an *Order of Limited Remand* affording the district court the authority to render an attorney's fee award for those proceedings.

**DATED** this 11th day of January, 2016.

Respectfully Submitted By:

WILLICK LAW GROUP



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Email@willicklawgroup.com
*Attorneys for Respondent*

## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the WILLICK LAW GROUP and on this date 11 day of January, 2016, Respondent's *Motion for Order of Limited Remand to the District Court* was filed electronically with the Clerk of the Nevada Supreme court, and therefore electronic service was made in accordance with the master service list as follows:

Marshal S. Willick, Esq.
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*Attorney for Respondent*

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*Attorney for Appellant*

An Employee of the WILLICK LAW GROUP

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# EXHIBIT 5

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC HOLYOAK,
Appellant,
vs.
TONI HOLYOAK,
Respondent.

No. 67490

FILED
FEB 23 2016
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

*ORDER DENYING MOTION*

This is an appeal from a post-divorce decree order regarding distribution of retirement benefits. Respondent has filed a motion requesting this court remand this appeal to the district court for the limited purpose of allowing the district court to enter an order awarding attorney fees. No good cause appearing, the motion is denied. A remand is not necessary for such purpose. "Although, when an appeal is perfected, the district court is divested of jurisdiction to revisit issues that are pending before this court, the district court retains jurisdiction to enter orders on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal's merits." *Mack-Manley v. Manley*, 122 Nev. 849, 855, 138 P.3d 525, 529-30 (2006). The district court retains jurisdiction to resolve matters collateral to the final judgment. *See Lee v. GNLV Corp.*, 116 Nev. 424, 996 P.3d 416 (2000) (defining a final judgment as one that disposes of all issues presented in the case, and leaves nothing for the future consideration of the district court, except for post-judgment issues such as attorney fees and costs). Accordingly, the motion is denied.

It is so ORDERED.

C.J.

cc: Hon. Vincent Ochoa, District Judge
Neil J. Beller, Ltd.
Willick Law Group
Eighth District Court Clerk

# EXHIBIT 6

Electronically Filed
03/18/2016 04:14:09 PM

CLERK OF THE COURT

MOT
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Email: email@willicklawgroup.com
Former Attorney for Plaintiff

**DISTRICT COURT**
**FAMILY DIVISION**
**CLARK COUNTY, NEVADA**

TONI HOLYOAK,

Plaintiff,

vs.

ERIC HOLYOAK,

Defendant.

CASE NO: D-08-395501-Z
DEPT. NO: H

DATE OF HEARING: 5/2/16
TIME OF HEARING: 10:00 AM

ORAL ARGUMENT Yes X No ___

*NOTICE*: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.

# WILLICK LAW GROUP'S MOTION TO ADJUDICATE ATTORNEY'S RIGHTS, TO ENFORCE ATTORNEY'S LIEN, AND FOR AN AWARD OF ATTORNEY'S FEES

The WILLICK LAW GROUP has been substituted out as counsel for our former client. This *Motion* is brought to adjudicate our statutory right to enforce our lien, and an order for attorney's fees in accordance with our written contracts with our former client.

This *Motion* is made and based upon the papers and pleadings on file herein, and the Points and Authorities and Declaration of Marshal S. Willick, Esq., below.

**NOTICE OF MOTION**

TO: DAWN R. THRONE, ESQ, Current Attorney for Plaintiff, and

TO: TONI HOLYOAK, Plaintiff, and

TO: NEIL J. BELLER, ESQ., Attorney for Defendant, and

TO: ERIC HOLYOAK, Defendant.

**YOU WILL EACH TAKE NOTICE** that on the 2nd day of May, 2016, at the hour of 10:00 AM .m. in Department H of the above-entitled Court, the Movant, Marshal S. Willick, will move to adjudicate rights he has to be paid attorney's fees and to enforce his attorney's lien.

**POINTS AND AUTHORITIES**

**I. FACTS**

Plaintiff, Toni Holyoak, originally hired the WILLICK LAW GROUP on January 29, 2014, for the purpose of negotiating the option selection for a Nevada PERS Plan. This blossomed into representation in a highly contested case in the District Court and in the Nevada Supreme Court.[1] The fee agreements are attached as Exhibits "1" and "2." Since the time of hiring this office, considerable time and work has been expended by this law office on Toni's behalf. Toni's fees exceeded the initial retainer as evidenced by her Statement of Account attached hereto as Exhibit "3." Toni failed to maintain the $2,500 minimum trust requirement as specified in her fee agreement executed on January 29, 2014 (page 1, paragraph 1).

[1] A separate retainer agreement was executed for the Appeal.

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## II. ATTORNEY'S LIEN

### A. There Is an Unambiguous Statutory Right to an Attorney's Lien

NRS 18.015 Lien for attorney's fees: Amount; perfection; enforcement.

1. An attorney at law shall have a lien upon any claim, demand or cause of action, including any claim for unliquidated damages, which has been placed in his hands by a client for suit or collection, or upon which a suit or other action has been instituted. The lien is for the amount of any fee which has been agreed upon by the attorney and client. In the absence of an agreement, the lien is for a reasonable fee for the services which the attorney has rendered for the client on account of the suit, claim, demand or action.

2. An attorney perfects his lien by serving notice in writing, in person or by certified mail, return receipt requested, upon his client and upon the party against whom his client has a cause of action, claiming the lien and stating the interest which he has in any cause of action.

3. The lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section.

4. On motion filed by an attorney having a lien under this section, his client or any party who has been served with notice of the lien, the court shall, after 5 days' notice to all interested parties, adjudicate the rights of the attorney, client or other parties and enforce the lien.

5. Collection of attorney's fees by a lien under this section may be utilized with, after or independently of any other method of collection.

The Nevada Supreme Court has recognized that "[t]he attorney's right to be paid is not based upon, or limited to, his lien"; instead it is based upon an express or implied contract, and "[t]he lien is but security for [the attorney's] right."[2] The

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[2] *Sarman v. Goldwater, Taber and Hill,* 80 Nev. 536, 540, 396 P.2d 847, 849 (1964); *see Gordon v. Stewart,* 74 Nev. 115, 324 P.2d 234, 235 (1958).

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purpose of NRS 18.015 is to secure attorney's fees and to "encourag[e] attorneys to take cases of those who could not otherwise afford to litigate."[3]

NRS 18.015 unambiguously dictates that an "attorney at law" ***has*** a lien on his client's cause of action. It is not a matter of debate, dispute, or award. And an attorney may include costs in his lien to the extent such costs were incurred in furtherance of the client's litigation.[4] Further, an attorney's charging or retaining lien may be reduced to personal judgment against a client by the Court hearing the underlying action as a matter of judicial economy,[5] so long as the necessary conditions are satisfied.[6]

Movant filed our Lien for Attorney's Fees on March 17, 2016.[7] Movant now requests that there be an adjudication regarding our rights and an enforcement of our Lien. The current unpaid fees and costs of Toni's case is $88,403.95 plus interest from March 17, 2016. Movant requests permission to take whatever action is necessary to collect on the Lien, from whatever assets Toni may possess or may receive in this case.

## III. REQUESTED FINDINGS OF REASONABLENESS

In *Argentena*, the Nevada Supreme Court found that in an adjudication such as the one requested here, the district court is required to make findings to support the requested award of fees.

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[3] *Mujie v. A North Las Vegas Cab Co.*, 106 Nev. 664, 667, 799 P.2d 559, 561 (1990); *Bero-Wachs v. Law Offices of Logar & Pulver*, 123 Nev. 71, 157 P.2d 704 (2007).

[4] *See Edwards v. Andrews, Davis, Legg, Bixler, etc.*, 650 P.2d 857, 863 (Okla. 1982); *Eleazer v. Hardaway Concrete Co., Inc.*, 315 S.E.2d 174, 177-78 (S.C. Ct. App. 1984).

[5] *Gordon v. Stewart*, 74 Nev. 115, 324 P.2d 234, 235 (1958).

[6] *Argentena Consolidated Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 216 P.3d 779, (2009), modified by statutory amendment to NRS 18.015.

[7] *See* Exhibit 4, Lien, which has been attached here without its exhibits (Toni's Fee Agreement and billing statement) to avoid duplicating Exhibits 1, 2 and 3 already attached to this *Motion*.



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With specific reference to Family Law matters, the Court has adopted "well-known basic elements," which in addition to hourly time schedules kept by the attorney, are to be considered in determining the reasonable value of an attorney's services qualities, commonly referred to as the *Brunzell* factors:[8]

> 1. *The Qualities of the Advocate:* his ability, his training, education, experience, professional standing and skill.
>
> 2. *The Character of the Work to Be Done:* its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation.
>
> 3. *The Work Actually Performed by the Lawyer:* the skill, time and attention given to the work.
>
> 4. *The Result:* whether the attorney was successful and what benefits were derived.

Each of these factors should be given consideration, and no one element should predominate or be given undue weight.[9] Additional guidance is provided by reviewing the "attorney's fees" cases most often cited in Family Law.[10]

The *Brunzell* factors require counsel to rather immodestly make a representation as to the "qualities of the advocate," the character and difficulty of the work performed, and the work ***actually*** performed by the attorney.

First, respectfully, we suggest that the supervising counsel is A/V rated, a peer-reviewed and certified (and re-certified) Fellow of the American Academy of Matrimonial Lawyers, and a Certified Specialist in Family Law.[11]

As to the "character and quality of the work performed," we ask the Court to find our work in this matter to have been adequate, both factually and legally; we

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[8] *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).

[9] *Miller v. Wilfong*, 121 Nev. 119, P.3d 727 (2005).

[10] Discretionary Awards: Awards of fees are neither automatic nor compulsory, but within the sound discretion of the Court, and evidence must support the request. *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973); *Levy v. Levy*, 96 Nev. 902, 620 P.2d 860 (1980), *Hybarger v. Hybarger*, 103 Nev. 255, 737 P.2d 889 (1987).

[11] Per direct enactment of the Board of Governors of the Nevada State Bar, and independently by the National Board of Trial Advocacy. Mr. Willick was privileged (and tasked) by the Bar to write the examination that other would-be Nevada Family Law Specialists must pass to attain that status.



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have diligently reviewed the applicable law, explored the relevant facts, and believe that we have properly applied one to the other.

The fees charged by paralegal staff are reasonable, and compensable, as well. The tasks performed by staff in this case were precisely those that were "some of the work that the attorney would have to do anyway [performed] at substantially less cost per hour."[12] As the Nevada Supreme Court reasoned, "the use of paralegals and other nonattorney staff reduces litigation costs, so long as they are billed at a lower rate," so "'reasonable attorney's fees' . . . includes charges for persons such as paralegals and law clerks."

Finally, as to the result reached, we ask the Court to find that the result in this action through this date was appropriate, given the factual circumstances and applicable law, and the client derived the benefits reasonable available under the circumstances.

## IV. ATTORNEY'S FEES FOR THIS PROCEEDING

The retainer agreements signed by our former client included an express provision governing rights and responsibilities in the event we were required to file and adjudicate a lien, as we have here:

> Client agrees to pay any fees and costs that are incurred by Attorney to collect fees, costs, or expenses from Client, including reasonable attorney's fees.

In accordance with this express contractual provision, we request a further award of fees, in a sum equal to the costs of preparing the lien, this request for adjudication, and our appearance at the hearing requested in this *Motion*, in a sum of not less than $500, which sum is to be updated at the hearing of this *Motion*. *See* NRS 125.150 (attorney's fees may be awarded in any pre- or post-divorce motion); EDCR 7.60 (fees are appropriate when the opponent's motion or opposition is

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[12] *LVMPD v. Yeghiazarian*, 129 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 81, Nov. 7, 2013) citing to *Missouri v. Jenkins*, 491 U.S. 274 (1989).



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frivolous, unnecessary, or vexatious); *Gordon v. Stewart*, *supra* (trial court may make determination, rather than requiring the filing of a new action).

## IV. CONCLUSION

Movant respectfully requests that this Court adjudicate our rights and enter its order enforcing the Lien.

**DATED** this 17th day of February, 2015.

WILLICK LAW GROUP

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 002515
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110
Former Attorney for Plaintiff

**DECLARATION OF MARSHAL S. WILLICK, ESQ.**

1. I, Marshal S. Willick, Esq., am an attorney duly licensed to practice law in the State of Nevada and declare that I am competent to testify to the facts contained in the preceding filing.

2. I have read the Motion and the same is true of my own knowledge, except for those portions based on information and belief, and as to those portions I believe them to be true.

3. Plaintiff, Toni Holyoak, pursuant to the Agreements to Employ Attorney executed by her on January 29, 2014, and September 28, 2015, a copy of which are attached hereto as Exhibits "1" and "2," owes this firm $88,403.95 which balance includes interest through March 17, 2016.

4. A billing statement is submitted herewith as Exhibit "3" showing:

   a. Work done, date and time spent on that work showing the total work done and amount due thereon;[13]

   b. Charges made and payments made on account by our former client and the amount due thereon.

5. I certify that the entries on the time slips were made by members of the staff of this law office each day as the course of the work was completed and each entry was believed true and correct when made.

6. The basis of charges known and agreed upon by our former client and this law firm is as follows: $500.00-$600.00 per hour for Marshal Willick's services; $350.00 - $500.00 per hour for the services of associates; and $110.00 to $275.00 per hour for paralegal/legal assistants and law clerks.

7. I further certify that the entries on the billing statements by all staff were supervised as to the accuracy of the entries made by the office bookkeeper and were

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[13] The billing statement detail for Ms. Holyoak is many pages long and will be provided to the Court upon request. Attached is a summary showing total amount of work done, by which employees, and the cost of that work, a list of hard costs incurred, and the payments made to the account.



WILLICK LAW GROUP
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Las Vegas, NV 89110-2101
(702) 438-4100

made in the regular course of business and supervised in the regular course of business.

8. I further certify that mailings of the billings have been sent on a regular (twice-monthly) basis. Our records show no unresolved claims of any error or request for correction from our former client.

9. On March 17, 2016, I made and served on our former client by mail, as required by law, a copy of our Lien, a copy of which is attached as Exhibit "4".

10. We request compensation in the amount of $88,403.95 plus interest from March 17, 2016, until paid in full, and for formal entry of Judgment that can be duly recorded; the Court is asked in advance to set aside any bad faith transfers of the assets in question in this litigation that might be attempted in an effort to circumvent the security of our lien.

**I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045 and 28 U.S.C. § 1746), that the foregoing is true and correct.**

**EXECUTED** this 17th day of March, 2016.

MARSHAL S. WILLICK, ESQ.

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Attorney for: APPELLANTS, Veterans In Politics International, Inc. and Steve W. Sanson

Electronically Filed
Aug 21 2017 02:07 p.m.
Elizabeth A. Brown
Clerk of Supreme Court

**IN THE SUPREME COURT OF NEVADA**

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|---|---|
| VETERANS IN POLITICS INTERNATIONAL, INC.; AND STEVE W. SANSON<br><br>Appellants,<br><br>vs.<br><br>MARSHAL S. WILLICK; AND WILLICK LAW GROUP,<br><br>Respondents. | SUP. CT. CASE #: 72778<br><br>DIST. CT. CASE #: A-17-750171-C (Dept. 18) |

# APPELLANTS' APPENDIX

## VOLUME IV OF IX

Appeal from Eight Judicial District Court, Clark County

Senior Judge, Hon. Charles Thompson, Dept. 18



Docket 72778 Document 2017-27926

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waived even though it is coming out as VA disability compensation. The portion of the retirement that they waived is absolutely still divisible. It is not protected like the disability compensation.

**Assemblyman Elliot T. Anderson:**
When it comes to family law matters, the federal law would allow it, but this bill would preclude it. When it comes to family law issues, if we have permissible authority from the federal government and we decide to change it or not exercise the authority that they have given us, this bill does not speak to Assemblyman Wheeler's intent. I think you will want to take a look at section 2, subsection 2.

**Caleb Harris:**
I am going to defer to Jeanette Rae.

**Jeanette Rae:**
The military retirement is only received in addition to compensation when you are rated at 50 percent or greater. The ability to now waive your retirement in order not to have your income taxed only relates to those individuals who are rated below 50 percent. They are currently still subject to concurrent receipt where dollar for dollar your military pay is offset by your compensation. It only relates to those individuals. Anyone 50 percent or over is receiving all of both benefits, so it would be separate. The verbiage may have gotten a little confusing in the bill, and may not have been completely thought out.

**Assemblyman Gardner:**
Hypothetically, we have a disabled veteran who earns $2,000 a month. He has a spouse earning $1,000 a month. The court, by federal statute and by law, cannot take his disability pay, but what they are doing is awarding alimony and saying they cannot separate them. We cannot give part of your disability pay away, but, in fact, we are giving part of your disability pay to the spouse. Is that what this law is supposed to be fixing?

**Assemblyman Wheeler:**
That is exactly what this law is supposed to be fixing. As you know, sometimes you spin things a little bit. What we are trying to fix is when they say they do not touch the $500 that you are getting for disability, but the other $1,500 we will take two-thirds of. That is what we are trying to fix; that cannot be used in the calculation.

**Chairman Hansen:**
Is there anyone else who would like to testify in favor of A.B. 140 at this time? Seeing no one, we will open it up to opposition. Does anyone want to speak in opposition to A.B. 140 at this time? We will go down south first.

**Marshal S. Willick, Attorney, Willick Law Group, Las Vegas, Nevada:**
I have been studying military and divorce matters for over 30 years. I have written the textbook on the subject. I regularly teach the Judge Advocate General's (JAG) Corps and private practice lawyers everywhere. I have been highly involved in this issue for a very long time.

To make it clear, because there have been statements from people who do not entirely understand how things work, disabilities occur in all lines of work, in the public and private sectors, military, police, firefighters, teachers, et cetera. In all circumstances in family law, disability income that someone receives for a disability suffered is separate property. That has been the law in Nevada for over 50 years. It is always separate property. The question, however, is what a divorce court should do when people with all of the various circumstances that they might have present themselves before the court for the administration of justice. Family law should always be based on the truth. Those who put on the uniform swear to protect American values, and possibly the most important is equality under the law. The proposal as drafted—and I am familiar with the people who originally drafted it and why they did so—does not seek to achieve equal rights. It seeks superior rights, literally, a state license to lie, cheat, and steal: to lie to the court about what income they are receiving, to cheat the spouse and children they swore to provide for, and to steal postdivorce property already awarded to someone else.

To answer Assemblyman Gardner's question, the bill does two things and was drafted specifically to do those two things: to prevent the court from seeing the truth as to who is receiving what at the time that a divorce is in process, and to allow someone postdivorce to reach backward in time and recharacterize money already awarded to someone else as being in a different category. Therefore, they are taking it out of that person's pocket and putting it in their own postdivorce, blocking the ability of the court to do anything about it. There has, unfortunately, been some misinformation.

I have been copied on some of the submissions to this Committee, and there have been some personal attacks. Briefly, let me clear up some misconceptions of motivations or any allegations that spin. No attorney in the state of Nevada to my knowledge has done more for military members in family law protecting their legitimate interests than I have. In my private practice, I have represented many hundreds of military members, including now, in every kind of case.

I helped create the Uniform Deployed Parents Custody and Visitation Act, which this body adopted two years ago. It protects military members from having custodial decisions made against them based on their military service. I am a founding member of the Military Pro Bono Project. I found out last week that I have just been named the American Bar Association's Attorney of the Year for the amount of pro bono work that I do for military members. I am a participant in Operation Stand-by, which helps military officers throughout the world at bases all over the planet. I advise military members of their legal rights and responsibilities related to family law. Last week I helped a Marine in California. My father is a disabled veteran, and I employ two disabled veterans. I get the subject.

To answer Assemblywoman Diaz's question, no, there are no cases of veteran disability benefits being divided in divorce court. It does not happen. If it did happen, I would know about it because no one studies these issues more closely than I do. The *McCarty* case has nothing to do with the subject. It is irrelevant.

To answer Assemblyman Nelson's question, the only quibble I have is that courts are not all over the map on this. The case law is uniform. Unless the game has changed, unless the state chooses to rig the game, the cases are absolutely uniform throughout the United States. I have already supplied this Committee with a recitation of case law (Exhibit I) following *Rose* from all over the United States for the last 30 years. To the best of my knowledge there is no notable alternative authority. There is no authoritative expert opinion in opposition. All of the experts in the United States are in complete agreement on this subject. I know them all: they come from all walks of life, have various political persuasions, come from various states, and all of them are in full agreement on this subject.

It is important that the members of this Committee understand what this bill actually seeks to do. The first speaker quoted policy, but appears not to understand it. Disability benefits are not divisible, but a family court should always know the truth. A family court should always know who is actually receiving what dollars per month. It is the only way to do substantial justice to the people in front of them. The very first thing that this bill seeks to do is hide the truth from the court. The second thing this bill seeks to do is allow someone post-divorce to change the game, and that should not be allowed either. The United States Supreme Court has explained that child support and alimony are not attachments or levies. Everyone who knows the subject is in full agreement on that.

To answer Assemblywoman Fiore's question, yes, in many cases there can be both community property retirement and separate property disability payments going to the same person. Community property is divisible as property and the separate property is acknowledged as separate property income of the person who is getting it no matter why that person is getting separate property income, whether it is because of a military disability or a slip-and-fall at work or that person is a trust-fund baby. Whatever the reason that there is a separate property income stream going to a party, that information is before the court as a fact of the reality of the economic circumstances of the parties and it should never be hidden. There should never be a situation where the poorer person can be compelled to pay money to the richer person, or a party can unilaterally undo a court order by retroactive recharacterization. That is what this bill seeks to do. Apportionment is available under current law for both child support and alimony if a state court orders it. What the bill seeks to do is prevent the state court from ever being able to make the order. It is important for the Committee to understand what the bill actually intends.

To answer Assemblyman Ohrenschall's and Assemblyman Anderson's questions, yes, you have it exactly. The point of drafting the legislation the way it was drafted was to specifically allow for postdivorce recharacterization of what was a property allocation into disability after the divorce and then prevent the court from doing anything to protect the party who has been ordered to receive a portion of the property. That would undo existing Nevada case law.

Answering Assemblywoman Seaman's question, yes, all income is to be considered by a divorce court, from whatever source. That is the only way substantial justice can be done. I would be pleased to answer any technical questions as to what is really being done; what the law actually is nationally or in Nevada. It is important for the Committee to understand how it works before it allows anyone to alter the balance of equities and the ability of the court to do justice to the parties before it.

**Assemblyman Gardner:**
First, I disagree with your comments regarding personal attacks. Reading your opposition, all 28 pages, you called proponents of this bill "whack-jobs," "nut-jobs," "opportunistic reprobates," "snake oil salesmen," and "fanatics" among others that I read. I would call those personal attacks.

As far as the bill, go back to one of the examples you were talking about to put it in simple terms. A man is receiving $2,000 in disability pay. His wife is a stay-at-home mom. If they get divorced right now, the divorce would look at both parts. What we are saying is that disability income is not divisible, so they

would then say that he has to pay a certain amount of alimony. Is that correct? Would that not be taking a portion of that disability pay, dividing it, and giving it to the spouse?

**Marshal Willick:**
First, in terms of the matter that you cited, that is an article from years before this bill was drafted having to do with people in another state. Those people threatened my life, threatened my family, and did not like the academic work that I had been posting, publishing, and teaching for the last 20 years and came after me, my office, my family, and my employees personally. I finally had to sue them to stop the death threats. It has very little to do with the people who are in this room right now.

Turning to the issue of the specific question that you asked, all income from all sources is considered in balancing the equities between husbands and wives. Let us suppose you have an unemployed spouse and the only income available to the family is disability income. Then, yes, it can be looked at. With due respect to Assemblyman Wheeler's comment, just because you choose to divorce does not lessen the status of your spouse as family. That is how the court can apportion matters to make sure everyone stays alive. There is the published case from New Hampshire a couple of years ago which is on point. The disabled military veteran was receiving several thousand dollars a month in disability income. The spouse, who was also totally disabled, had no income of any kind other than food stamps. The effect of this bill if passed would be that the only thing the divorce court would be able to see or could take knowledge of is the food stamps. In that circumstance, the military member would keep the several thousands of dollars a month. The spouse would get half of the food stamps, and the other half would be given to the military member in addition to the several thousand dollars a month. The spouse would starve in the streets. That is the intent of this legislation and the reason it should not be passed.

**Assemblyman Gardner:**
That means, in the hypothetical I put out there, the court would be able to look at the disability benefit and would be able to give a portion of that to the spouse. Is that correct?

**Marshal Willick:**
I am sorry if I was unclear. No. The benefits themselves are nondivisible. There is no property interest for the spouse. The fact is, one party has several thousands of dollars a month in income and, despite what anyone in this room says, income is income is income. It does not matter how it is labeled or what it is called. If you are receiving money on a monthly basis, from any source, for

family court purposes it is income and is to be taken into account by a court in figuring out how to keep everyone alive. There are never sufficient resources in these cases. In that circumstance where one party and only one party has several thousands of dollars of disability income, the court cannot divide that benefit but can order spousal support payments if otherwise justified under law. Support, whether it is child support or spousal support, is part of the core function of the family court, part of the divorce court's reason for existing. The discretion of the judge to be able to provide for the survival of everyone involved should never be taken away. In this circumstance and under Nevada law, child support guidelines would be a couple hundred dollars a month. If the person who has custody of that child has no income, both that person and the child would be on the streets.

**Assemblyman Elliot T. Anderson:**
I want to talk about Assemblyman Wheeler's intent, which was codification. I was hoping you would give us your opinion on what portion of the bill codifies and what portions of the bill go beyond. My reading is that section 2, subsection 1, codifies as it relates to disability and being divisible for purposes of community property. Beyond that, I am struggling to see where it codifies. Can you give us your opinion?

**Marshal Willick:**
There is no portion of this bill that intends to codify or does codify federal law. Existing federal law is quite clear and, to my knowledge, is applied everywhere in the state of Nevada. I know of no contrary cases; none have been brought to my attention. I have a significant appellate practice, so if there were such cases, presumably, people would be seeking me out to challenge them. None have ever been brought to my attention. In section 2, subsection 1, the somewhat surreptitious word is "consider." The point of the legislation is not to prevent the division of disability benefits, which is already prohibited under both state and federal law. As I said, disability—whether it is military, police, fire, state, private sector—is all separate property; it is nondivisible as community property by definition of Nevada law. This seeks to block the court from ever knowing that someone is receiving the money in question. If that party is making $3,000 a month in disability and both parties have $1,000 in income, from the court's point of view—and the proponents admitted this—they want that money to be invisible. They do not want the courts to know about it. They want the court to falsely believe that he has $1,000 a month to live on, and she has $1,000 a month to live on, when the reality is that it is $4,000 to $1,000.

**Assemblyman Elliot T. Anderson:**
I am trying to understand how the bill, as written, would technically work inside a family law context. I would imagine that you have to disclose everything when you go into court. This bill does not seem to operate that way. It seems to say that you disclose everything coming in and the judge just ignores it. Is that how you see the bill operating, or would you read this to not disclose at all upon going into family court?

**Marshal Willick:**
Yes. This would prevent disclosure or the court taking any knowledge of it. I do not know whether it would be on the forms and then ignored, or not be on the forms at all. I am not sure that makes any difference. In the one place where this has actually been litigated, Arizona, where the genesis of this bill comes from, an opinion that came out in 2011 interpreting this legislation says,

> We are not unmindful of the troublesome fiction created by (the legislation) requiring a court as (the spouse points) out to "pretend" the Title 38 funds do not exist for the purpose of determining a spouse's income and his or her ability to pay, or need for, spousal maintenance. The legislature, however, has made clear that that is precisely what this court is to do. Until the statute's clear language is modified in some way, it is the court's responsibility to follow the law as written.

The intent of the legislation—and that provision is identical to this provision—is to prevent the court from seeing, knowing, acknowledging, or using the truth.

**Assemblywoman Diaz:**
We have been focusing a lot on the perspective, or the assumption that, when there is a divorce proceeding, the spouse usually wants to take money from the veteran. I want you to share the other side. I am sure there are instances where the spouse is independent and has her own income. If this law were to go into effect, in those situations where the spouse does not need to be financially supported and the veteran does not have as much income as the spouse, will this law block the veteran's disability income from being contemplated in the equation and would that spouse have to pay more alimony?

**Marshal Willick:**
Precisely. If the spouse had an independent income of $2,000 a month and the military veteran was receiving disability income of $2,000 a month, this would make the $2,000 that the veteran is receiving invisible to the divorce court. Under this legislation, the military veteran would be able to say that the only income the court is allowed to acknowledge is the $2,000 a month that his

spouse receives. He could say, "I want half of her income because it is necessary for my support, and you are not entitled to consider the income that I am receiving as a reason why I should not have it." In other words, this legislation can easily be used, not just as a shield, but as a sword.

**Assemblyman Nelson:**
In the hypothetical situation that you were talking about, and let us say the veteran is getting $2,000 a month in disability and the spouse has no income at all—like the New Hampshire case but without the food stamps—the way the law is right now is that the disability income would not be divisible or attachable. Correct?

**Marshal Willick:**
If I understand your question correctly, it is not divisible or attachable, but it can be considered as income going to one of the two parties in the marriage.

**Assemblyman Nelson:**
It can be considered, but it cannot be taken by the court. The court could not order that the veteran pay any of that to the spouse.

**Marshal Willick:**
That money is not specifically identified. The point is that the court takes into consideration the full panoply of both parties' financial circumstances. If one party has $2,000 per month and the other party has zero dollars per month, then, yes, a spousal support, alimony, or child support order can be made based on the reality that one party has more money than the other party from a separate property source.

**Assemblyman Nelson:**
I understand that, but what I am saying is if the entire universe of money is that disability payment, I thought you said that everyone agrees that it is exempt. The court will not order the veteran to pay any of that to the spouse even though it could consider it.

**Marshal Willick:**
That money is not specifically divisible. Again, we have to separate what is property versus what is support. A support order is nonspecific as to the source of the funds. It simply says that you, sir, for whatever reason, have whatever money you have and this person does not have money. You are ordered to pay this person some money for support of either spouse or child. It does not make any difference why that person has that money, or whether the source of that money was a previous community property source or a prior separate source. The reality of the situation is that one party, and only one

party, has any funds at all; the other party has nothing. The only way the court can prevent someone from starving in the street is to order one party to support the other. That is part of the function and purpose of the divorce court's existence.

**Assemblyman Nelson:**
I understand that, but I thought the disability funds are not available. The court could make a support order, but it could not enforce it against disability funds. Is that correct?

**Marshal Willick:**
No. That is not correct. That was the point of the *Rose* case and the fifty cases that I gave you in the legal note analyzing the law of alimony following up on the *Rose* case.

**Assemblyman Nelson:**
I probably used the wrong word. Let us focus on alimony; forget child support. It is my understanding that—notwithstanding the *Rose* case which was a child support case—if we are just talking about alimony, the court would not force the veteran to use disability payments to pay alimony.

**Marshal Willick:**
The court does not force anyone to turn to any particular source. The reality is that, if the only money in the possession of the party happens to have come from disability as opposed to any other separate property income source, the party will use that money or will get other money. It does not make any difference for the purposes of family law why a party has funds. The point to the family court's order is that one party has resources and the other party does not. That court's charter is to make sure both parties survive. It does not make any difference where the money came from or why the money is in that party's possession. It is not an attachment for a levy. That is what the lay people who testify do not understand. A spouse or a child is not a creditor, it is not an attachment for a levy. When the United States Supreme Court said it is for the support of the veteran and his family, they mean the people who are before the divorce court. That is existing law.

To answer a question that was asked earlier, this did not come from 1981; this has been the case for over 60 years. The federal provisions in question go back pre-World War II, and they have simply been recodified over and over. This is the way it has been for a very long time. Disability awards, whether military, private sector, or state, are separate property, but they are income. It is figured by the court and by court order if necessary for enforcement for contempt if a party with resources refuses to obey a court order to support a spouse or

a child who has no resources. That is the purpose of the courts having the power to enforce their orders, but part of this legislation is to prevent courts from having that authority.

**Chairman Hansen:**
Is there anyone else down south who would like to testify in opposition at this time? Seeing no one, we will come back up north.

**Roger Harada, Attorney, Reno, Nevada:**
I believe we are going to go in order.

**Melissa L. Exline, Attorney, Surratt Law, Reno, Nevada:**
We are working together on this, and I want to start with where we agree. I am not here personally to spin anything. I am just an attorney who goes on both sides of this issue. If you had ever told me that I would be sitting in a room with a lot of veterans behind me—given my upbringing—and that I would be here to technically oppose something they were proposing, I would not have believed you.

**Chairman Hansen:**
You might want to give us your background. Some accusations have been made that people who oppose this bill are people who have no interest in veterans. Put this on the record.

**Melissa L. Exline:**
I testified very briefly from Ely when we had a short time to speak. I have not served, and I am not going to pretend that I can stand in the shoes of a veteran. My father served in the United States Army for 23 years. Most of that time was spent in the Special Forces—Green Beret—and I understand that he served five tours in Vietnam voluntarily. He retired as an E-8 master sergeant. I can see this issue as a daughter of the spouse who was married to that veteran, as well as the daughter of a veteran. I am here as a family law practitioner who can look at and appreciate both sides of the issue. I do appreciate the service of our veterans.

Protecting our military service members is extremely important, and we strongly believe common ground exists related to A.B. 140. Common ground means we agree on keeping in place that service disability should not be garnished, seized, or levied; that is the law. In speaking with Mr. Harris prior to this hearing, we agreed that the *Shelton* case [*Shelton v. Shelton*, 119 Nev. 492; 78 P.3d 507 (2003)] should remain intact. With that common ground as we look at some of the nuances of A.B. 140, we talked through the various issues that can take

place as the bill is written today. Starting from that common ground is important because judges make mistakes, and we can help educate them.

There are very specific factors that the courts must consider when they are looking at alimony. It says, under *Nevada Revised Statutes* (NRS) 125.150, that the court shall consider the financial condition of each spouse; the nature and value of the respective property of each spouse; contribution of each spouse to any property held by the spouses; duration of the marriage; income, earning capacity, age, and health of each spouse; standard of living during the marriage; the career before marriage; any specialized education or training or the level of marketable skills obtained by each spouse during the marriage; contribution of either spouse as homemaker; 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 physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse. When you look at these factors—and we have not delved into these specific factors—one of the words that has been bantered around quite a bit today and there has been a lot of discussion on, is what the court shall consider in looking at the issue of alimony versus the ability to execute, levy, and tap a specific disability award. What does that mean? The alimony factors were lengthy. These issues already weigh in favor of the veteran if, in fact, the court is doing it right.

That is where we have common ground. We want to ensure that veterans with service-related disabilities are potentially given their due and acknowledged. We do not want to do it the wrong way. When I am talking before this body about not doing it the wrong way, I am talking about some of the odd scenarios where we might be improperly pretending like an asset does not exist. I do not want to delve into some esoteric mundane minutia of all of these various factors, but there are odd situations that can be created that I do not think we want to create in Nevada. I think we recognize that service members offer a lot and, often, so do their spouses. The spouse can be a huge support system for the member of the military who may be deployed or out in the field providing for his family. Sometimes they are the unsung heroes in these deployments because they are there for their spouses.

I do not know the nuances of why one particular couple may or may not get divorced. We have a no-fault state. The reality is when you balance the alimony factors the correct way, the likelihood that the VA disability or any of the service-related disabilities are going to be tapped is probably lower because that veteran is coming to the table with a disability. He or she has less ability to work and make a living. It is not about going after the money that the veteran needs to live on. I want to make that clear. I do not have a dog in this

fight. I do not necessarily want to make it so that there is a situation that the service member who needs that money to live on cannot, but we do not want to have it the other way either. When a spouse has these factors weighing in their favor, a court might say that there is $3,000 on this side of the equation and there is hardly anything on the other side. It is the right thing to do to possibly contemplate that this is the only reality that exists for this family in front of me. I am saying to this body do not hamstring the courts, let them make the right decisions. We have to do that in a full and fair way, and I think the specific questions that have been asked highlight the body here and that this Committee understands the issues. We are here and ready to talk through the issues in a hypothetical that highlights the issues very specifically. We are here to make it known that there is common ground on this bill, and there are things that can be done to fix what we perceive as oddities in the way the bill is written and to talk through those in a meaningful way.

**Roger Harada:**
I am speaking on behalf of myself as a family law practitioner and a veteran. I can tell this Committee with complete honesty that I have no agenda to go after the veterans in any unfair way. I do not believe the legislation being proffered is fair. That is why I have come before you to speak against it.

I am the middle generation of three generations of Harada men who have served in the United States Army. My father served in World War II. He got to the war late, so fortunately he did not see the action that he might have seen when he was initially assigned to the 442nd Regimental Combat Unit, which is the most highly decorated combat regiment in U.S. Army history. He is Japanese American and was initially interned during World War II. His whole family was displaced from their farm in California to an internment camp in Colorado. The entire time that I knew my father—he died some years back—he never spoke ill against his country or being interned. He just did not talk about it or the war.

I served in the 1980s during the Grenada campaign, so I am not really a war veteran. I served for four years in military intelligence and was a paratrooper. I served my last 15 months at Fort Bragg jumping out of planes and making myself shorter than I was before I joined the Army.

My son, Ken Harada, served for five years recently. He was an infantryman and served for a year in Afghanistan. He was in a vehicle that was blown up by an improvised explosive device (IED). Fortunately, he was able to escape from it relatively unscathed. It was a vehicle designed to withstand IED attacks. His fellow troopers did not fare as well—one of them lost his leg—but none of them died. It was an interesting call that I got from the Army. The first thing

out of the Army representative's mouth was that my son was all right. It was interesting. A few days later I heard from my son who let me know that he was okay.

The last thing I would ever want to do is to have my testimony hurt veterans. I want to make that clear. My veteran's benefits paid for my education. I was able to go through undergraduate school and even save a little for my first year of law school. I got veteran's benefits during that time that helped support me, my wife, and my two children while I was going through law school, so I am very grateful for my benefits which enabled me to have an education to speak intelligently about what is going on here.

I have been practicing law for 20 years, and 12 of those years have been almost exclusively domestic relations—family law. In my 20 years of practice, especially the last 12 years, I have never had a client or heard of an opposing party ever say they love paying alimony. Nobody loves paying alimony. It seems to be a divisive issue in family courts. What is going on here is one thing and one thing only, and I do not want any of you to misconstrue this. I do not believe this group of veterans speaks for every group of veterans. This group of veterans in support of this legislation is doing one thing and one thing only, the one thing they do very well—go to war. I am very proud of their service to our country, but they are going to war on alimony. Do not make a mistake about it, no one likes paying alimony and none of these people here want to pay alimony, and frankly, I do not blame them. If it ever comes down to me getting divorced and I have to pay alimony, I will not like it either. But the reality is that all income should be considered in the analysis by a judge in determining alimony.

To make one thing clear, and to distinguish myself from Mr. Willick, who is a very esteemed colleague of mine and a friend and mentor—I have learned so much from him—I personally have never benefited by going against a veteran where that veteran was ever assessed increased alimony because they get VA disability benefits. I have never had a case like that. I have no agenda when I say there are problems with this law.

You may have previously been given a hypothetical (Exhibit J), maybe electronically. That hypothetical is a little off as to the numbers. In this hypothetical, the inequities of what this law intends to do speaks very clearly. Let us make no mistakes about it, A.B. 140, especially subsection 3, seeks to legislatively reverse the Supreme Court of Nevada's decision in *Shelton*. *Shelton* is a case that has been mirrored in many other states, at least a dozen that I can think of. It is meant to address the inequities created that are

highlighted in this hypothetical. In this hypothetical a service member and a wife were married for 23 years. [Read from written hypothetical (Exhibit J).]

The husband made a claim with the VA for disability and ultimately received a 40 percent disability rating resulting in $587 a month in disability compensation. Since it was 40 percent, I want to make it clear that this particular hypothetical only applies to cases where the rating is 40 percent or less. If the disability rating is 10, 20, 30, or 40 percent, this happens. If a veteran gets a disability rating of 50 percent or higher, what happens is what I believe truly happens in all cases. This is where I am on the veteran's side because the war should not be occurring here; it should be occurring in Washington, D.C. In a case where veterans get over 50 percent, that benefit is added on top of their retirement if they get retirement. Like a personal injury action, if anyone were run over by a car by someone being negligent, and you received money for that personal injury action, that would be your separate property under Nevada law. [Continued to read from written hypothetical (Exhibit J).]

I am going to set aside the obvious disparate impact on women because of the nature of the military service equal protection argument and try to give you three quick hypotheticals on why this is unfair, absurd, and impractical. Two wives, in identical situations, were married to retired military. The veterans get the same amount of money. One veteran's spouse gets disability and the other one does not. The money is the same. The wife who is married to the nondisabled veteran will get less money. That is problematic.

Two Nevada doctors went to the University of Nevada Medical School. One went into the service and gets VA disability, while the other had private disability insurance as a benefit from his hospital. Both of them have the same injury and receive the same amount of money. The doctor who is not a veteran will pay more alimony because this law says the doctor who is a veteran does not have that extra income.

There were two men, one a veteran getting VA disability and one who received a personal injury award and is not a veteran. Personal injury awards are separate property. The person who got the personal injury award, which is compensation for a loss, is going to pay more alimony in the same situation than the veteran because this law says we have to ignore that income.

What I am trying to point out is how this legislation is absurd and unfair. The law in the State of Nevada under *Shelton* says—we do not need to codify federal law because the *Shelton* case states what federal law is—disability benefits are not community property. It cannot be divided and cannot be taken

or attached; federal law precludes it, that is the law. What this legislation seeks to do is to put a blindfold on a judge and say this income that you receive cannot be considered for alimony purposes. Assemblyman Nelson's question earlier hit it on the nose: all this law is trying to do is take away the disability income from alimony calculations. Assembly Bill 140 attempts, in a very broad stroke, to put a blindfold on our district court judges. Justice should be blind, but our judges should not be.

**Assemblyman Gardner:**
If you take the same hypothetical regarding retirement, but instead of it being recharacterized because of a disability, we will say the VA screwed up and they were giving him too much. I have seen this happen where the VA says they were giving you $1,200 a month but should have been giving you $800 a month. How would the court deal with that now, where the money from the VA went down? Would the veteran who got his retirement reduced still have to keep paying what was put in the divorce?

**Roger Harada:**
No, because of the change of circumstances, he would have grounds to reduce the alimony award. If his income is down, that has to be readjusted just as in a child support case. If you were paying child support and all of a sudden you lost your job—and you are not making the same amount of money—you could go back to the court and tell them that you are not making the same amount of money and your child support should go down.

**Assemblyman Elliot T. Anderson:**
I want to get into how alimony works. Are any other sources of income not considered by a judge now? Are you aware of anyone having to pay alimony indefinitely? My understanding of alimony is that, generally, it stops after a spouse has time to get her career back on track. If she was a homemaker for a while after giving up her career, that is not an indefinite benefit is it? It is not like child support that goes until the child is 18 years old. Do you know the average time an alimony award lasts?

**Melissa L. Exline:**
The court generally looks at all sources of all assets. Right now as it stands, this law does not clearly address disclosure, but it would likely be disclosed. From there, the court would have to act like the asset did not exist. That is a separate issue. With respect to alimony, there are a couple of types of alimony: rehabilitative alimony and a long-term alimony. Nevada does not have a formula like other states—California for example—where you plug in the information and it spits out a number. We have factors that the court shall consider in addressing what makes sense for an alimony award.

The rehabilitative alimony looks more to the issue of what the cost of reeducation, school, getting back on your feet, and is it going to take a year or two to do that. It is very fact specific. The way the statute is written, it gives the court flexibility to address it. I would say there is no rule of thumb per se, but many practitioners think if you get 25 percent or a third, that is the ballpark that alimony lands in generally speaking. It can eke up higher depending on the case and the specific instance.

**Roger Harada:**
I would like to answer the question also and involve Mr. Willick. I know of no circumstance where there is any kind of income that will not be considered by a court. The only case is *Metz*, *Metz v. Metz*, 120 Nev. 786 (2004), that distinguishes between Supplemental Security Income (SSI) and Social Security Disability (SSD), but I think that is for property purposes. Mr. Willick, do you know if SSD is a type of income that cannot be considered for alimony? I do not think it is.

**Marshal Willick:**
Yes. The *Metz* case makes a distinction between SSD and SSI. They are two different kinds of federal benefits and the program of SSD indicates that it is different from SSI. One of them is considered and used as income from any source for Nevada child support purposes and the other is not. *Metz* was a child support case and not an alimony case. As I tried to make clear earlier, child support and alimony are analyzed identically in terms of what is and is not before the court. Anything that would not be income under federal law for child support purposes would also not be income for alimony purposes. The case law that I submitted to this Committee indicates that military disability benefits are an entirely different category. They are not SSD; they are not SSI. There is a specific federal law which sets these benefits up and every single known federal and state case analyzing it properly has indicated that they are to be considered for both purposes.

**Assemblyman Elliot T. Anderson:**
Part of my question was answered, but I am still waiting for the average time that you would expect an alimony award to continue.

**Roger Harada:**
There is no fixed formulary approach to alimony. Alimony is really looked at by the judges as needs and ability to pay.

**Assemblyman Elliot T. Anderson:**
I understand that. I am looking for anecdotes.

**Roger Harada:**
As a general rule, we are talking about a marriage of some substantial number of years, typically at least four or five years. The more years, the more likelihood there would be alimony if there is a disparate opportunity to earn income. Generally speaking, I have found the courts fall somewhere in the ballpark of one-third to one-half the number of years of marriage. If you have a 20-year marriage, alimony will probably last around 10 years. There are exceptions.

**Assemblyman Jones:**
To me, it seems there are two viewpoints of fundamental fairness. The veterans believe if you have a disability, that is something that cannot be taken away. If they could give it back, they would be willing to, but they cannot. You believe, on the other end of the spectrum, that it does not matter that they have income that needs to be split so the spouse gets a percentage of it. In your analogy you said there were two people in the military for a number of years. One has a disability and the other does not. The wife whose spouse has the disability, under this law, would not get it. Would it not be in your analogy that the disability would be on top of the retirement? If there are two servicemen and one gets injured so he gets disability, would not his money then be, say $1,000 plus $500 for the disability, and the other one would just get $1,000? Your analogy is not true to character, is it?

**Roger Harada:**
If his disability rating is 50 percent or more, then it is a bonus, as it should be in all instances, like a personal injury case. If I were a victim of a personal injury case and I got an annuity for that injury, that annuity would be considered by the court in determining alimony because that was income to me even though it is compensation for personal injury. There is a distinction between community property and income. The problem with the legislation is that it is trying to blur that distinction and I am trying to clarify it. In both cases, the disability and the personal injury award would be separate property, but they would still be income. In your hypothetical, if the veteran has a rating of 50 percent or over, it is additional income. The reality is that the veteran has more money and, therefore, there is a possibility in those two circumstances that the veteran would probably pay more spousal support.

**Assemblyman Jones:**
The truth is, if there is a disability of 50 percent or more, it is on top of what the retirement would be. The veterans would still have to divide the retirement, but the disability—my leg is missing, or I have huge migraines that prevent me from working—money is so they can function or be recompensed for that specific disability, not the retirement. That is completely different.

Your analogy was trying to say that they are bunched together, but they are not really. Your fairness is saying that it does not matter that they have a disability, that is just more income that they have so they should divide the bigger pot. Although you cannot specifically attach the disability income, they still need to divide the bigger pot. Fundamentally, do we believe it is fair if someone has a disability that is paid to them that it should be considered for their use only, or the money is part of a big pot, so let us divide it?

**Melissa L. Exline:**
I think you are zeroing in on the issue pretty clearly. The hypothetical that I would propose is that you have two spouses and one is a police officer and the other is a military service member and they are both injured. They both get shot in the line of duty. They both have a disability. As this is written, they are both getting $2,000 a month from their disability, but one is not considered at all by the court; it does not exist. The other is considered by the court, even though they are both disabilities. There is a fairness issue on how that is looked at. I want to make it clear that we are not saying at any point that the disability should be taken. Whether or not an alimony award is given is fact specific and based on need. The need goes both directions. If the veteran or the military service member has need for that money, and it is eaten up by that need, the court should do the right thing and not give that money over in any way, shape, or form. The intent is to give some protections and to do something good for the veteran. When you have two potential disability positions before a court, the way the bill is written, one exists and one does not; one can be considered in the broad scheme of what can and should be considered, and one is not. We can see the situation that creates a lopsidedness. In trying to do something potentially good for a veteran, we may create an odd situation where we have the nonveteran bearing and shouldering more of the burden than is appropriate under the circumstances. That is the concern that we are coming to the table with. We want to make sure the Committee understands that we are potentially and needlessly blindfolding the judge because we are concerned that they will overstep. If the improper cases come down—and I will not say that does not happen—we are legislating for that fringe element. The way the alimony factors are written, it addresses the situation and does not make it so that we should do that in this case.

**Assemblyman Jones:**
You gave your analogy outside of the bill. First of all, we were talking about veteran versus veteran and now you turned it into veteran versus police officer. That is completely different. We are not dealing with police officers; we are dealing with veterans right now. If you want to sponsor a bill for police officers, we can discuss police officers. Right now we are dealing with veterans so I addressed the specific veteran-veteran, which I thought was

inauthentic because you were using facts which do not really characterize what is going on, and that is why I tried to address Mr. Harada. To change to something else is inauthentic, as well. That was what I was trying to get to, the authenticity of the actual analogy. The question was not really answered.

**Chairman Hansen:**
We are getting out into the weeds on the hypotheticals. Let us go back to Assemblyman Anderson for one more quick question.

**Assemblyman Elliot T. Anderson:**
My concern is similar, and I do not know every factual situation that comes up. There is a clear rule of law that says disability benefits are not divisible. However, the court is forced to make a division of property under the law because we are a community property state. Alimony, as it is now, is already discretionary and is not ordered in every case. It is harder to make a clear rule of law and say you cannot consider certain facts when it is discretionary in the first place. My concern is what happens in a situation that we have not contemplated. It is hard to put ourselves in the judge's place as we can see here while talking about hypotheticals and trying to get our heads around it. Traditionally, the trial courts have been given the discretion to consider the facts. I feel like we are saying that they can consider some facts but not others. This is where my worry is. I want to try to get there and work with Assemblyman Wheeler, but we have to ensure that the court has some discretion, otherwise we are opening ourselves up to the unknown.

**Chairman Hansen:**
Is there anything absolutely new that you have to add?

**Roger Harada:**
I wish to follow up because I would have answered the question slightly different. I want to speak to what Assemblyman Anderson was saying. I can tie that up. What I am talking about and trying to emphasize is the concept of equal protection. Essentially, equal protection should be two people similarly situated coming before the court with identical situations and being treated the same. When they are treated differently, that is unfair. I do not think it is an inappropriate analogy that Ms. Exline used when she gave us the situation with a veteran and a law enforcement officer. They are both getting disability for being injured in the line of duty, yet the law enforcement officer is going to pay a greater amount of alimony because his disability income is going to be considered by the court. This legislation would render the judge blind to this veterans disability income. What Mr. Willick was trying to say earlier is that A.B. 140 seeks to give the veterans this extra special treatment that nobody else gets. That is what is problematic about this law.

Equal protection is an important concept. At one point in time, we used to treat two men similarly situated differently, and it was legal to do so for one purpose and one purpose only. The depth of pigmentation of one person's skin being darker and deeper meant that they would be treated differently. That is when equal protection was used to strike down those kinds of laws. I am of the belief that equal protection would be used to strike down this law. There is a very real reason why cases like *Shelton*—and there are a lot of cases around the United States just like it—have been appealed to the United States Supreme Court and certioraris have been denied. Contrary to what was alleged earlier, California has not adopted, as far as we know, any similar legislation. Mr. Willick has not been able to find it and neither have I. Two states, Wyoming (Exhibit K) and Arizona (Exhibit L), have passed legislation somewhat similar to this. In Arizona, their law is unique in that it is simpler and not such an attack on alimony. I have looked at the case law in Arizona and they have had four appeals of that piece of legislation where it has been argued that this particular piece of legislation would be applied. Two reported decisions and two unreported decisions, and in all four cases the Supreme Court basically ruled against the legislation. Reading between the lines and reading those cases, I think the Arizona Supreme Court is looking for a case where they can point out the equal protection problem and strike the legislation down. I would think it would be a waste to have this legislation pass by the Legislature only to have the Supreme Court see the inequity of it and later strike it down. It then becomes a war between the Legislature and the Supreme Court in doing what is fair and right.

**Chairman Hansen:**
We could have a very interesting conversation on equal protection laws on a lot of different levels.

**Assemblyman Nelson:**
In the *Shelton* case, one of the factors was the recharacterization. What if it had not been recharacterized? What if it had been disability income from the start? Would that have changed things?

**Roger Harada:**
In the sense of property division, yes, it absolutely would have changed things. If the veteran's disability had been in place before, that would not be a divisible asset. The income would still be considered for alimony purposes, but it is not divisible per se. There is no ability to execute against the statement that I am getting disability income, but it is being taken away from me. There would be a distinction because the disability that existed before would not be dividable.

**Chairman Hansen:**
Is there anyone else who intends to testify in opposition in the north? Seeing no one, we have already checked in the south.

**Assemblyman Ohrenschall:**
We have a lot of bills in this Committee where we have to be careful about creating two classes of litigants. There is a sign in the courthouse that says "Equal justice under law." I think we have to tread carefully. Earlier, the proponents said if a veteran sought to recharacterize his retirement pay as disability pay, federal law already does not allow that shielding of assets. Do you agree with that or is there a misunderstanding of current federal law?

**Melissa L. Exline:**
There is not a federal law right now that says you cannot address a recharacterization. Right now, we have very specific Nevada law that says you can address a recharacterization. I would like to point this out because I think it is important where we have consensus. Going back to where I started my discussion, we actually have some agreement. When you heard Mr. Harris speaking earlier, he conceded on the issue we were focusing on in subsection 3 and the indemnity issue. If there is a recharacterization postdivorce like the hypothetical that was put forward, there is some opening for dialogue on addressing the concern. The intent, as I understand it in speaking with the proponents of this bill, is not to bar a spouse who is getting a property division from keeping her intact rights. We can bridge that gap. Right now, as it stands, federal law does not prohibit that. When we talk about just codifying the federal law, if that was all we were talking about, we would not be here. The problem is that A.B. 140 goes beyond federal law.

**Chairman Hansen:**
We will conclude the opposition testimony. Is there anyone here to testify in the neutral position? Seeing no one, Assemblyman Wheeler would you like to come back up and tie things up?

**Assemblyman Wheeler:**
I am here to say that I am tired of being lied to or about. Mr. Willick, for instance, says that the attacks were not personal, yet he said them to us anyway, so apparently they were.

**Chairman Hansen:**
Hold up. Talk about the bill.

**Assemblyman Wheeler:**
I am perfectly willing to sit down and work with the opponents of this bill to make good policy. We are not here to make statements; we are here to make policy. We are willing to do that, but I was a little upset about the outright falsehoods that came out from people who basically make their living by how big of a judgment they get. If Mr. Anderson would like to sit down with us, I would be very happy to do it and see what we can do to make good policy.

**Chairman Hansen:**
We made those offers to both parties. I have a conference room in my office, and we intend to have that conversation. Mr. Harris has already agreed to that.

**Caleb Harris:**
I submitted as evidence the California bill (Exhibit M) regarding what we are similarly trying to pass here, so it does exist. They said that it does not exist in law currently, and it does. It is in federal law for the waiver in lieu of retirement. It is absolutely in law, 42 U.S. Code § 659 (Exhibit G), Consent to Support Enforcement, says,

> by the Secretary of Veterans Affairs as compensation for a service-connected disability paid by the Secretary to a former member of the Armed Forces who is in receipt of retired or retainer pay if the former member has waived a portion of the retired or retainer pay in order to receive such compensation.

That was specifically listed to be included. To not be included specifically lists "of periodic benefits under title 38." So this code actually does exist for the reasons she was talking about.

I would like to briefly touch on inequality. It would be unfair to take away from a person money that was given to him to try to make him a whole person. Obviously, I believe it is outside the realm of possibility to attach, levy, or seize and that falls within the law. If we take from that person so that they are less apt to be able to care for themselves, build ramps, or have a special vehicle to get to doctor's appointments, that would be a disparity. That would be an inequality, and that is the reason why the federal government has set these codes in place. [Submitted but not discussed are (Exhibit N), (Exhibit O), (Exhibit P), (Exhibit Q), (Exhibit R), (Exhibit S), (Exhibit T), and (Exhibit U).]

**Chairman Hansen:**
We will close the hearing on A.B. 140. We will open this up for public comment. There is no one, so we will close the public comment period.

Committee business is a bill introduction at this time. We will have a bill draft request (BDR) today.

**BDR 10-1093**—Enacts the Uniform Voidable Transactions Act. (Later introduced as Assembly Bill 420.)

I will entertain a motion at this time.

ASSEMBLYMAN OHRENSCHALL MOVED TO INTRODUCE BDR 10-1093.

ASSEMBLYMAN GARDNER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

We will recess for five minutes because we have some more BDRs to introduce. No, everyone is leaving so we will reconvene before everyone leaves.

**BDR 3-1084**—Revises provisions relating to constructional defects. (Later introduced as Assembly Bill 418.)

I will entertain a motion at this time.

ASSEMBLYWOMAN DIAZ MOVED TO INTRODUCE BDR 3-1084.

ASSEMBLYMAN GARDNER SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

**BDR 10-1104**—Clarifies the applicability of the Uniform Unclaimed Property Act. (Later introduced as Assembly Bill 419.)

I will entertain a motion at this time.

ASSEMBLYMAN OHRENSCHALL MOVED TO INTRODUCE BDR 10-1104.

ASSEMBLYWOMAN SEAMAN SECONDED THE MOTION.

THE MOTION PASSED UNANIMOUSLY.

Is there any other business that needs to be brought before the Committee at this time? Seeing no one, this meeting is adjourned [at 10:35 a.m.].

RESPECTFULLY SUBMITTED:

_____
Janet Jones
Recording Secretary

RESPECTFULLY SUBMITTED:

_____
Karyn Werner
Transcribing Secretary

APPROVED BY:

_____
Assemblyman Ira Hansen, Chairman

DATE: _____

**EXHIBITS**

**Committee Name: Committee on Judiciary**

**Date: March 20, 2015** **Time of Meeting: 8 a.m.**

| Bill | Exhibit | Witness / Agency | Description |
|---|---|---|---|
| | A | | Agenda |
| | B | | Attendance Roster |
| A.B. 97 | C | Ben Graham, Administrative Office of the Courts | Proposed Amendment |
| A.B. 140 | D | Caleb Harris, representing Disabled American Veterans; Veterans of Foreign War | Written Testimony |
| A.B. 140 | E | Russ Murray, Private Citizen, Washoe City, Nevada | Written Testimony |
| A.B. 140 | F | Assemblyman Elliot T. Anderson and Caleb Harris, representing Disabled American Veterans; Veterans of Foreign War | Supreme Court case *McCarty v. McCarty* |
| A.B. 140 | G | Caleb Harris, representing Disabled American Veterans; Veterans of Foreign War | 42 U.S. Code §659 |
| A.B. 140 | H | Steve Sanson, Veterans in Politics International, Inc. | Written Testimony |
| A.B. 140 | I | Marshal Willick, Willick Law Group | Letter in Opposition, Case Law, and Documentation |
| A.B. 140 | J | Roger Harada, Attorney, Reno, Nevada | Hypothetical Situation |
| A.B. 140 | K | Roger Harada, Attorney, Reno, Nevada | Wyoming State Law |
| A.B. 140 | L | Roger Harada, Attorney, Reno, Nevada | Arizona State Law |

| | | | |
|---|---|---|---|
| A.B. 140 | M | Caleb Harris, representing Disabled American Veterans; Veterans of Foreign War | California Law S.B. 285 |
| A.B. 140 | N | Caleb Harris, representing Disabled American Veterans; Veterans of Foreign War | Written Testimony |
| A.B. 140 | O | Jack Fleeman,<br>Jessica Anderson,<br>Kenneth M. Roberts<br>Gayle Nathan<br>Gary R. Silverman | Miscellaneous Letters of Opposition |
| A.B. 140 | P | William Fox | Information from the Department of Health and Human Services |
| A.B. 140 | Q | William Fox | Title 38-Veteran's Benefits |
| A.B. 140 | R | William Fox | Written Testimony |
| A.B. 140 | S | American Bar Association | *Mansell v. Mansell* |
| A.B. 140 | T | American Bar Association | Information on Family Law |
| A.B. 140 | U | Steve Sanson, Veterans in Politics International, Inc | Will you let our disabled vets die? |

# EXHIBIT 9

# WILLICK LAW GROUP

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March 3, 2015

Mr. Ira Hansen
Chair, Assembly Judiciary Committee
Legislative Building
401 S. Carson Street, Room 3127
Carson City, NV 89701-4747

**Re:** AB 140

Pending before your committee is AB 140, which would greatly injure Nevada family law if passed.

Specifically, it would prevent courts from using the actual income of a small group of people – as opposed to everyone else who gets divorced – in setting alimony and possibly child support. It would also permit one party, after a divorce, to effectively put back in his own pocket property awarded by the divorce court as belonging to the other spouse. Again, this would apply unequally, to only the selected group proposing the legislation.

The American Academy of Matrimonial Lawyers (the most prestigious organization of family law attorneys in the world) has formally gone on record as saying this type of legislation should be rejected, because divorce courts should have the ability to consider ***all*** separate property income streams – including VA disability compensation – in determining the actual assets, income, and expenses of the parties when distributing the marital estate, and in setting spousal support and child support. The Academy also urges legislatures to reject any proposal, like this one, that would prevent State divorce courts from protecting their decrees and the parties in divorce cases.

Enclosed for your review are two legal notes supplying the legal background of the situation. Legal note # 47 ("Military Retirement Militant Groups") was issued in December, 2011, and legal note # 53 ("The Actual Legal Analysis as to 38 U.S.C. § 5301 and Alimony") issued in October, 2012.

I have studied these issues, and taught courses to other lawyers on this subject, for over 20 years. AB 140 is awful in every way – masquerading as a flag-waving exercise, its provisions are either

A legal note from Marshal Willick about developments – good, bad, and ugly – in the application of family law to cases involving military personnel (part two).

As set out in the last legal note, family law has accommodated military personnel to facilitate members' participation and fair treatment in child custody, visitation, and support matters.

Despite all the advantages handed to them, however, some military members just can't resist the temptation to ask for even more special treatment. The last legal note (posted at http://www.willicklawgroup.com/newsletters) debunked the rationales under which some members claimed that they were not required to support their children on the basis of the entirety of their income (like everyone else in the United States).

This note turns to a more insidious, and unfortunately, more prevalent larceny – the rationalizations of various former military members who seek to deprive their spouses of half of the retirement benefits earned during marriage, redirecting those sums into the veterans' own pockets, by way of misguided appeals to false "patriotism."

## I. SO-CALLED "VETERAN SUPPORT GROUPS" SEEK TO PERVERT FAMILY LAW FOR THEIR PERSONAL ENRICHMENT

### A. SYNOPSIS OF THE PROBLEM

Small but well-organized bands of former military members, seeking to undermine the relevant federal law, and many decades of State law designed to treat spouses equally under law, have mounted bursts of lobbying. Their targets are selected State Legislatures seen as vulnerable to enactment of a radical agenda seeking to deprive military spouses of the community or marital property protections held by all other spouses, with the goal of taking the spousal share of retirement benefits and re-directing it to the military members, under any of several rationalizations.

### B. BACKGROUND – BIG PICTURE – WHY SPOUSES SHARE IN RETIREMENTS

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage. *See, e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R. 3d 176. This is particularly true of military marriages, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

In every single one of the United States, and in ***every*** retirement system, the decision has been made that marriage is, among other things, an economic partnership, in which the spouses share ***equally*** in the present and future economic benefits earned during marriage. That is true for military retirement benefits, as it is true for every single ***other*** kind of retirement benefits.

Law throughout the country now recognizes military retirement benefits as marital property. The reasons for this consensus are several: the benefits accrued during the marriage; income for both parties during the marriage was reduced in exchange for the deferred pension benefits; and both parties chose to endure the rigors of the military lifestyle and forego possible alternative employment which would have paid more in current wages, in order to have the pension.

But as with the child support laws discussed in the prior note, a certain segment of the military community has decided that its members are so "special" that they should be exempt from the laws governing everyone else – or, more specifically, that their spouses and children should have fewer rights than the spouses and children of all other workers in the country.

If anything, the equities are even clearer, and the arguments more transparently absurd, when employed by former military members trying to find a rationalization permitting them to pocket their former spouses' half of the military retirement benefits earned during the marriage.

## C. BACKGROUND – MILITARY RETIREMENT BENEFITS

Even more so than with active duty pay components, the information regarding military retirement benefits is too extensive to fully recap here. Those wishing more detail should see my 1998 book, or the substantial CLE materials entitled "Divorcing the Military: How to Attack, How to Defend," posted along with forms, checklists, and many other practice aids at http://www.willicklawgroup.com/military_retirement_benefits.

For the purpose of this discussion, the primary military retirement benefit is a non-contributory defined benefit pension plan payable after at least 20 years of service, for life, in a monthly amount dependent on the rank and years of service of the member. Additionally, military members can now participate in a version of the "Thrift Savings Plan" (TSP) – essentially the government version of a 401(k) that has long been available to Civil Service employees.

One provision of federal law permits a military retiree, upon a finding of partial or total disability, to waive receipt of retired pay in favor of receipt, instead, of disability pay. It makes sense for a retiree to convert retired pay into a disability award, because a disability award is received tax-free, increasing the bottom line for turning one into the other. And under certain laws, a retired member with a disability can get ***both*** the full retirement pay ***and*** disability pay, concurrently.

In summary, conflict arises when a military retiree does such a conversion ***after*** a divorce in which a spouse was awarded a portion of the military retirement as her separate property, since the conversion to disability shuts off the retirement payments to the spouse (in whole or part), and sends that money, now called "disability pay," to the retired military member instead.

The technicalities of how such waiver and conversion works, and what courts have done about it, is too lengthy to detail here, but those that are interested should see pages 40-61 of the article noted above, where that treatment, nationally over the past 30 years, is detailed.

D. BACKGROUND – NEVADA CASE LAW

The Nevada Supreme Court, siding with the overwhelming majority of courts everywhere, found that a retiree who has waived military retirement benefits for disability, as allowed under the federal retirement scheme, must nevertheless indemnify a former spouse awarded a portion of that retirement benefit and pay to the former spouse what she was receiving before the conversion. *See Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (2003).

The Court was likewise in the mainstream in holding that where retirement benefits contain both retirement and disability components, only the disability component is shielded from distribution ***as property*** upon divorce. The remaining disability portion is not divisible property – but it clearly constitutes a separate property income stream for all other purposes, such as calculating child or spousal support. *See Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

II. FEDERAL LAW

A. WHY THE USFSPA EXISTS, AND WHY IT IS FAIR

For many years, recruiters and others described the job of a military spouse as "the hardest job in the military" in recruiting literature, and recognition awards. Whether that statement was accurate or just recruiting hyperbole, there is no doubt that the ability to have the military retirement benefits after retirement has been used for decades as an enticement to ***both*** parties to a military marriage.

The reality of the life of a military spouse almost always involves frequent relocations (prohibiting the development of a personal career and retirement benefits), and extended periods of being solely responsible for family duties that in other households take both parents.

The 1981 United States Supreme Court case (*McCarty*) that gave rise to the federal legislation included the flat statement that "We recognize that the plight of an ex-spouse of a retired service member is often a serious one," and noting that "Congress may well decide, as it has in the Civil Service and Foreign Service contexts, that more protection should be afforded a former spouse of a retired service member."

Congress did, and reversed *McCarty* by enacting the Uniformed Services Former Spouses Protection Act (USFSPA) the following year. The law explicitly returned to the States the ability to divide military retirement between spouses, so that ***military*** retirement benefits – like all other retirement benefits – could be treated by State divorce courts as what they are – a valuable asset accrued during marriage that is received later.

The USFSPA is entirely gender-neutral, exactly like every ***other*** retirement division statute – including the ones governing Civil Service workers, state government workers, and all workers in all civilian businesses. And like every other retirement system in the United States, it makes no difference of any kind what work was done to earn the pension – firing a rifle, arresting bad guys, putting out fires, sitting behind a desk, or teaching first-graders. There is no connection whatever

between the services performed and the fact of accrual of pension benefits during marriage.

Through the details of the USFSPA, military members have more protections than ***any*** of the workers in ***any*** other retirement system. Put another way, the ***spouses*** of military members have fewer, and lesser, rights than the spouses of any other employees in or out of government service. This was verified by the Department of Defense review and comparison of retirement systems in 2001. (Those wishing to compare how various retirement systems actually work can review the materials from the day-long seminar our firm taught on this subject, posted at http://www.willicklawgroup.com/published_works.)

That means that a military servicemember, married to a spouse who works for the Civil Service (or in the private sector) will always get a better deal out of the spouse's retirement than the spouse gets out of the member's retirement. Military members are the single most favored group of retirees in ***any*** retirement system in the United States.

And it's not like military members had no choice. First, no one is ***in*** the military except by choosing to do so. Every member of our all-volunteer armed forces ***decided*** to do that for a living, knowing the risks. Second, those who did not want to share equally in everything earned during military service had another pretty easy solution – don't get married.

## B. MEMBERS RECEIVING *ONLY* DISABILITY PAY

A military member might be discharged for disability with far fewer than the 20 years of service required for a regular longevity retirement. Where the member qualifies for a disability retirement, he has a separate property income stream, presumably for life. But it is still income.

A couple years ago, the papers recounted the story of a lineman for the power company who touched a live line and lost use of both arms, and was permanently disabled. His family lost its primary provider, and he was relegated to a limited future life of pain, disability, and reduced opportunities. But that did not erase the fact that he also had obligations – to his children, and to his spouse – that the court in the ensuing divorce was obliged to weigh in determining who would obtain what from whom. His children still required support; he and his spouse still had to equitably divide their property and determine their future support obligations to one another.

It is absolutely no different for disabled military veterans. The loss, to every member of the family, is just the same. The obligation of the courts to determine equity – among ***all*** those involved upon consideration of ***every*** source of income – is just the same.

The source of the disability is simply irrelevant to the distribution of benefits and burdens after such a disability. If there is disability income, it is the separate property of the individual receiving it, meant to compensate for future lost wages – but it ***is*** income. Sorting out who should get, and pay, what, among the individual facts of individual cases, is what divorce courts are for.

## III. THE ANTI-USFSPA FRINGE GROUPS

### A. WHO THESE GROUPS ARE, AND WHAT THEY WANT

A certain segment of the military retiree community has always hated the USFSPA. They routinely portray themselves as "victims" of the law, because their spouses can obtain a share of the retirement benefits earned during marriage. Unconcerned with concepts such as community property, marital property, marital partnership, or equality, and fixated solely on themselves, they see no irony in demanding upon divorce half of whatever their spouses accrued (pension or otherwise) during the marriage, while screaming with outrage that military retirement benefits are considered divisible property.

The groups in question, pretending to be large organizations and operating under important-sounding names such as "Veterans for Justice," have persuaded themselves that they are so "special" that they deserve to be treated differently than everyone else under the law. One recently put into print that the existence of a Cabinet-level department of veteran affairs justifies the financial rape of his former spouse and children.

They typically advocate that the member should get it ***all*** – any retired pay, and any disability pay, all of which they insist should be "immune" from being considered as the income that it is when a divorce court determines child and spousal support.

It is an ugly but altogether too-often-seen self-delusion. The Nevada Highway Patrol troopers tried a similar tactic, and succeeded in getting NRS 125.155 – which was largely neutered only at the last minute – enacted by claiming that they deserved special treatment (and superior property rights to those of their spouses) because of the job they did while earning retirement benefits. (For a full discussion, see "PERS Primer (extracted from *Hedlund* Amicus)" posted at http://www.willicklawgroup.com/ely_2010_advanced_track_materials.)

But the fringe military-retiree groups are even ***more*** self-impressed, and self-obsessed. They routinely categorize anyone who disagrees with their position (that they get all of the benefits, and their former wives and children get nothing) as "Benedict Arnolds," "sewer rats," and even betrayers of "the Life of the Almighty while He was still on earth." One posted for the world a couple weeks ago that "anti-veteran attorneys [. . .] should all be lined up and shot so they can experience a little of the pain and anguish our combat wounded troops experience. The battle line has been drawn, and we know who the enemy really is."

And some of them have gone beyond rationalizing that they deserve superior rights as a matter of "patriotism," to believing that a higher power gives some theoretical foundation for their greed. They appear unable to process the concept that there should be some actual meaning to the fact that they each once stood at the altar of their respective gods, and proclaimed to their spouses "With all my worldly goods I thee endow." Apparently, they have persuaded themselves that their respective preachers put some kind of special reservation in about military retirement benefits, entitling them to a retroactive Mulligan to their vows.

In other words, they are whack-jobs. But they are persistent. The groups have gone to State legislatures in several jurisdictions (including Arizona, Oklahoma, Alabama, and Maryland) with an assortment of proposals that in any other context would be laughed out of the room as absurd and backward. They range from exempting disability income from consideration in figuring child and spousal support (instead pretending that the income does not exist), to limiting the spousal share of the future lifetime benefits to the length of the marriage, to seeking to re-introduce fault into divorce by only permitting a spouse to share in retirement benefits if the spouse is retroactively adjudged a "good wife" throughout the marriage.

All of those proposals were rejected at the last possible moment in Oklahoma last year. The year before that, some of those provisions were snuck into a bill in Arizona and became law before anyone noticed them, taking advantage of the diversion of attention to immigration and other matters, and a particularly extremist legislature (one Arizona lawyer described the bill as a "compromise" measure, with secondary provisions waiting for later consideration that would revoke voting rights for women and mandate that they stay barefoot and in the kitchen). The Arizona statute effectively nullified decades of solid and nationally-respected case law. (If and when a measure of sanity is returned to the Arizona legislature, repeal of that measure should be the first matter of business.)

## B. WHY THEY ARE WRONG

### 1. THEIR BOGUS ARGUMENTS

The groups have many arguments. One typical line is that a military retirement is not "really" a pension (that might be divided with a spouse) because of the rules governing military members – except when it benefits them. They tend to argue that a military retirement is not a pension, but actually "reduced pay for reduced services," an argument they only abandon, as in *Barker v. Kansas*, 503 U.S. 594 (1992), when the members' tax position required military retirement to ***be*** a pension in order to get tax benefits.

Commonly, they purposely confuse division of the military retirement benefits with alimony, and complain that a spousal share of the military retirement benefits should terminate upon the spouse's remarriage – even though the member's share of all benefits earned by the ***spouse*** during the marriage would not end if the ***member*** remarried – whether the asset in question was cash in the bank, a Civil Service pension, a 401(k) account, or any other asset.

In recent years, they have postured that while "perhaps" it was fair to divide military retirement benefits in 1981, when the USFSPA was enacted, it no longer is so, because so many women are now in the workforce. That argument is utter hogwash, factually and logically.

First, to the extent that spouses ***are*** now in the workforce, the members ***share*** in their spouses' pension benefits, 50/50, as to all benefits earned during marriage. And while they complain at the State level that division of military retirement with spouses is no longer "necessary," the Military Officers Association was testifying before Congress as recently as November, 2011, that the existing

military retirement system should not be altered in the current budget debate because the pension is such an inducement for ***both*** parties to a military marriage to stick out 20 years of service, despite "enormous demands and sacrifices that have no counterpart in civilian employment, including frequent relocations that disrupt spousal earnings and children's education . . . ." *See* "Voice for vets in D.C. fights to preserve retirement," *Air Force Times*, Nov. 21, 2011, at 11.

In fact, those "disruptions and interference" with the ability of a military spouse to create an independent career pension were explicitly a large part of the reason why Congress permitted spouses to share in the retirement benefits in the first place, and that reality has not changed from that time to this one.

The 2011 "Navy Spouse of the Year" is a gentlemen named Robert Duncan of Fallon, Nevada, whose wife is a Judge Advocate General officer. The write-up on his selection included the notation that the parties' child "depended on his dad 'for everything'" while the officer (mom) was deployed, and the observation from Mr. Duncan that:

> The thing about it is you're just one person, judge, jury, and executioner. You've got to do everything. You're not just dad, you're mom. You're mom and dad.

That has been the burden of the non-member military spouse since time immemorial – male or female. The burdens of the military life are substantial, last for decades, and fall on both parties – and are to be offset, in large part, by the promised reward of the substantial retirement benefits, which ***both*** parties endure the military lifestyle in order to receive.

Members of the groups are particularly incensed that, when they seek to convert retirement benefits into disability benefits payable only to themselves, judges have the temerity to indemnify their former spouses from such retroactive recharacterizations and order them to ensure that the former spouses continue to receive what was previously awarded. In other words, they consider it "unfair" that they are not allowed to steal their former spouses' property without interference.

Their arguments vary, depending on the audience and issue of the moment, with the only universal theme that they get more, and everyone else (especially their spouses and children) get less. The point is the utterly shameless hypocrisy and over-reaching of these groups in adopting whatever rationale leads to the conclusion that they get more – to the detriment of their spouses and children.

## 2. THEIR UN-AMERICAN POLITICAL AGENDA

In America, couples electing to marry pledge themselves and their fortunes to one another for the future. When that does not work out, for whatever reason, they divide that which they accrued during the marriage, and go their separate ways, with a judge ensuring their children are supported, and making a call as to whether the needs and abilities of the parties mean that one of them should help support the other after divorce.

In pretty much any ***other*** community, the prospect of lifetime retirement benefits payable starting

at age 39 or 40, plus cost of living increases forever, sounds pretty good just now. And splitting those benefits with a spouse upon divorce, to the extent earned during marriage, would be met with "of course."

But not with these folks. The members of the fringe groups want to ***retroactively*** decide – after years or decades of marriage – that their spouses do not get half of what is almost always the single most valuable asset accrued during years of mutually living the military lifestyle.

If you run the scenario past any of them of, say, a Sergeant married to a Wal-Mart employee with a 401(k), and ask what should be divided at the end of the marriage and why, all you get is a hysterical screech changing the subject to how "She didn't have to put her life on the line! . . . ." This is true despite the irrelevance of the work performed to the benefits accrued during marriage and to be divided upon divorce, and is the same even where the guy in question ***actually*** maintained trucks at a depot in Kansas.

As discussed in the last prior legal note, and as the United States Supreme Court stated in *Rose*, disability payments are intended for the support of a veteran ***and his family***. But the fringe groups are having none of that; they want any income titled "disability" to land in their pockets invisibly to the courts – unlike any similar income received by any other citizen of the United States.

Zoo keepers "put their lives on the line," as do construction workers, cops, fire-fighters, and a host of others. The sort of entitlement mentality exhibited by the military groups is not (usually) seen from any of those workers, and neither would or should be tolerated if it was tried. Besides, whether a career is risky is irrelevant. It simply makes no difference ***what*** job created the pension benefits that the marital couple decided was worth the risks involved, for whatever rewards would be gained.

The proponents of the fringe-group positions being sold to State legislatures are entirely fixated, unconcerned with any opinion but their own, and have no concept of equal justice under law, equity, reciprocation, spousal or child rights, or anything else that does not mesh with their particular branch of jihad. Trying to have a rational discussion with them is the oratorical equivalent of stepping in bubble gum.

## C. "THEY WALK AMONG US"

It should not be assumed that the nut-jobs who cannot focus beyond their own predispositional focus are all located elsewhere. One local member of the military-obsessed fraternity – a lawyer! – actually wrote in, protesting the last legal note (No. 46, "Military allowances for child/spousal support," posted at http://www.willicklawgroup.com/newsletters), and suggesting that garnishing military pay was some kind of illicit money-making scheme.

The inane note ignored, of course, that if garnishment has been ordered, it is because the obligor has ignored his duty to make court-ordered child and spousal support, and that the sum garnished goes to the spouse and children who have been left unsupported. The point is that there are some members of the Nevada Bar who just shouldn't be.

## IV. RED HERRINGS, WILD GEESE, AND ASIDES

### A. COMPLAINTS ABOUT THE FORMER SPOUSE

We frequently see the screeds of the fanatic groups include horror stories about the two-timing Jezebels they married who spent the time the members were on deployment sleeping their way around the command (or the city, the county, or the continent).

But as one Montana lawyer says: "It's a damn flat pancake that doesn't have two sides." In the 30 years I've done military divorces, I've seen plenty of bad behavior on both sides, including a shocking number of military marriages involving unforgivable recurring physical abuse by members against their spouses and children. This was such a problem on a national scale that the USFSPA was amended years ago to preserve the spousal share of retirement benefits when members were court-martialed for such domestic violence.

However, ***none*** of that misbehavior – on either side – matters to the concept of property division at the termination of a marriage. In modern America, anyone unhappy with their spouse for any reason can choose divorce, but that choice does not alter the fact that valuable assets were accrued ***during*** the time that the parties chose, for whatever reason, to remain married. When the marriage ends, the property accrued during the marriage is to be divided, and neither side should be permitted to retroactively recharacterize the property awarded to the other spouse as his or her own, whether by conversion to disability, or by any other means.

### B. AN ASIDE ABOUT US

Postings from members of the groups in question indicate that they have isolated and insulated themselves from meaningful analysis to the point of convincing themselves that their way of perceiving things is the right way – the ***only*** way – the question might even be seen, not even taking into account that their view might reasonably be subordinated to a larger picture of social justice or equal treatment under law.

They seem to have a nearly universal "if you're not with us, you're against us" mindset, unable to comprehend the possibility that informed, honorable people might disagree with them. And they tend to concoct elaborate conspiracy theories when their views are not shared (hence the "line them up and shoot them" comments from one of their members above).

This law firm includes both civilians and several veterans, including two former 30-year career military officers. In our family law practice, we represent military members, and their spouses, in about equal numbers.

The firm regularly provides information to military personnel and JAG offices world-wide, without charge, participating in both "Operation Stand-by" and the military pro bono project since the inception of both programs. We've provided hundreds of hours of free educational programs on

military-related divorce topics, for decades, and as recently as last month. My own family includes both veterans and disabled veterans.

In short, we have no "political" agenda beyond preserving equal treatment of parties under law, and looking out for the best interest of their children. There is no conspiracy, and no other agenda. Our reasons for opposing the fanatical fringe groups are based solely on the lack of merit – logical, legal, or equitable – of their proposals, and not on any other factor.

## V. SUGGESTION TO LEGISLATORS

Eventually, these nuts will reach Nevada, and it can only be hoped that there is both a high-enough IQ, and sufficient common-sense resistence to absurdity, to prevent anyone here from drinking their kool-aid.

Nevada law guarantees equal justice under law. It is a cornerstone of our democratic republic that the armed services exist to protect. When a flag-wrapped militant shows up, demanding special privilege in the form of financially victimizing his wife and children, he should be shunned as the opportunistic reprobate that he is.

## VI. CONCLUSIONS

Amending the family law system to ensure an opportunity for meaningful participation in family law cases by military personnel is reasonable. Abandoning equity because a participant is or once was in uniform is not. And once a military member retires, he or she is a civilian entitled to equal – not superior – protection of the laws, like every other citizen.

As to child and spousal support, military allowances are just like every other kind of allowances. As to retirement benefits, it dishonors military members, and their spouses, to portray members as any kind of victims, or to suggest that military members are somehow being treated unfairly when they are subject to the same rules governing everyone ***else*** in the country. And it is intellectually dishonest to pretend that seeking repeal or evasion of the USFSPA has anything to do with looking for "fairness." It is mere greed. The single most advantaged group of retirees in the United States has ***no cause whatsoever*** to complain about it.

Here's the "take-away" for the fanatical fringe groups:

– Equal treatment under law does not make you "victims."
– Whether you were previously a paratrooper or a pastry chef, disability income is "income."
– Just because you're adjudged "disabled" does not mean your obligations, to society, to others – and most importantly, to your spouse and children – end. It's about more than you.

The best interest of the child, and equal protection under law, trump all flag-waving claims for special precedence and preference. Military retirement benefits are just like every other bit of property accrued during a marriage, and belong to both parties. This remains true when one party

attempts to convert the form of the benefits to disability after divorce, and thereby steal property already adjudged to belong to somebody else.

## VI. QUOTES OF THE ISSUE

"Patriotism is the last refuge of a scoundrel."
– Samuel Johnson, *Life of Boswell*, vol. 2, p. 348 (1775).

"To strike freedom of the mind with the fist of patriotism is an old and ugly subtlety."
– Adlai Stevenson, speech, New York City, Aug. 27, 1952.

"A fanatic is one who can't change his mind and won't change the subject."
– Sir Winston Churchill (1874-1965).

.....

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For a great deal more information on military retirement benefits, go to http://www.willicklawgroup.com/military retirement benefits. For the archives of previous legal notes, go to http://www.willicklawgroup.com/newsletters.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.

Cite as: Shelton v. Shelton

2. 119 Nev. Adv. Op. No. 55

October 29, 2003

IN THE SUPREME COURT OF THE STATE OF NEVADA

No. 37483

MARYANN C. SHELTON, N/K/A MARYANN C. MITCHELL,

Appellant,

vs.

ROLAND A. SHELTON,

Respondent.

Appeal from a district court order denying wife's motion to enforce provision in divorce decree awarding her a portion of husband's pension. Eighth Judicial District Court, Family Court Division, Clark County; Robert E. Gaston, Judge.

Reversed and remanded.

Amesbury & Schutt and David C. Amesbury, Las Vegas, for Appellant.

Leavitt Law Firm and Glenn C. Schepps, Las Vegas, for Respondent.

BEFORE AGOSTI, C.J., SHEARING and BECKER, JJ.

OPINION

By the Court, SHEARING, J.:

The principal issue in this appeal is whether relief is available to a former spouse when a veteran unilaterally waives his military pension in order to receive disability benefits, resulting in the former spouse's loss of her community share in the pension. We conclude that, although courts are prohibited by federal law from determining veterans' disability pay to be community property, state law of contracts is not preempted by federal law. Thus, respondent must satisfy his contractual obligations to his former spouse, and the district court erred in denying former spouse's motion solely on the basis that federal law does not permit disability pay to be divided as community property.

FACTS

Respondent Roland Shelton and appellant Maryann Shelton were married on September 6, 1980, in San Diego, California. Roland served in the United States Navy for more than ten years during the marriage. On January 17, 1997, the Sheltons jointly petitioned for a summary decree of divorce in Clark County District Court. On January 29, 1997, the district court entered a decree of divorce

incorporating the parties' joint petition.

Under the terms of the agreement, the parties designated both Roland's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay to Roland. The parties, who negotiated the terms without the aid of counsel, agreed that Roland, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." Maryann would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise."[1] At the time of the divorce, Roland had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled. Both Roland and Maryann waived any right to spousal support; however, Maryann remained as beneficiary under Roland's military retirement insurance.

Beginning in January 1997, Roland regularly made his required payments to Maryann. In 1999, the Department of Veterans Affairs reevaluated Roland's disability status and concluded that Roland was 100 percent disabled, effective May 1, 1998. Roland elected to waive all his military retirement benefits for an equivalent amount of tax-exempt disability pay as federal law allows.[2] Upon receiving notice of an increased disability rating on February 26, 1999, Roland ceased his payments to Maryann.

Thereafter, Maryann moved the district court for an order enforcing the decree of divorce. Maryann asked for half of Roland's military pension, or $577, as had been agreed upon before the divorce and as was incorporated in the divorce decree. Roland opposed Maryann's motion on the grounds that the divorce decree did not allocate disability pay to Maryann, and that federal law prohibited community property division of veterans' disability benefits. The district court denied Maryann's motion on the basis of the United States Supreme Court's decision in Mansell v. Mansell (Mansell I),[3] despite repeatedly stating how unfair the result was to Maryann. In Mansell I, the Supreme Court held that federal law prevents states from treating military disability pay as divisible community property.[4] The district court also refused to grant Maryann equitable relief for the loss of her $577 monthly income on the basis that it lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree.

DISCUSSION

Domestic relations are generally within the purview of state courts.[5] However, in McCarty v. McCarty, a 1981 decision, the United States Supreme Court construed federal statutes to prevent state courts from treating military retirement pay as community property.[6] The United States Supreme Court reasoned that federal preemption was necessary as the federal government was interested in maintaining military retirement schemes as an inducement for enlistment and re-enlistment and for effective military personnel management.[7] In response to the broad preemption ruling in McCarty, Congress enacted the Uniformed Services Former Spouses' Protection Act (USFSPA) in 1982.[8] The USFSPA authorizes state courts to divide "disposable retired pay" among spouses in accordance with community property law.[9] Although the USFSPA clearly subjected military retirement pay to community property laws, it did not clearly address whether disability benefits were also subject to state community property or equitable distribution laws.

Subsequently, in Mansell I, the Supreme Court considered whether state courts may treat veterans'

disability benefits as community property. The Court initially noted that "[i]n order to prevent double dipping, a military retiree may receive disability benefits only to the extent that he waives a corresponding amount of his military retirement pay."[10] The Court then held that under USFSPA's "plain and precise language, state courts have been granted the authority to treat disposable retired pay as community property; they have not been granted the authority to treat total retired pay [which includes disability pay] as community property."[11] Because Roland elected to receive full disability pay in lieu of his retirement pay, he argues that Mansell I prevents any payments to Maryann, thus depriving her of her community property interest in Roland's pension. Based on the cases decided after Mansell I, we do not agree.

Many courts have determined that a recipient of military disability payments may not deprive a former spouse of marital property.[12] The courts proceed under various theories, but the underlying theme is that it is unfair for a veteran spouse to unilaterally deprive a former spouse of a community property interest simply by making an election to take disability pay in lieu of retirement pay.[13] Although states cannot divide disability payments as community property, states are not preempted from enforcing orders that are res judicata[14] or from enforcing contracts[15] or from reconsidering divorce decrees,[16] even when disability pay is involved.

In Poullard v. Poullard, the Louisiana Court of Appeal held that the husband had stipulated to give his former wife one half of his retirement pay in consideration of her alimony waiver.[17] The court held that "[n]othing in either the state or federal law prevents a person from agreeing to give a part of his disability benefit to another. . . . [T]he re-designation of pay cannot defeat the prior agreement of the parties."[18]

In Hisgen v. Hisgen, the Supreme Court of South Dakota enforced a property settlement agreement, stating:

That case [Mansell I], however, does not preclude state courts from interpreting divorce settlements to allow a spouse to receive property or money equivalent to half a veteran's retirement entitlement. "[T]he source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets."[19]

The question of the interpretation of a contract when the facts are not in dispute is a question of law.[20] "A contract is ambiguous if it is reasonably susceptible to more than one interpretation."[21] The best approach for interpreting an ambiguous contract is to delve beyond its express terms and "examine the circumstances surrounding the parties' agreement in order to determine the true mutual intentions of the parties."[22] This examination includes not only the circumstances surrounding the contract's execution, but also subsequent acts and declarations of the parties.[23] Also, a specific provision will qualify the meaning of a general provision.[24] Finally, "[a]n interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[25]

The property settlement agreement between Roland and Maryann is ambiguous. The agreement states that Roland's military disability is community property, but it awards the entire amount to Roland. The award of military retirement pay to Maryann describes the award as "[o]ne half of HUSBAND'S military retirement in the amount of $577, until her demise," but the amount designated is more than one-half the amount of Roland's retirement pay at the time. Roland paid

Maryann $577 until the time he elected to take disability pay in lieu of retirement pay.

It appears, therefore, that the agreement of the parties was that Roland pay Maryann $577 each month for her portion of the community asset, rather than pay her one-half of his retirement pay, since $577 is more specific than "one-half." Moreover, the parties' subsequent conduct reinforces this conclusion, in that Roland ratified the terms of the agreement by performing his obligations under the decree for a period of two years.[26] In addition, this interpretation yields a fair and reasonable result, as opposed to a harsh and unfair result. Roland cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay.[27] It appears that Roland possesses ample other assets from which to pay his obligation without even touching his disability pay. Even if he lacks these assets, nothing prevents him from using his disability payments to satisfy his contractual obligation.[28]

CONCLUSION

Although states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved. The district court's order is reversed and this matter is remanded to the district court for further proceedings consistent with this opinion.

AGOSTI, C.J., and BECKER, J., concur.

**********FOOTNOTES**********

[1] Despite the purported equal division, the numerical disparity between the respective portions of military retirement pay was never addressed.

[2] 38 U.S.C. § 5305 (2000).

[3] 490 U.S. 581 (1989).

[4] Id. at 594-95.

[5] Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979).

[6] 453 U.S. 210, 232-35 (1981); see also Mansell I, 490 U.S. at 584 (discussing McCarty).

[7] McCarty, 453 U.S. at 213, 234.

[8] Pub. L. No. 97-252, 96 Stat. 730 (codified as amended at 10 U.S.C. § 1408). The parties refer to the 1982 version of the statute; however, the relevant parts of the statute have not changed since 1982.

[9] 10 U.S.C. § 1408(c)(1) (2000). Disposable retired pay refers to monthly retired pay minus statutory exceptions. Id. § 1408(a)(4).

[10] Mansell I, 490 U.S. at 583; see also 38 U.S.C. § 5305 (2000) (previously codified at 38 U.S.C. § 3105 (1988)).

[11] 490 U.S. at 589.

[12] In re Marriage of Mansell, 265 Cal. Rptr. 227 (Ct. App. 1989) (Mansell II), cert. denied, 498 U.S. 806 (1990); Ford v. Ford, 783 S.W.2d 879 (Ark. Ct. App. 1990); McHugh v. McHugh, 861 P.2d 113 (Idaho Ct. App. 1993); Adams v. Adams, 725 A.2d 824 (Pa. Super. Ct. 1999); Trahan v. Trahan, 894 S.W.2d 113 (Tex. App. 1995); Owen v. Owen, 419 S.E.2d 267 (Va. Ct. App. 1992); In re Marriage of Jennings, 980 P.2d 1248 (Wash. 1999).

[13] Virtually any military retiree eligible for disability will elect to receive disability pay rather than retirement pay since disability pay is not subject to federal, state and local taxation, and thus increases the recipient's after-tax income. 38 U.S.C. § 5301(a) (2000) (previously codified at 38 U.S.C. § 3101(a) (1988)); Mansell I, 490 U.S. at 583-84.

[14] Mansell II, 265 Cal. Rptr. at 227; Ford, 783 S.W.2d at 879; Trahan, 894 S.W.2d at 113.

[15] Adams, 725 A.2d at 824; McHugh, 861 P.2d at 113; Owen, 419 S.E.2d at 267.

[16] Marriage of Jennings, 980 P.2d at 1248.

[17] 780 So. 2d 498, 499-500 (La. Ct. App. 2001).

[18] Id. at 500 (internal quotation marks omitted).

[19] 554 N.W.2d 494, 498 (S.D. 1996) (quoting Holmes v. Holmes, 375 S.E.2d 387, 395 (Va. Ct. App. 1988)).

[20] Grand Hotel Gift Shop v. Granite St. Ins., 108 Nev. 811, 815, 839 P.2d 599, 602 (1992).

[21] Margrave v. Dermody Properties, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994); see also Pressler v. City of Reno, 118 Nev. __, __, 50 P.3d 1096, 1098 (2002).

[22] Hilton Hotels v. Butch Lewis Productions, 107 Nev. 226, 231, 808 P.2d 919, 921 (1991).

[23] See Trans Western Leasing v. Corrao Constr. Co., 98 Nev. 445, 447, 652 P.2d 1181, 1183 (1982).

[24] See Mayer v. Pierce County Medical Bureau, 909 P.2d 1323, 1327 (Wash. Ct. App. 1995).

[25] Dickenson v. State, Dep't of Wildlife, 110 Nev. 934, 937, 877 P.2d 1059, 1061 (1994).

[26] Hoskins v. Skojec, 696 N.Y.S.2d 303, 304 (App. Div. 1999).

[27] Dexter v. Dexter, 661 A.2d 171, 174-75 (Md. Ct. Spec. App. 1995) (holding that under Maryland contract law, "the pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily . . . waiving . . . the pension benefits"); Johnson v. Johnson, 37 S.W.3d 892, 897 (Tenn. 2001) (holding that the spouse's "vested interest cannot thereafter be unilaterally diminished by an act of the military spouse," and that the trial court must enforce the decree to provide the spouse with guaranteed monthly payment).

[28] Poullard, 780 So. 2d at 500 (holding that "[n]othing in either state or federal law prevents a person from agreeing to give part of his disability benefit to another").

unnecessary (VA disability is already non-divisible as property upon divorce) or promote fraud, unjust enrichment, and wrongful deprivation. Ultimately, of course, former spouses who are deprived of their share of retirement benefits tend to become additional welfare recipients, consigned to an old age of destitution. I have represented many such persons.

Not only would this proposal tell the divorce courts to ignore the income of one party – but not the other – in setting alimony, it would leave former spouses open to unilateral, retroactive recharacterization of benefits awarded to them in divorce by stripping the courts of the power to protect decrees, and victims, from such actions. This would overrule decades of case law (in Nevada, the lead case is *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (Nev. 2003), in which the Nevada Supreme Court prevented a military member from taking back all of the payments stipulated and ordered to go to her in the divorce years earlier). I've enclosed a copy of the case.

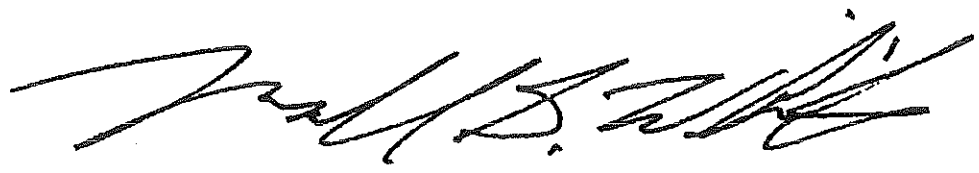
To illustrate why the proposed bill would be an unconstitutional violation of equal protection on its face, consider the facts of the *Brownell* case discussed in legal note # 53. Both parties were totally disabled; the former member received over $3,000 in monthly disability-based income, whereas his spouse received only $200 in food stamps. The member was outraged when the divorce court required him to prevent his former spouse from starving in the street by awarding some alimony.

If AB 140 was the controlling law, ***his*** income would have been rendered "invisible" to the divorce court, but ***her*** $200 in food stamp allowance would not – and would presumably have been split, giving him half of the food stamps in ***addition*** to the $3,000+ in cash. The proposed bill states on its face that no court would have any ability to rectify that inequity.

In short, AB 140 is bad in virtually every way a proposed modification to law can be bad. It would treat similarly situated people unequally, would allow one group of people to cheat another out of benefits awarded to them, would prevent courts from doing equity to the parties in litigation, and would almost certainly leave a number of former spouses (virtually all women) utterly destitute, without any valid reason in law or in equity. The bill should be rejected.

I would be happy to supply whatever further information, background, or assistance the Committee might request.

Sincerely yours,
WILLICK LAW GROUP



Marshal S. Willick, Esq.

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RESOLUTION OPPOSING
PENSION LEGISLATION EXCLUDING DISABILITY PAY FROM PROPERTY AND SUPPORT CASES
Adopted by the American Academy of Matrimonial Lawyers Board of Governors
at its meeting on November 8, 2013

WHEREAS, the American Academy of Matrimonial Lawyers (AAML) is an organization of highly regarded domestic relations attorneys the mission of which is "To provide leadership that promotes the highest degree of professionalism and excellence in the practice of family law," and consists of highly skilled negotiators and litigators who represent individuals in all facets of family law; and

WHEREAS the AAML provides leadership and guidance in family law policy matters assisting states in evaluating, passing, and enforcing just laws for the support of families and the distribution of marital and community property; and

WHEREAS, the AAML has several times reaffirmed its position that state divorce court judges should have the authority to divide all marital or community property between the parties to a marriage, to award spousal support as necessary to do equity to the parties to a marriage, and to provide child support adequate to support of children; and

WHEREAS, AAML positions have specifically addressed military retirement benefits and military-related divorce matters, including a detailed position papers submitted to Congress in 2001 and 2010 regarding the Uniformed Services Former Spouses Protection Act and related issues, in favor of distribution of all retirement benefits earned during marriage and state sovereignty over custody and visitation law; and,

WHEREAS, property division and support laws should apply to all parties fairly and equally, holding no class of citizens above any other, and avoiding preference for any special class of persons as to equal protection of the law; and

WHEREAS, state divorce laws should recognize and account for all benefits and property earned or acquired during a marriage to avoid unjustly enriching or wrongly depriving parties of property and earnings of, or with, benefits earned during marriage; and,

WHEREAS, the election of disability payments from the U.S. Department of Veterans Affairs (VA disability compensation) or the Department of Defense (Combat-Related Special Compensation) can effect a reduction in the share of a military pension that is awarded to a former spouse, often without the knowledge or consent of that former spouse; and

WHEREAS, state divorce courts generally take into consideration all separate property income streams when determining the financial resources available to the parties to a divorce case, and do and should indemnify parties from any post-divorce recharacterization of assets distributed upon divorce that would have the effect of removing payments from a party to whom those payments have been awarded; and

WHEREAS, the majority of state courts take into consideration such disability payments in determining child and spousal support; and

WHEREAS, the majority of state courts allow or require indemnification of the former spouse when a military retiree elects VA disability compensation and that election reduces the former spouse's share of the military pension; and

WHEREAS, the majority of state courts that have ruled on the subject allow or require indemnification when a military retiree elects Combat-Related Special Compensation and that election reduces the former spouse's share of the military pension; and

WHEREAS, single-issue activists are now targeting state legislatures to try to block judges from considering such disability payments in calculating spousal support or child support and divisions of property, and to prevent courts from indemnifying former spouses from post-divorce recharacterization of benefits by the pension-earning spouses; and

WHEREAS such attempts have been successful in Arizona in 2011 (§ 25-530) and in Wyoming in 2013 (SF0046), but defeated in every other jurisdiction in which it has been raised, and every known jurisdiction in which there has been an open, publicized review of such proposals and their actual effects,

NOW, THEREFORE, IT IS RESOLVED that the American Academy of Matrimonial Lawyers urges state legislatures to reject any bill attempting to deny divorce courts the ability to consider all separate property income streams – including VA disability compensation and Combat-Related Special Compensation – in determining the actual assets, income, and expenses of the parties when distributing the marital estate, and in setting spousal support and child support; and,

IT IS FURTHER RESOLVED that the American Academy of Matrimonial Lawyers urges the legislatures of each State to reject any proposal that would prevent State divorce courts from protecting their decrees from the potentially damaging effects of a post-divorce recharacterization of retired pay, and protecting the parties in divorce cases from having the pension payments awarded to them reduced or eliminated through the election of disability pay by the other party.

# EXHIBIT 10

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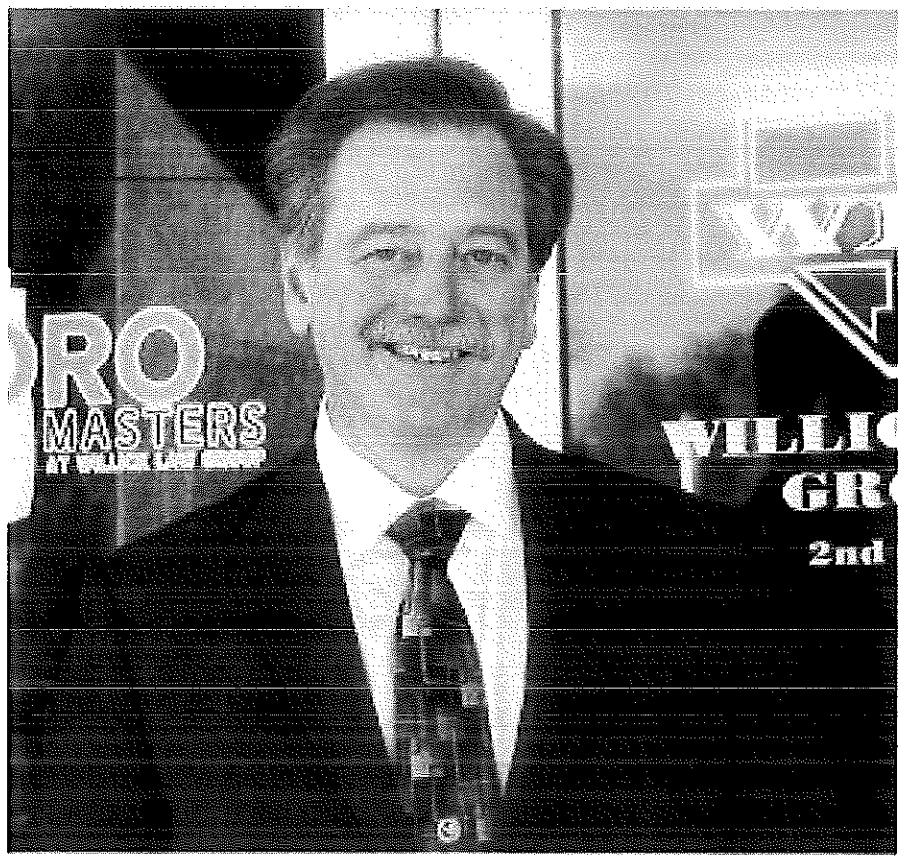

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Lawyer's license tabled in sex coercion case

The Nevada Supreme Court temporarily suspended a Las Vegas attorney from practicing law after he pleaded guilty to one felony count of sexually motivated coercion.

Richard L. Crane, a member of the Willick Law Group, which focuses on family law, was sentenced in October to five years of probation by District Judge David Barker. As part of the conditions of probatic Crane must file as a sex offender and not live within 1,000 feet of a school, park or other structure designed primarily for use by children, according to court records.

Crane's suspension was handed down by justices Michael Cherry, Mark Gibbons and Nancy Saitta.

PO Box 28211, Las Vegas NV, NV 89126, (702) 283-8088 Info@veteransinpolitics.org



The Willick Law Group's website on Friday still listed Crane as a practicing attorney. The state's high court temporarily suspended him from practicing law on Monday. Attempts to reach Crane through the office were unsuccessful.

According to Supreme Court Rules, temporary suspension of an attorney is mandatory when he or she been convicted of a serious crime, including felonies. The matter was referred to the Southern Nevada Disciplinary Board for disciplinary proceedings. It was not immediately known when those proceeding would take place.

Crane, a graduate of the Thomas Jefferson School of Law in San Diego, was admitted to the Nevada ba in October 2005.

Before law school, Crane spent 30 years in the Navy and retired as a lieutenant commander, according his biography on the Willick Law Group's website.

Contact reporter Francis McCabe at fmccabe@review journal.com or 702-380-1039.

Supreme Court suspends Las Vegas attorney

By SEAN WHALEYLAS VEGAS REVIEW-JOURNAL CAPITAL BUREAU
CARSON CITY – A Las Vegas attorney was suspended for three years Friday by the Nevada Supreme Court following a 2010 conviction of sexually motivated coercion of a minor.

The court, in a unanimous order, imposed the suspension on Richard L. Crane, who had been a membe of the Willick Law Group, which focuses on family law. The firm's website no longer lists Crane as an attorney.

A Southern Nevada disciplinary board had recommended a suspension of six months and one day.

But the court, after reviewing the matter, said: "However, we conclude that the seriousness of Crane's offense warrants a three-year suspension, retroactive to the date of his initial suspension on November 2010."

Crane was sentenced in October 2012 to five years of probation by Clark County District Judge David Barker. As part of the conditions of probation, Crane must file as a sex offender and not live within 1,0

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF RICHARD L. CRANE, BAR NO. 9536.

No. 59168

FILED

JAN 10 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic review, pursuant to SCR 105(3)(b), of a Southern Nevada Disciplinary Board hearing panel's findings that attorney Richard L. Crane violated one rule of professional conduct and its recommendation that he be suspended from the practice of law for six months and one day.

The underlying facts in this matter provide that Crane was convicted, pursuant to a guilty plea, of coercion (sexually motivated), a felony in violation of NRS 207.193 and NRS 175.547 on October 4, 2010. Crane was given a suspended sentence and placed on probation for an indeterminate period not to exceed 5 years. On October 7, 2010, Crane self-reported his conviction to the state bar pursuant to SCR 111(2). The state bar filed a petition pursuant to bar counsel's reporting requirements as detailed in SCR 111, and this court ordered Crane temporarily suspended on November 15, 2010. In re: Discipline of Crane, Docket No. 57121 (Order of Temporary Suspension and Referral to Disciplinary Board, November 15, 2010).

During the formal disciplinary hearing, Crane admitted to communicating with what he believed to be a 15-year-old minor, agreeing to and arriving at an in-person meeting, and being arrested by officers at

Effective Date: 1/10/2013
Bar No. 9536

that time. Evidence regarding those communications confirms that significant portions were sexual in nature. The disciplinary panel found that Crane violated RPC 8.4(b) (misconduct).

The findings and recommendations of a disciplinary board hearing panel are persuasive; however, our automatic review of a panel decision recommending a suspension is conducted de novo, requiring the exercise of independent judgment by this court. SCR 105(3)(b); In re Stuhff, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992). We conclude that clear and convincing evidence supports the panel's findings, and that Crane violated RPC 8.4(b) (misconduct). SCR 105(2)(e).

The panel further recommended that Crane be (1) suspended from the practice of law for six months and one day from July 8, 2011; and (2) required to submit full payment for the costs of the disciplinary proceeding pursuant to SCR 120 within 30 days after the state bar issues a bill of costs.

Having reviewed the record, we agree that the panel's recommendation of suspension is an appropriate discipline tailored to these circumstances. However, we conclude that the seriousness of Crane's offense warrants a three-year suspension, retroactive to the date of his initial suspension on November 15, 2010.

Further, we order that any petition for reinstatement must demonstrate proof that Crane has (1) continued to seek psychosexual therapy with Mr. John Pacult, a licensed clinical social worker, or a similarly situated professional; (2) met all the requirements and conditions of his criminal probation; and (3) abstained from any further criminal or professional misconduct. Should Crane not furnish the required proof as part of his petition for reinstatement, we note that this

court will be disinclined to approve any recommendation of reinstatement. If, however, Crane offers such proof and reinstatement is to be granted, Crane's reinstatement will still be subject to the condition that he be on probation for two years from the date of reinstatement, with the terms and conditions of probation to be decided by state bar counsel.

Crane shall also pay the costs of the disciplinary proceedings within 30 days of receipt of the Nevada State Bar's bill of costs. See SCR 120. Crane and the State Bar shall comply with all requirements of SCR 115 and SCR 121.1.

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Jeffry R. Albregts, Chair, Southern Nevada Disciplinary Board
David Clark, Bar Counsel
Kimberly K. Farmer, Executive Director, State Bar of Nevada
William B. Terry, Chartered
Perry Thompson, Admissions Office, United States Supreme Court

# IN THE UNITED STATES DISTRICT COURT
# FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

| | |
|---|---|
| R. Scotlund Vaile,<br><br>*Plaintiff,*<br><br>v.<br><br>Marshal S. Willick, et al.,<br><br>*Defendants.* | CIVIL ACTION NO. 6:07cv00011<br><br>MEMORANDUM OPINION AND ORDER<br><br>JUDGE NORMAN K. MOON |

This matter is before the Court on the parties' cross-motions for summary judgment [Docket #38, #41]. Plaintiff argues in his motion that Defendants published false statements in a series of letters sent to Washington & Lee University School of Law and the American Bar Association that they knew to be untrue and that the letters were sent in malice and with an intent to defame. Defendants argue in opposition that the statements in the letters were materially true and represent part of a judicial opinion issued by the United States District Court for the District of Nevada. For the reasons that follow, the Court will GRANT in PART Plaintiff's motion for summary judgment because the letters are defamatory *per se*, but will DENY in PART because the letters may be privileged depending on whether the letters materially departed from the information within the judicial opinion of the Nevada District Court. The Court will also GRANT in PART Defendants' motion for summary judgment as to Plaintiff's claim for intentional infliction of emotional distress as Plaintiff has not offered any evidence to support his claim, but will DENY in PART because the issue of whether Defendants' letters were privileged is an issue for a jury to decide.

## I. BACKGROUND

This matter is the latest in a series of disputes between the plaintiff, R. Scotlund Vaile

("Vaile"), and the defendants, Marshall S. Willick ("Willick") and Richard L. Crane ("Crane"). Willick and Crane are members of the Willick Law Group ("WLG"), a Nevada law firm that specializes in family law including, among other things, divorce, annulments, child custody visitation, and child support. Willick and Crane represented Cisilie Vaile Porsboll, Vaile's ex-wife, and Kaia Louise Vaile and Kamilla Jane Vaile, his children, in a series of lawsuits in state and federal courts in Nevada to recover damages from Vaile's removal of the children from their mother's custody without her consent.

The latest suit occurred in the United States District Court of Nevada before the Honorable Roger L. Hunt. The matter was scheduled for trial on February 27, 2006, but Vaile notified the court on February 21, 2006, that he intended to cease his defense and that he would not oppose an eventual judgment entered against him. Judge Hunt issued his decision on March 13, 2006, and awarded Vaile's ex-wife and children damages in the amount of $688,500.00 and attorneys' fees and costs of $272,255.56.

At the time of the Nevada litigation, Vaile was a student at Washington & Lee University School of Law ("W&L") and subsequently graduated in May 2007. On March 24, 2006, Willick sent a letter to W&L that advised that Vaile had been "found guilty of multiple violations of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO." Willick concluded that W&L must be unaware of Vaile's "history" because "[i]t would be astounding if your institution would willingly countenance association with such an individual." Willick attached Judge Hunt's March 13, 2006 decision to his letter and urged W&L to "reconsider [Vaile's] fitness for continued enrollment." He further advised that "no form of federal state, or private money should be used for the support or aid of this individual."

W&L seemingly took no action and, as a result, Crane sent a letter to the American Bar

Association ("ABA") to inform it of W&L's recalcitrance. Crane advised the ABA that Vaile was enrolled at W&L and that "[i]t baffled [the Willick Law Group] that a law school would admit a student found to have committed multiple violation [sic] of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO." Crane attached Judge Hunt's March 13, 2006 decision to his letter, as well as the March 24, 2006 letter to W&L, and called for the ABA to rescind W&L's accreditation because it "knowingly admit[s] students with Mr. Vaile's credentials" and "seem[s] to have little concern" of his conduct because he "is still a student at the school."

Vaile filed this action on March 30, 2007, and alleged, among other things, that Willick's letter to W&L was false and defamatory and that Willick and Crane sent the letters to inflict severe emotional distress upon him. Vaile later added a second claim for defamation because of Crane's letter to the ABA. Vaile also alleged that Willick and Crane violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, by their conduct and that Willick and Crane conspired to injure his professional and business interests under the Virginia Business Conspiracy Act, Va. Code Ann. § 18.2-499, -500, but these claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief could be granted.

Vaile filed the pending motion for summary judgment and argues that Willick and Crane sent the letters to W&L and the ABA with malice and an intent to defame. Vaile further argues that he has never been found guilty of any state or federal laws, and, therefore, the statements in the letters are false and defamatory because they suggest he has been convicted of criminal offenses. In response, Willick and Crane argue that the letters are true or, at worst, substantially true, and do not necessarily suggest a criminal conviction. Willick and Crane assert that the statements, read as a whole with the letters and Judge Hunt's decision, cannot be construed as defamatory *per se* because

they represent the findings of Judge Hunt in his March 13, 2006 decision. Willick and Crane also argue that Vaile is unable to produce any evidence of severe emotional distress to support his claim for intentional infliction of emotional distress and, therefore, that this claim also fails.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The Court does not weigh the evidence or determine the truth of the matter when considering a motion for summary judgment. *Anderson*, 477 U.S. at 249. Instead, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; *see also Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994).

If the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing' . . . an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party can establish such an absence of evidence, the burden shifts to the nonmoving party to set forth specific facts illustrating genuine issues for trial. Fed. R. Civ. P. 56(e); *see also Celotex*, 477 U.S. at 324. Summary judgment is appropriate if, after adequate time for discovery, the nonmoving party fails to make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The nonmoving party may not rest upon mere allegations, denials of the adverse party's pleading, or mere conjecture and speculation. *Glover v. Oppleman*, 178 F. Supp. 2d 622, 631 (W.D. Va. 2001) ("Mere speculation by the non-movant cannot create a genuine issue of material fact.").

If the proffered evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Anderson*, 477 U.S. at 242). Indeed, the trial judge has an affirmative obligation to "prevent 'factually unsupported claims and defenses' from proceeding to trial," *Anderson*, 477 U.S. at 249, and there is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249.

## III. DISCUSSION

### A. The Letters to W&L and the ABA Are Defamatory Per Se

The elements of defamation[1] under Virginia law are (1) publication of (2) an actionable statement with (3) the requisite intent. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (citations omitted). A statement is not "actionable" simply because it is false; it must also be defamatory, meaning it must "tend so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* quoting (Restatement (Second) of Torts § 559). The issue of whether a statement is actionable is to be determined by the Court as it is a matter of law. *See Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998).

Under Virginia law, it is defamatory *per se* to make false statements that among other things, (1) impute the commission of a criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished; (2) impute that a person is unfit to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; or (3) prejudice a person in his or her profession or trade. *Shupe v. Rose's*

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[1]Virginia does not distinguish between libel, defamation by published writing, and slander, defamation by speech, unlike most states. *Fleming v. Moore*, 275 S.E.2d 632, 635 (Va. 1981).

*Stores, Inc.*, 192 S.E.2d 766, 767 (Va. 1972). If a statement is defamatory *per se*, Virginia law presumes that the plaintiff suffered actual damage to his reputation and, therefore, no proof of damages is required. *Fleming*, 275 S.E.2d at 636. The plaintiff still must establish the requisite intent, however, by a showing that the defendant knew the statement to be false or negligently failed to ascertain its truthfulness. *Great Coastal Express, Inc. v. Ellington*, 334 S.E.2d 846, 852 (Va. 1985). Punitive damages, on the other hand, require a showing of actual malice on the part of the defendant. *Gov't Micro Res., Inc. v. Jackson*, 624 S.E.2d 63, 70 (Va. 2006) (noting that a plaintiff must prove actual malice by clear and convincing evidence that the defendant either knew the statements were false at the time he made them, or that he made them with a reckless disregard for the truth).

The allegedly defamatory meaning of a statement is to be considered in light of the plain and natural meaning of the words used in the context as the community would naturally understand them. *Wells v. Liddy*, 186 F.3d 505, 523 (4th Cir. 1999). Words may be defamatory by their direct and explicit terms and also indirectly, "and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory." *Carwile v. Richmond Newspapers*, 82 S.E.2d 588, 592 (Va. 1954). Because a defamatory charge may be made "by inference, implication or insinuation," the Court must look not only to the actual words spoken, but also to all inferences fairly attributable to them. *Id.* Nevertheless, the meaning of the allegedly defamatory words cannot, by innuendo, be extended beyond their ordinary and common acceptation. *Id.*

**1. The Statements Within the Letters Impute the Commission of a Crime**

Words that impute the commission of a crime "punishable by imprisonment in a state or federal institution" or "regarded by public opinion as involving moral turpitude" are defamatory *per se*. *Great Coastal Express, Inc.*, 334 S.E.2d at 850. The words need not establish all the elements

of the offense imputed, only that a person committed a felony which he did not commit. *Schnupp v. Smith*, 457 S.E.2d 42, 46 (Va. 1995). Words that impute the commission of a felony are defamatory even if the individual committed another felony of the same general character. *James v. Powell*, 152 S.E. 539, 543 (Va. 1930) (finding newspaper liable for libel when it stated that the plaintiff was charged with both murder and robbery when he was charged only with murder).

In this case, the statements within Willick and Crane's letters to W&L and the ABA are "actionable statements" because they impute the commission of a crime upon Vaile that he did not commit. The statements, taken in their plain and popular sense in which the average person would naturally understand them, denote that Vaile was found "guilty" of the crimes of kidnaping, passport fraud, felony non-support of children, and RICO. Technically, a person may be charged with civil kidnaping and racketeering, but passport fraud and felony non-support of children are punishable only as criminal offenses and likely result in imprisonment. *See* 18 U.S.C. § 228 (stating that a person who fails to pay a child support obligation may be imprisoned for up to two years or fined); 18 U.S.C. § 1542 (stating that a person who makes a false statement to acquire a passport, either for his own use or the use of another, may be imprisoned for up to 10 years or fined).

*A. Willick's Statement that Vaile Had Been Found "Guilty" Is Defamatory Per Se*

The statement in Willick's letter—that Vaile had been found "guilty" of multiple violations of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO—undoubtedly would be understood by those that heard or read it as charging Vaile with the commission *and* conviction of numerous crimes. Willick argues that the word "guilty" applies in both criminal and civil contexts because it is defined as having committed not only a crime, but also a reprehensible act, including a tort or fault. *See Black's Law Dictionary* 637 (5th ed. 1979). The fact that "guilty" applies civilly notwithstanding, the use of the word "felony"

alongside the word "guilty," as well as stating that someone is "guilty" of an offense that only applies in a criminal context, requires the Court to apply the word "guilty" in this sentence in only its criminal context. *See Burgess v. United States*, 128 S.Ct. 1572, 1577 (2008) (noting that the term "felony" is commonly defined to mean "a crime punishable by imprisonment for more than one year"); *Black's Law Dictionary* 555–56 (5th ed. 1979) (defining "felony" as "[a] serious crime usu[ally] punishable by imprisonment for more than one year or death"); *see also Webster's Third New Int'l Dictionary* 836 (1976) (defining "felony" as "any crime for which the punishment in federal law may be death or imprisonment for more than one year"). In addition, it is questionable that an average listener or reader would interpret "kidnaping" and "RICO" in their civil context given their placement alongside the crimes of "passport fraud" and "felony non-support of children."[2] Moreover, Willick's subsequent statement that questioned why W&L "would willingly countenance with such an individual" if it knew of his "history," in conjunction with his earlier statement of Vaile's offenses, intimates that Vaile is a criminal of such ill repute with which one would not willingly associate. Accordingly, the Court finds that the March 24, 2006 letter is defamatory *per se* because it imputes the commission and conviction of a crime to Vaile.

*B. Crane's Statement that Vaile Had Committed Violations of Law Is Defamatory Per Se*

Similarly, the statement in Crane's letter—that Vaile had been found to have "committed" multiple violations of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO—would also be understood by those that heard or read it as charging Vaile with the commission, and presumably the conviction, of numerous crimes. The statement in Crane's letter is nearly identical to the defamatory statement in Willick's letter, but

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[2]This assumes, of course, that an average person would know that a person can be held civilly liable for kidnaping and RICO and that they are not exclusively criminal offenses, which the Court believes to be a dubious proposition.

Crane did alter one key word—changing the word "guilty" in Willick's letter to "committed." Nevertheless, the acts of passport fraud and felony non-support of children are solely criminal acts and, as explained above, the word "felony" can only mean a serious criminal act. Moreover, the words "commit" literally means, among other things, to "perpetrate a crime." *Black's Law Dictionary* 248 (5th ed.1979); *see also Webster's Third New Int'l Dictionary* 457 (1976) (defining "commit" to mean to "do, perform <convicted of committing crimes against the state>"). Therefore, by saying that Vaile had been "found" to have "committed" multiple violations of State and Federal law, Crane suggests that a judge or jury has held that Vaile did perpetrate a series of crimes. *Black's Law Dictionary* 568 (5th ed. 1979) (defining "find" as "[t]o determine a fact in dispute by verdict or decision," *i.e.*, to find guilty); *see also Webster's Third New Int'l Dictionary* 852 (1976) (defining "find" as "to arrive at a conclusion"). And, much like in Willick's letter, a reader is unlikely to interpret the words "kidnaping" and "RICO" in their civil context when read in conjunction with a person being "found" to have "committed" the felonies of passport fraud and non-support of children. As a result, the Court finds that the statement in the April 13, 2007 letter is also defamatory *per se* because it imputes the commission and conviction of a crime to Vaile.

**2. The Letters Also Impute an Unfitness to Study or Practice Law**

Further, Willick and Crane's letters are defamatory *per se* as a whole because they suggest Vaile is unfit to continue his studies or otherwise lacks the integrity to continue in the study of law. The study and practice of law is an honorable profession and an individual that has committed or has been convicted of a crime may be found to lack the honesty, trustworthiness, diligence, or reliability required of an applicant to be admitted to the bar. *See, e.g.*, Rules of the Virginia Board of Bar Examiners, § III, 2. Vaile had not yet graduated from W&L or sat for the bar, but he was still subject to the same obligation to prove that he could perform the obligations and responsibilities of

a practicing attorney. There is no question that Willick's letter portrayed Vaile as one unfit to study or practice the law by stating that he has been "found guilty" of several felonies which, if known, would prevent W&L from "willingly countenanc[ing] association with such an individual" and that his "history" of "violations of State and Federal law" was such that W&L should "reconsider his fitness for continued enrollment." Similarly, Crane's letter also portrayed Vaile as unfit to study or practice law by stating that he was "baffled" that W&L would "admit a student found to have committed multiple violations of State and Federal law" and that W&L should lose its accreditation because it admitted such a student and permitted him to continue to study the law. Thus, the Court finds that Willick and Crane's letters are defamatory *per se* not only because they impute the commission of a crime, but also because they impute that Vaile is unfit to perform the duties of a law student or lawyer and that he lacks the integrity required of such employment.

**B. Issue of Whether Letters Were Privileged Is Question for Jury**

In Virginia, both truth and privilege are defenses to defamation. *Ramey v. Kingsport Publ'g Corp.*, 905 F.Supp. 355, 358 (W.D. Va. 1955). Therefore, the Court must determine whether the defamatory statements within Willick and Crane's letters were either true or privileged.

**1. The Truth of the Letters Is Immaterial Because the Letters May Be Privileged**

It is well settled that truth is an absolute defense in an action for defamation. *Goddard v. Protective Life Corp.*, 82 F. Supp. 2d 545, 560 (E.D. Va. 2000). A defendant need not plead truth as an affirmative defense in Virginia, however, because the plaintiff now bears the initial burden of proving the falsity of the statements in order to prevail. *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985). The statements need not be literally true for the defendant to prevail; "[s]light inaccuracies of expression are immaterial provided the defamation charge is true in substance, and it is sufficient to show that the imputation is substantially true." *Jordan v. Kollman*, 612 S.E.2d 203,

207 (Va. 2005).

Willick and Crane argue that, even if the letters do impute that Vaile committed a crime, the letters are true, or at worst, substantially true and, therefore, cannot be defamatory. Further, Willick and Crane assert that the letters merely restate the findings made by Judge Hunt in his March 13, 2006 decision. Vaile counters that he has never been convicted, much less charged, of kidnaping, passport fraud, felony non-support of children, or racketeering, and that the only crime with which he actually has been convicted is speeding.

The fact that the parties disagree as to whether or not Vaile has been charged or convicted of a crime ordinarily would create a genuine issue of material fact such that summary judgment would be inappropriate. Moreover, the question of whether a plaintiff has sufficiently proven the falsity of the defamatory statements is to be decided by a jury under Virginia law. *Jordan*, 612 S.E.2d at 207. In this case, however, the question is not whether the letters are substantially true, but rather whether the letters are a substantially accurate representation of the decision issued by Judge Hunt on March 13, 2006.

**2. Absolute Privilege to Publish Matters of Public Record Applies to the Letters**

There can be no liability for a communication that is privileged. *Warren v. Bank of Marion*, 618 F. Supp. 317, 324 (W.D. Va. 1985); *see also* 50 AM. JUR. 2d *Libel and Slander* § 255 (2008). The defense of privilege is based on public policy to further the right of free speech by protecting certain communications of public or social interests from liability for defamation that otherwise would be actionable. 50 AM. JUR. 2d *Libel and Slander* § 255 (2008). A privilege can either be absolute or qualified depending upon the circumstances of the occasion. *Warren*, 618 F. Supp. at 324.

A qualified privilege is defined as a "communication, made in good faith, on a subject matter

in which the person communicating has an interest, or owes a duty, legal, moral, or social, [and] is qualifiedly privileged if made to a person having a corresponding interest or duty." *Taylor v. Grace*, 184 S.E. 211, 213 (Va. 1936). The defense of qualified privilege may be defeated by a finding of malice on the part of the jury, *Gazette, Inc.*, 325 S.E.2d at 727, but the court first must decide as a matter of law if the communication itself is privileged. *Fuste v. Riverside Healthcare Ass'n*, 575 S.E.2d 858, 863 (Va. 2003).

An absolute privilege, on the other hand, precludes liability for a defamatory statement even if the statement is made maliciously and with knowledge that it is false. *Lindeman v. Lesnick*, 604 S.E.2d 55, 58 (Va. 2004). The publication of public records to which everyone has a right of access is absolutely privileged in Virginia.[3] *Alexander Gazette Corp. v. West*, 93 S.E.2d 274, 279 (Va. 1956); Restatement (Second) of Torts § 611. The privilege is not lost if the record is incorrect or if it contains falsehoods. *Times-Dispatch Publ'g Corp. v. Zoll*, 139 S.E. 505, 507 (Va. 1927). The privilege exists so long as the published report is a fair and substantially accurate account of the public record or proceeding. *Alexander Gazette Corp.*, 93 S.E.2d at 279. If the publication substantially departs from the proceeding or record, however, then the privilege is lost.

The Court finds that the absolute privilege of publication of public records applies to the letters sent by Willick and Crane. The letters contained statements that allegedly represent the finding of the United States District Court of Nevada and attached the entire March 13, 2006 opinion for further reference. Therefore, the question is whether the letters substantially departed from Judge Hunt's decision such that the privilege was lost. This question is one left for the jury, however, because reasonable people could disagree whether the letters are an impartial and accurate

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[3]This privilege applies to media and non-media defendants alike. *See, e.g.*, Restatement (Second) of Torts § 611.

account of Judge Hunt's decision. *See Rush v. Worell Enters., Inc.*, 21 Va. Cir. 203, 206–07 (Va. Cir. Ct. 1990) (noting that if the facts are not in dispute and reasonable people could not differ about whether the publication substantially departs from the public record then the trial court may decide if the privilege is lost, but if reasonable people could disagree, the issue should be decided by a jury).

Accordingly, the Court will grant partial summary judgment only as to the letters being defamatory *per se*. The question of whether Willick and Crane lost their absolute privilege by substantially departing from the record and whether Vaile can prove that Willick and Crane acted with the requisite intent sufficient to be awarded compensatory and punitive damages is left for a jury to decide.

**C. Vaile Has Not Proven Emotional Distress or Outrageous Behavior**

A plaintiff must prove four elements to prevail on a claim for intentional infliction of emotional distress in Virginia: (1) that the wrongdoer's conduct was intentional or reckless; (2) that the conduct was so outrageous and intolerable that it offends against the generally accepted standards of decency and morality; (3) that there is a causal connection between the wrongdoer's conduct and the emotional distress; and (4) that the emotional distress is severe. *Womack v. Eldridge*, 210 S.E.2d 145, 148 (Va. 1974). The issue of whether the conduct may be regarded as so extreme and outrageous as to permit recovery is a matter of law to be decided by the court unless reasonable persons could differ. *Id.*

Vaile alleges that Willick and Crane sent three letters as a pattern of communication to inflict severe emotional distress. The three letters included the Willick letter to W&L, the Crane letter to the ABA, and an unknown communication to Willick's employer in the summer of 2006, Baker Botts LLP. Vaile claimed that the communications caused him to suffer such severe emotional

distress that no reasonable person could be expected to endure and that it disrupted his daily personal life, including his preparation for the bar examination. Vaile has failed to produce any evidence at this point, however, to establish any of the elements. He has not shown that he suffered any emotional distress, severe or otherwise, other than that he felt concerned with his standing in the eyes of his professors at W&L and that the letters made it difficult to concentrate on his studies. In addition, the parties learned during discovery that it was not Willick and Crane that contacted Vaile's summer employer, but rather the Clark County Office of the District Attorney, Family Support Division, for the State of Nevada in order to collect his outstanding child support obligation. Even if this communication led to Vaile's ultimate dismissal from Baker Botts, this result cannot be attributed to the actions of Willick or Craine.

Further, Vaile has not offered any evidence that he has discussed his emotional health with a healthcare professional or designated any expert to testify as to his emotional distress. The emotional distress suffered by Vaile is certainly not of the severity that no reasonable person can be expected to endure. *See Russo v. White*, 400 S.E.2d 160, 163 (Va. 1991) (finding that plaintiff has not suffered extreme emotional distress when she fails to produce any evidence of objective physical injury caused by stress, that she sought medical attention, that she was confined at home or in a hospital, or that she lost income). Moreover, the Court is unable to find as a matter of law that the two letters sent by Willick and Crane are so outrageous and extreme that they offend generally accepted standards of decency. Therefore, the Court cannot find that Vaile has made a sufficient showing to establish the existence of the elements essential to his claim for intentional infliction of emotional distress and will grant summary judgment as to this claim. *Celotex*, 477 U.S. at 322 (holding that summary judgment is appropriate if nonmoving party fails to make a showing sufficient to establish the existence of an element essential to his claim).

## IV. CONCLUSION

For the reasons stated herein, the Court hereby GRANTS in PART and DENIES in PART the parties' cross-motions for summary judgment. The Court finds that the letters sent by the Defendants are defamatory *per se* and hereby GRANTS partial summary judgment as to Plaintiff's motion for summary judgment, but only with respect to that issue [Docket #38]. In addition, the Court finds that Plaintiff has not satisfied any of the elements of his claim for intentional infliction of emotional distress and hereby GRANTS Defendants' motion for summary judgment [Docket #41] as to this claim. The Court otherwise DENIES summary judgment on Plaintiff's defamation claims as the question of whether Defendants have lost their absolute privilege and whether Plaintiff can prove that Defendants acted with the requisite intent sufficient to be awarded compensatory and punitive damages is for a jury to decide.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

Entered this _____ day of July, 2008

Norman K. Moon
NORMAN K. MOON
UNITED STATES DISTRICT JUDGE

# EXHIBIT 11

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January 18 at 6:12pm ·

CLARIFICATION:

Attorney Marshall Willick's letters against opposing party found defamatory per se in 2008; Willick settled before trial on issue privilege.

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Richard Crane, formerly with Willick's firm, guilty of sexual misconduct involving a minor and suspended from the practice of law.

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# IN THE UNITED STATES DISTRICT COURT
# FOR THE WESTERN DISTRICT OF VIRGINIA
LYNCHBURG DIVISION

| | |
|---|---|
| R. Scotlund Vaile,<br>*Plaintiff,*<br>v.<br>Marshal S. Willick, et al.,<br>*Defendants.* | CIVIL ACTION NO. 6:07cv00011<br>MEMORANDUM OPINION AND ORDER<br>JUDGE NORMAN K. MOON |

This matter is before the Court on the parties' cross-motions for summary judgment [Docket #38, #41]. Plaintiff argues in his motion that Defendants published false statements in a series of letters sent to Washington & Lee University School of Law and the American Bar Association that they knew to be untrue and that the letters were sent in malice and with an intent to defame. Defendants argue in opposition that the statements in the letters were materially true and represent part of a judicial opinion issued by the United States District Court for the District of Nevada. For the reasons that follow, the Court will GRANT in PART Plaintiff's motion for summary judgment because the letters are defamatory *per se*, but will DENY in PART because the letters may be privileged depending on whether the letters materially departed from the information within the judicial opinion of the Nevada District Court. The Court will also GRANT in PART Defendants' motion for summary judgment as to Plaintiff's claim for intentional infliction of emotional distress as Plaintiff has not offered any evidence to support his claim, but will DENY in PART because the issue of whether Defendants' letters were privileged is an issue for a jury to decide.

## I. BACKGROUND

This matter is the latest in a series of disputes between the plaintiff, R. Scotlund Vaile

("Vaile"), and the defendants, Marshall S. Willick ("Willick") and Richard L. Crane ("Crane"). Willick and Crane are members of the Willick Law Group ("WLG"), a Nevada law firm that specializes in family law including, among other things, divorce, annulments, child custody visitation, and child support. Willick and Crane represented Cisilie Vaile Porsboll, Vaile's ex-wife, and Kaia Louise Vaile and Kamilla Jane Vaile, his children, in a series of lawsuits in state and federal courts in Nevada to recover damages from Vaile's removal of the children from their mother's custody without her consent.

The latest suit occurred in the United States District Court of Nevada before the Honorable Roger L. Hunt. The matter was scheduled for trial on February 27, 2006, but Vaile notified the court on February 21, 2006, that he intended to cease his defense and that he would not oppose an eventual judgment entered against him. Judge Hunt issued his decision on March 13, 2006, and awarded Vaile's ex-wife and children damages in the amount of $688,500.00 and attorneys' fees and costs of $272,255.56.

At the time of the Nevada litigation, Vaile was a student at Washington & Lee University School of Law ("W&L") and subsequently graduated in May 2007. On March 24, 2006, Willick sent a letter to W&L that advised that Vaile had been "found guilty of multiple violations of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO." Willick concluded that W&L must be unaware of Vaile's "history" because "[i]t would be astounding if your institution would willingly countenance association with such an individual." Willick attached Judge Hunt's March 13, 2006 decision to his letter and urged W&L to "reconsider [Vaile's] fitness for continued enrollment." He further advised that "no form of federal state, or private money should be used for the support or aid of this individual."

W&L seemingly took no action and, as a result, Crane sent a letter to the American Bar

Association ("ABA") to inform it of W&L's recalcitrance. Crane advised the ABA that Vaile was enrolled at W&L and that "[i]t baffled [the Willick Law Group] that a law school would admit a student found to have committed multiple violation [sic] of State and Federal law, including kidnaping, passport fraud, felony non-support of children, and violation of RICO." Crane attached Judge Hunt's March 13, 2006 decision to his letter, as well as the March 24, 2006 letter to W&L, and called for the ABA to rescind W&L's accreditation because it "knowingly admit[s] students with Mr. Vaile's credentials" and "seem[s] to have little concern" of his conduct because he "is still a student at the school."

Vaile filed this action on March 30, 2007, and alleged, among other things, that Willick's letter to W&L was false and defamatory and that Willick and Crane sent the letters to inflict severe emotional distress upon him. Vaile later added a second claim for defamation because of Crane's letter to the ABA. Vaile also alleged that Willick and Crane violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, by their conduct and that Willick and Crane conspired to injure his professional and business interests under the Virginia Business Conspiracy Act, Va. Code Ann. § 18.2-499, -500, but these claims were dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6) for failing to state a claim upon which relief could be granted.

Vaile filed the pending motion for summary judgment and argues that Willick and Crane sent the letters to W&L and the ABA with malice and an intent to defame. Vaile further argues that he has never been found guilty of any state or federal laws, and, therefore, the statements in the letters are false and defamatory because they suggest he has been convicted of criminal offenses. In response, Willick and Crane argue that the letters are true or, at worst, substantially true, and do not necessarily suggest a criminal conviction. Willick and Crane assert that the statements, read as a whole with the letters and Judge Hunt's decision, cannot be construed as defamatory *per se* because

they represent the findings of Judge Hunt in his March 13, 2006 decision. Willick and Crane also argue that Vaile is unable to produce any evidence of severe emotional distress to support his claim for intentional infliction of emotional distress and, therefore, that this claim also fails.

## II. STANDARD OF REVIEW

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, the discovery and disclosure materials on file, and affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986). The Court does not weigh the evidence or determine the truth of the matter when considering a motion for summary judgment. *Anderson*, 477 U.S. at 249. Instead, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255; *see also Shaw v. Stroud*, 13 F.3d 791, 798 (4th Cir. 1994).

If the nonmoving party bears the burden of proof, "the burden on the moving party may be discharged by 'showing' . . . an absence of evidence to support the nonmoving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). If the moving party can establish such an absence of evidence, the burden shifts to the nonmoving party to set forth specific facts illustrating genuine issues for trial. Fed. R. Civ. P. 56(e); *see also Celotex*, 477 U.S. at 324. Summary judgment is appropriate if, after adequate time for discovery, the nonmoving party fails to make a showing "sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

The nonmoving party may not rest upon mere allegations, denials of the adverse party's pleading, or mere conjecture and speculation. *Glover v. Oppleman*, 178 F. Supp. 2d 622, 631 (W.D. Va. 2001) ("Mere speculation by the non-movant cannot create a genuine issue of material fact.").

If the proffered evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Felty v. Graves-Humphreys Co.*, 818 F.2d 1126, 1128 (4th Cir. 1987) (citing *Anderson*, 477 U.S. at 242). Indeed, the trial judge has an affirmative obligation to "prevent 'factually unsupported claims and defenses' from proceeding to trial," *Anderson*, 477 U.S. at 249, and there is no issue for trial "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Id.* at 249.

## III. DISCUSSION

### A. The Letters to W&L and the ABA Are Defamatory Per Se

The elements of defamation[1] under Virginia law are (1) publication of (2) an actionable statement with (3) the requisite intent. *Chapin v. Knight-Ridder, Inc.*, 993 F.2d 1087, 1092 (4th Cir. 1993) (citations omitted). A statement is not "actionable" simply because it is false; it must also be defamatory, meaning it must "tend so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him." *Id.* quoting (Restatement (Second) of Torts § 559). The issue of whether a statement is actionable is to be determined by the Court as it is a matter of law. *See Yeagle v. Collegiate Times*, 497 S.E.2d 136, 138 (Va. 1998).

Under Virginia law, it is defamatory *per se* to make false statements that among other things, (1) impute the commission of a criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished; (2) impute that a person is unfit to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment; or (3) prejudice a person in his or her profession or trade. *Shupe v. Rose's*

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[1]Virginia does not distinguish between libel, defamation by published writing, and slander, defamation by speech, unlike most states. *Fleming v. Moore*, 275 S.E.2d 632, 635 (Va. 1981).

An unpublished order shall not be regarded as precedent and shall not be cited as legal authority. SCR 123.

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: DISCIPLINE OF RICHARD L. CRANE, BAR NO. 9536.

No. 59168

FILED

JAN 10 2013

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF SUSPENSION

This is an automatic review, pursuant to SCR 105(3)(b), of a Southern Nevada Disciplinary Board hearing panel's findings that attorney Richard L. Crane violated one rule of professional conduct and its recommendation that he be suspended from the practice of law for six months and one day.

The underlying facts in this matter provide that Crane was convicted, pursuant to a guilty plea, of coercion (sexually motivated), a felony in violation of NRS 207.193 and NRS 175.547 on October 4, 2010. Crane was given a suspended sentence and placed on probation for an indeterminate period not to exceed 5 years. On October 7, 2010, Crane self-reported his conviction to the state bar pursuant to SCR 111(2). The state bar filed a petition pursuant to bar counsel's reporting requirements as detailed in SCR 111, and this court ordered Crane temporarily suspended on November 15, 2010. In re: Discipline of Crane, Docket No. 57121 (Order of Temporary Suspension and Referral to Disciplinary Board, November 15, 2010).

During the formal disciplinary hearing, Crane admitted to communicating with what he believed to be a 15-year-old minor, agreeing to and arriving at an in-person meeting, and being arrested by officers at

Effective Date: 1/10/2013
Bar No. 9536

that time. Evidence regarding those communications confirms that significant portions were sexual in nature. The disciplinary panel found that Crane violated RPC 8.4(b) (misconduct).

The findings and recommendations of a disciplinary board hearing panel are persuasive; however, our automatic review of a panel decision recommending a suspension is conducted de novo, requiring the exercise of independent judgment by this court. SCR 105(3)(b); In re Stuhff, 108 Nev. 629, 633, 837 P.2d 853, 855 (1992). We conclude that clear and convincing evidence supports the panel's findings, and that Crane violated RPC 8.4(b) (misconduct). SCR 105(2)(e).

The panel further recommended that Crane be (1) suspended from the practice of law for six months and one day from July 8, 2011; and (2) required to submit full payment for the costs of the disciplinary proceeding pursuant to SCR 120 within 30 days after the state bar issues a bill of costs.

Having reviewed the record, we agree that the panel's recommendation of suspension is an appropriate discipline tailored to these circumstances. However, we conclude that the seriousness of Crane's offense warrants a three-year suspension, retroactive to the date of his initial suspension on November 15, 2010.

Further, we order that any petition for reinstatement must demonstrate proof that Crane has (1) continued to seek psychosexual therapy with Mr. John Pacult, a licensed clinical social worker, or a similarly situated professional; (2) met all the requirements and conditions of his criminal probation; and (3) abstained from any further criminal or professional misconduct. Should Crane not furnish the required proof as part of his petition for reinstatement, we note that this

court will be disinclined to approve any recommendation of reinstatement. If, however, Crane offers such proof and reinstatement is to be granted, Crane's reinstatement will still be subject to the condition that he be on probation for two years from the date of reinstatement, with the terms and conditions of probation to be decided by state bar counsel.

Crane shall also pay the costs of the disciplinary proceedings within 30 days of receipt of the Nevada State Bar's bill of costs. See SCR 120. Crane and the State Bar shall comply with all requirements of SCR 115 and SCR 121.1.

It is so ORDERED.

Pickering, C.J.
Pickering

Gibbons, J.
Gibbons

Hardesty, J.
Hardesty

Parraguirre, J.
Parraguirre

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

cc: Jeffry R. Albregts, Chair, Southern Nevada Disciplinary Board
David Clark, Bar Counsel
Kimberly K. Farmer, Executive Director, State Bar of Nevada
William B. Terry, Chartered
Perry Thompson, Admissions Office, United States Supreme Court

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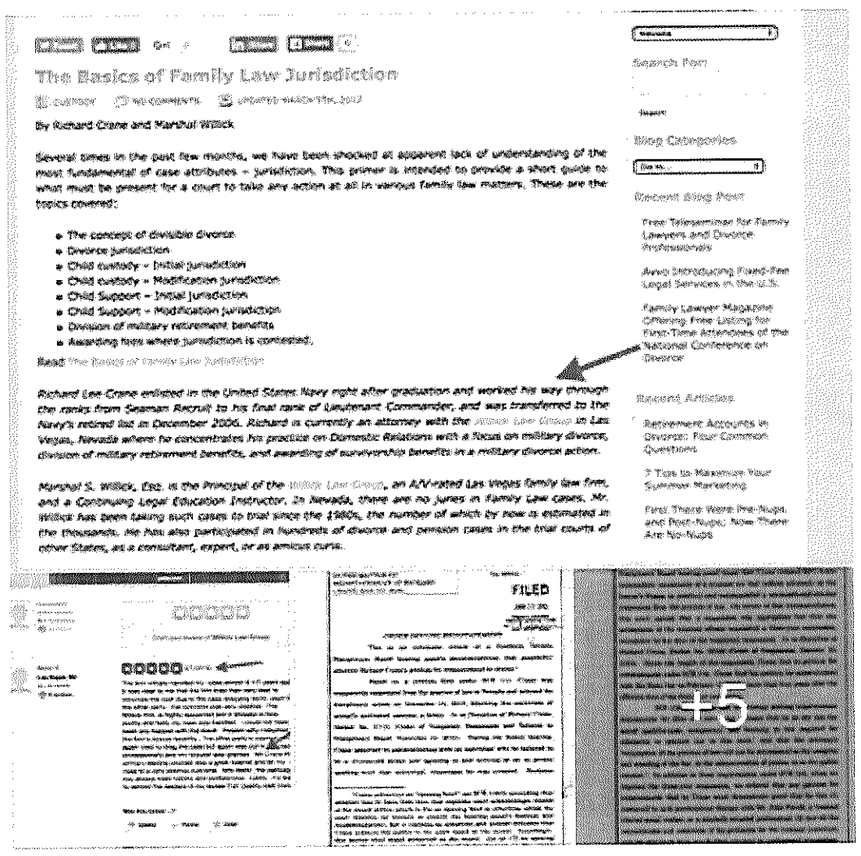





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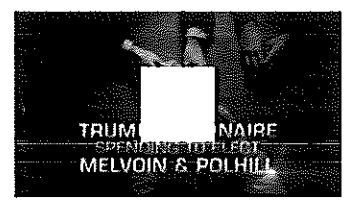


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IN THE SUPREME COURT OF THE STATE OF NEVADA

IN THE MATTER OF REINSTATEMENT OF RICHARD CRANE, BAR NO. 9536.

No. 68052

FILED

JAN 22 2016

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

*ORDER DENYING REINSTATEMENT*

This is an automatic review of a Southern Nevada Disciplinary Board hearing panel's recommendation that suspended attorney Richard Crane's petition for reinstatement be denied.[1]

Based on a petition filed under SCR 111, Crane was temporarily suspended from the practice of law in Nevada and referred for disciplinary action on November 15, 2010, following his conviction of sexually motivated coercion, a felony. *In re Discipline of Richard Crane*, Docket No. 57121 (Order of Temporary Suspension and Referral to Disciplinary Board, November 15, 2010). During the formal hearing, Crane admitted to communicating with an individual who he believed to be a 15-year-old minor and agreeing to and arriving at an in person meeting with that individual, whereupon he was arrested. Evidence

[1]Crane submitted an "opening brief," *see* SCR 116(2) (providing that attorney has 30 days from date that supreme court acknowledges receipt of the record within which to file an opening brief or otherwise advise the court whether he intends to contest the hearing panel's findings and recommendation), but it contains no argument and instead indicates that Crane submits the matter to the court based on the record. Accordingly, this matter shall stand submitted on the record. *See id.* ("If no opening brief is filed, the matter will be submitted for decision on the record without briefing or oral argument.").

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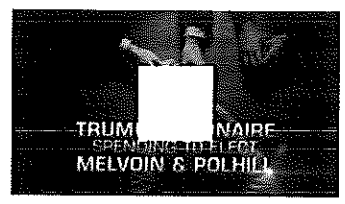


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regarding the communications confirmed that significant portions were sexual in nature. Following a formal hearing, a Southern Nevada Disciplinary Board hearing panel found that Crane violated RPC 8.4(b) (misconduct: commission of a criminal act that reflects adversely on the lawyer's fitness to practice) and recommended a six-month-and-one-day suspension from the practice of law. On review of that recommendation, this court agreed that a suspension was appropriate but that the seriousness of the criminal offense warranted a three-year suspension, retroactive to the date of the temporary suspension. *In re Discipline of Richard Crane*, Docket No. 59168 (Order of Suspension, January 10, 2013). Given the length of the suspension, Crane had to petition for reinstatement under SCR 116. Crane filed his petition for reinstatement with the State Bar on February 12, 2015—more than four years after the effective date of his three-year suspension.

SCR 116(2) requires that an attorney seeking reinstatement demonstrate "by clear and convincing evidence that he or she has the moral qualifications, competency, and learning in law required for admission to practice law in this state," and that the attorney's "resumption of the practice of law will not be detrimental to the integrity and standing of the bar, to the administration of justice, or to the public interest." In addition to those requirements under SCR 116, when we imposed the three-year suspension, we ordered that any petition for reinstatement filed by Crane must demonstrate proof that he has (1) continued to seek psychosexual therapy with Mr. John Pacult, a licensed clinical social worker, or a similarly situated professional; (2) met all the requirements and conditions of his probation for the criminal conviction; and (3) abstained from any further criminal or professional misconduct.



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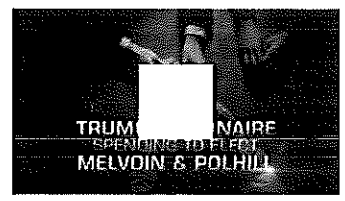


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*In re Discipline of Richard Crane*, Docket No. 59168 (Order of Suspension, January 10, 2013).

Having reviewed the record, we agree with the hearing panel's recommendation. To his credit, Crane met his burden to demonstrate by clear and convincing evidence that he has the competency and learning in law required for admission to practice law in this state, *see* SCR 116(2), he was honorably discharged from probation in the criminal case, and he has not engaged in any further criminal or professional misconduct. Like the hearing panel, however, we are concerned that while he complied with the letter of this court's therapy requirement, he did not comply with its spirit as he was dishonest about his sexual behavior during the first three years of therapy, which undermined the efficacy of that therapy. Although Pacult testified that despite Crane's dishonesty, he believes Crane remains a low risk to reoffend and that Crane has been meaningfully participating in therapy since November 2013, we share the hearing panel's concern that this is not clear and convincing evidence that Crane has the moral qualifications required for admission to practice, *see* SCR 116(2), particularly considering his dishonesty during a significant portion of the period of suspension. We are mindful of Crane's refocused participation in therapy and Sex Addicts Anonymous since November 2013 but remain convinced that a period of such participation commensurate with the original suspension is appropriate to demonstrate Crane's rehabilitation and moral qualifications to practice law. Accordingly, we deny the petition for reinstatement. Crane shall pay the costs of the reinstatement proceedings that exceed any advance cost deposit tendered under SCR 116(4) within 30 days of the date of this order.

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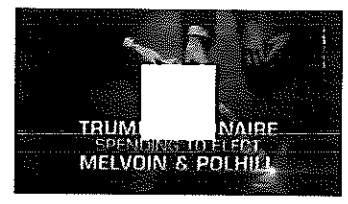


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Crane may file another petition for reinstatement on or after November 1, 2016. *See* SCR 116(6) (providing that successive petition may not be filed within 1 year following adverse judgment on a petition for reinstatement, "unless otherwise ordered by the court"). This court will be disinclined to approve a successive petition for reinstatement unless the petition demonstrates proof that Crane has (1) continued to meaningfully participate in psychosexual therapy with Pacult or another similarly situated professional, (2) not engaged in any additional criminal or professional misconduct, and (3) otherwise met the requirements of SCR 116(2). We suspend the requirement in SCR 116(5) that Crane retake the bar examination provided that the petition for reinstatement is filed no later than two years from the date of this order.

It is so ORDERED.

Parraguirre, C.J.

Hardesty, J.

Douglas, J.

Cherry, J.

Saitta, J.

Gibbons, J.

Pickering, J.

cc: Chair, Southern Nevada Disciplinary Board
William B. Terry, Chartered
C. Stanley Hunterton, Bar Counsel, State Bar of Nevada
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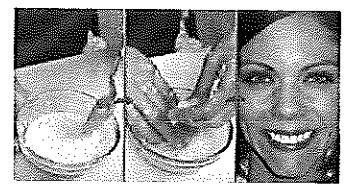

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# The Basics of Family Law Jurisdiction

CUSTODY NO COMMENTS UPDATED MARCH 5TH, 2012

By Richard Crane and Marshal Willick

Several times in the past few months, we have been shocked at apparent lack of understanding of the most fundamental of case attributes – jurisdiction. This primer is intended to provide a short guide to what must be present for a court to take any action at all in various family law matters. These are the topics covered:

- The concept of divisible divorce
- Divorce jurisdiction
- Child custody – Initial jurisdiction
- Child custody – Modification jurisdiction
- Child Support – Initial jurisdiction
- Child Support – Modification jurisdiction
- Division of military retirement benefits
- Awarding fees where jurisdiction is contested.

**Read** The Basics of Family Law Jurisdiction

*Richard Lee Crane enlisted in the United States Navy right after graduation and worked his way through the ranks from Seaman Recruit to his final rank of Lieutenant Commander, and was transferred to the Navy's retired list in December 2006. Richard is currently an attorney with the Willick Law Group in Las Vegas, Nevada where he concentrates his practice on Domestic Relations with a focus on military divorce, division of military retirement benefits, and awarding of survivorship benefits in a military divorce action.*

*Marshal S. Willick, Esq. is the Principal of the Willick Law Group, an A/V-rated Las Vegas family law firm, and a Continuing Legal Education Instructor. In Nevada, there are no juries in Family Law cases. Mr. Willick has been taking such cases to trial since the 1980s, the number of which by now is estimated in the thousands. He has also participated in hundreds of divorce and pension cases in the trial courts of other States, as a consultant, expert, or as amicus curia.*

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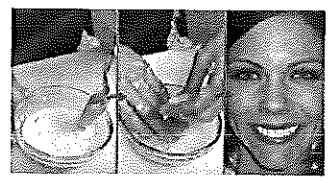

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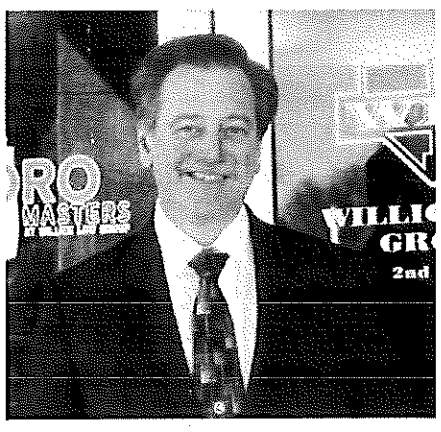


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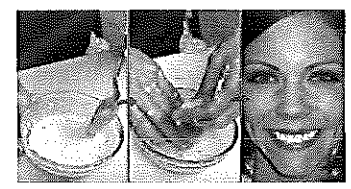

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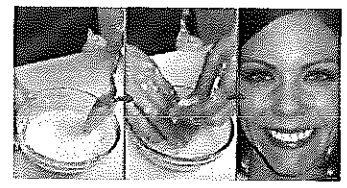

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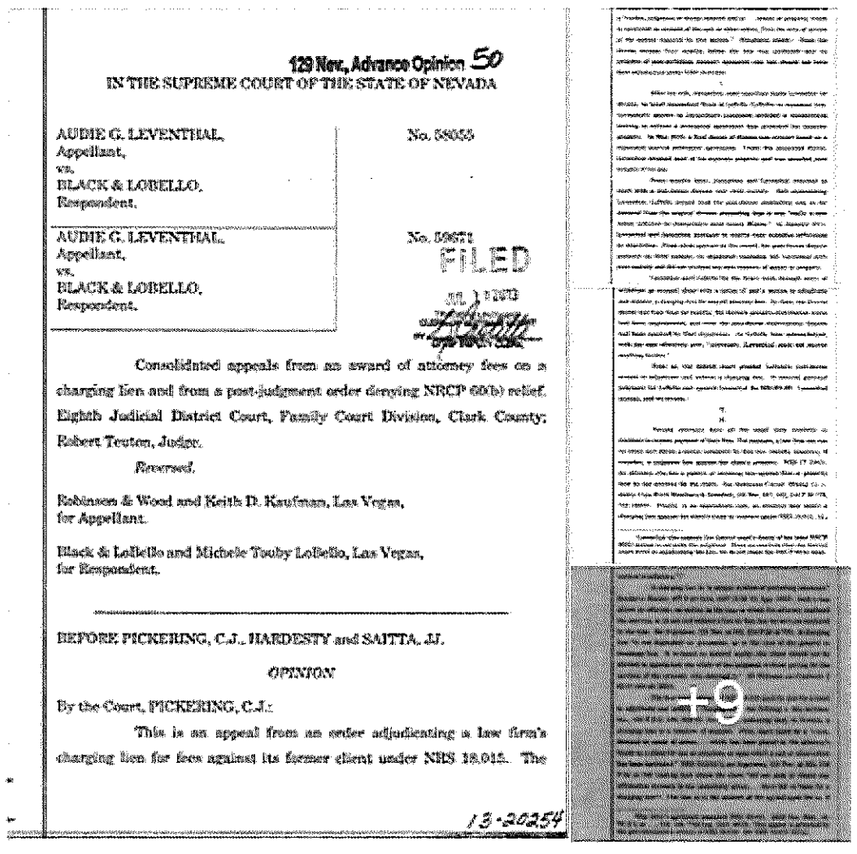


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129 Nev., Advance Opinion 50

IN THE SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| AUDIE G. LEVENTHAL,<br>Appellant,<br>vs.<br>BLACK & LOBELLO,<br>Respondent. | No. 58055 |
| AUDIE G. LEVENTHAL,<br>Appellant,<br>vs.<br>BLACK & LOBELLO,<br>Respondent. | No. 59671 |

FILED
JUL 11 2013
TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
DEPUTY CLERK

Consolidated appeals from an award of attorney fees on a charging lien and from a post-judgment order denying NRCP 60(b) relief. Eighth Judicial District Court, Family Court Division, Clark County; Robert Teuton, Judge.

*Reversed.*

Robinson & Wood and Keith D. Kaufman, Las Vegas,
for Appellant.

Black & LoBello and Michele Touby LoBello, Las Vegas,
for Respondent.

BEFORE PICKERING, C.J., HARDESTY and SAITTA, JJ.

*OPINION*

By the Court, PICKERING, C.J.:

This is an appeal from an order adjudicating a law firm's charging lien for fees against its former client under NRS 18.015. The

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13-20254

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firm did not serve the statutory notices required to perfect its lien until the case was over. Under NRS 18.015(3), a charging lien only attaches to a "verdict, judgment or decree entered and to . . . money or property which is recovered on account of the suit or other action, *from the time of service of the notices required by this section.*" (Emphasis added.) Since the decree became final months before the lien was perfected—and no prospect of post-perfection recovery appeared—the lien should not have been adjudicated under NRS 18.015(4).

I.

After his wife, Jacqueline, sued appellant Audie Leventhal for divorce, he hired respondent Black & LoBello (LoBello) to represent him. Leventhal's answer to Jacqueline's complaint included a counterclaim seeking to enforce a prenuptial agreement that protected his separate property. In May 2010, a final decree of divorce was entered based on a stipulated marital settlement agreement. Under the stipulated decree, Leventhal retained most of his separate property and was awarded joint custody of his son.

Some months later, Jacqueline and Leventhal returned to court with a post-decree dispute over child custody. Still representing Leventhal, LoBello argued that the post-decree proceeding was so far removed from the original divorce proceeding that it was "really a new action initiated by Jacqueline's most recent Motion." In January 2011, Leventhal and Jacqueline managed to resolve their custodial differences by stipulation. From what appears in the record, the post-decree dispute centered on child custody; its stipulated resolution left Leventhal with joint custody and did not produce any new recovery of money or property.

Leventhal paid LoBello for the firm's work through entry of the final decree. He did not pay LoBello, though, for the fees charged to



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litigate the post-decree dispute. Eventually, LoBello filed a motion to withdraw as counsel, along with a notice of, and a motion to adjudicate and enforce, a charging lien for unpaid attorney fees. By then, the divorce decree had been final for months, the decree's property-distribution terms had been implemented, and even the post-decree child-custody dispute had been resolved by filed stipulation. As LoBello later acknowledged, with the case effectively over, "[o]bviously, [Leventhal] could not recover anything further."

Even so, the district court granted LoBello's post-decree motion to adjudicate and enforce a charging lien. It entered personal judgment for LoBello and against Leventhal for $89,852.69. Leventhal appeals, and we reverse.[1]

II.

A.

Nevada attorneys have all the usual tools available to creditors to recover payment of their fees. For example, a law firm can sue its client and obtain a money judgment for fees due, thereby acquiring, if recorded, a judgment lien against the client's property. NRS 17.150(2). An attorney also has a passive or retaining lien against files or property held by the attorney for the client. *See Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 532, 216 P.3d 779, 782 (2009). Finally, in an appropriate case, an attorney may assert a charging lien against the client's claim or recovery under NRS 18.015. *Id.*;

[1]Leventhal also appeals the district court's denial of his later NRCP 60(b) motion to set aside the judgment. Since we conclude that the district court erred in adjudicating the lien, we do not reach the NRCP 60(b) issue.



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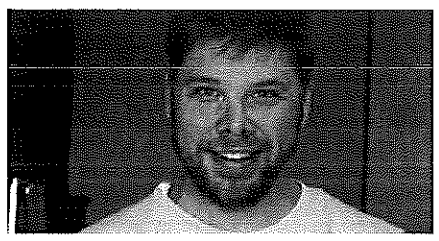

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*see* NRS 18.015(5) ("Collection of attorney's fees by a [charging] lien under this section may be utilized with, after or independently of any other method of collection.").[2]

A charging lien is "a unique method of protecting attorneys." *Sowder v. Sowder*, 977 P.2d 1034, 1037 (N.M. Ct. App. 1999). Such a lien allows an attorney, on motion in the case in which the attorney rendered the services, to obtain and enforce a lien for fees due for services rendered in the case. *See Argentena*, 125 Nev. at 532, 216 P.3d at 782. A charging lien "is not dependent on possession, as in the case of the general or retaining lien. It is based on natural equity—the client should not be allowed to appropriate the whole of the judgment without paying for the services of the attorney who obtained it." 23 *Williston on Contracts* § 62:11 (4th ed. 2002).

The four requirements of NRS 18.015 must be met for a court to adjudicate and enforce a charging lien. *See Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666, 669 (D. Nev. 1994) (indicating that, in Nevada, a charging lien is a creature of statute). First, there must be a "claim, demand or cause of action, . . . which has been placed in the attorney's hands by a client for suit or collection, or upon which a suit or other action has been instituted." NRS 18.015(1); *see Argentena*, 125 Nev. at 534, 216 P.3d at 783 (stating that where the client "did not seek or obtain any affirmative recovery in the underlying action, . . . there [is] no basis for a charging lien"). The lien is in the amount of the agreed-upon fee or, if

[2]The 2013 Legislature amended NRS 18.015. 2013 Nev. Stat., ch. 79, § 1, at ___; S.B. 140, 77th Leg. (Nev. 2013). This appeal is governed by the pre-amendment version of NRS 18.015. *See* NRS 18.015 (2012).



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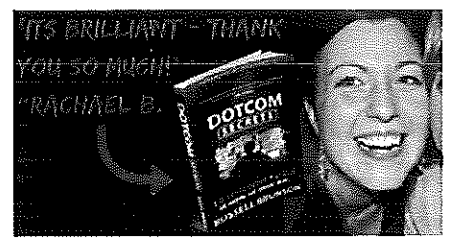

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none has been agreed upon, a reasonable amount for the services rendered "on account of the suit, claim, demand or action." NRS 18.015(1).[3] Second, the attorney must perfect the lien by serving "notice in writing, in person or by certified mail, return receipt requested, upon his or her client and upon the party against whom the client has a cause of action, claiming the lien and stating the interest which the attorney has in any cause of action." NRS 18.015(2).[4] Third, the statute sets a timing requirement: Once perfected, the "lien attaches to any verdict, judgment or decree entered and to any money or property which is recovered on account of the suit or other action, from the time of service of the notices required by this section." NRS 18.015(3). Fourth, the attorney must timely file and properly serve a motion to adjudicate the lien. NRS 18.015(4). It is the interpretation of the third requirement that is at issue here. The proper construction of NRS 18.015 is a question of law that we review de novo. *Argentena*, 125 Nev. at 531, 216 P.3d at 782.

B.

LoBello argues that the favorable outcomes in the property and child custody settlements both present recovery to which the lien could attach and that, alternatively, a lien can attach even where no

[3]At the outset of the representation, Leventhal signed LoBello's contract stating that if Leventhal failed to pay LoBello's fees, LoBello would have a lien on all funds recovered through the case and all paperwork produced.

[4]Leventhal disputes the adequacy of LoBello's service of the notice of lien; also, it does not appear LoBello served Jacqueline, as the firm should have under NRS 18.015(2). We do not reach these issues because they are not necessary to our decision.



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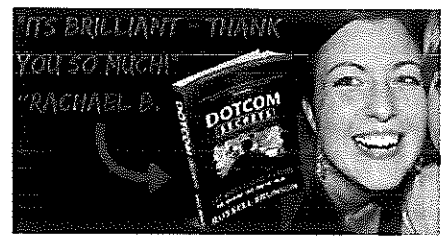


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tangible value is procured. In LoBello's view, *Argentena* incorrectly precludes charging liens in cases that do not produce an affirmative recovery. LoBello further argues that *Argentena* unconstitutionally disfavors attorneys who seek to defend or retain rights rather than procure property. LoBello both misunderstands the nature of charging liens and ignores the attorney's ability to pursue client fees via other means available to creditors.

Fundamentally, NRS 18.015(3) requires a client to assert an affirmative claim to relief, from which some affirmative recovery can result. A charging lien cannot attach to the benefit gained for the client by securing a dismissal; it attaches to "the tangible fruits" of the attorney's services. *Glickman v. Scherer*, 566 So. 2d 574, 575 (Fla. Dist. Ct. App. 1990); *see also Argentena*, 125 Nev. at 534, 216 P.3d at 783-84; *Sowder*, 977 P.2d at 1037. This "fruit" is generally money, property, or other actual proceeds gained by means of the claims asserted for the client in the litigation.[5] *See Glickman*, 566 So. 2d at 575; *see ABA/BNA Lawyers'*

[5]*Argentena* acknowledged that a charging lien is historically an in rem proceeding, which requires money or property over which the court has jurisdiction in order to adjudicate a charging lien. To the extent that *Argentena* suggests that in rem jurisdiction gives rise to subject matter jurisdiction, we clarify that they are distinct and both are required in order for a district court to adjudicate a charging lien. Other courts without statutory authorization to adjudicate a charging lien in the client's litigation have nevertheless done so because the court has the inherent power to supervise and regulate attorneys appearing before it, the court is likely already familiar with the relevant facts relating to the attorney's performance and services in the case giving rise to the fee dispute, Restatement (Third) of the Law Governing Lawyers § 42 cmt. b (2000), and it would be a waste of judicial time and resources to require a

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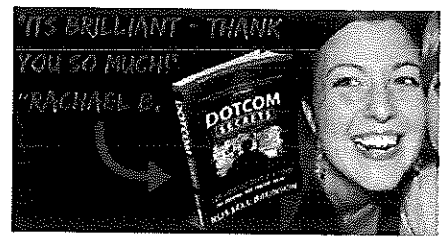


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*Manual on Professional Conduct*, at 41:2114 (2002) (discussing the types of property needed for a charging lien to attach); *see also Mitchell v. Coleman*, 868 So. 2d 639, 642 (Fla. Dist. Ct. App. 2004).

*Argentena* is controlling precedent. There, the parties settled a personal injury action, and all claims against Argentena were dismissed. 125 Nev. at 530, 216 P.3d at 781. Argentena's counsel moved to adjudicate its charging lien, but the only result obtained in that case was that the claims against Argentena were dismissed; Argentena did not assert any counterclaims or obtain an affirmative recovery. *Id.* Although Argentena unquestionably benefited from the dismissal, there was no recovery to which a charging lien could attach. *Id.* at 534, 216 P.3d at 784.

Attempting to distinguish *Argentena*, LoBello argues that Leventhal did obtain an affirmative recovery in the underlying case, namely the property retained in the divorce through the property settlement and the "financial benefits associated with . . . child custody," including tax benefits and value in avoiding increased child support.

As to the child-custody benefits, LoBello fails to identify any tangible recovery derived from the resolution of this issue that is appropriately subject to a charging lien. A child-custody agreement wherein Leventhal retained his share of custody and the associated benefits does not demonstrate any affirmative claim to, or recovery of, money or property. Rather, LoBello preserved Leventhal's previously

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separate proceeding to adjudicate the charging lien. *See Gee v. Crabtree*, 560 P.2d 835, 836 (Colo. 1977).



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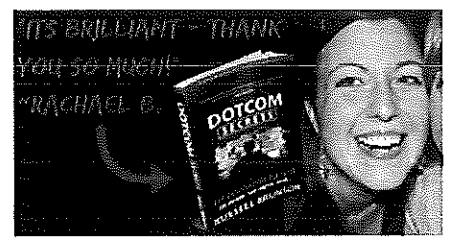


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established joint custody rights against his ex-wife's attempt to revise them. This is similar to *Argentena*, where the attorney's efforts led to the dismissal of the case but did not involve an affirmative claim or recovery.

As to the assets distributed pursuant to the property settlement and divorce decree,[6] a problem arises because the property settlement took place eight months before LoBello filed and made even a colorable attempt at perfecting its lien, *see supra* note 4. NRS 18.015(3) imposes a time requirement on attorneys seeking to perfect, adjudicate and enforce a charging lien: "The lien attaches . . . from the time of service of the notices required by this section." Although we have never expressly interpreted this section, Nevada's federal district court did so in *Schlang v. Key Airlines, Inc.*, 158 F.R.D. 666 (D. Nev. 1994).

In *Schlang*, the parties settled a wrongful termination action and their appeals were dismissed. *Id.* at 667-68. Former counsel filed a charging lien but failed to serve the notice required to perfect the lien until the settlement was consummated. *Id.* at 669-70. The federal court, citing NRS 18.015(3),[7] found that because the attorney did not perfect his lien before the settlement agreement was carried out, "there no longer

[6]Although this court has held that a charging lien may not attach to assets that are exempt from creditors under NRS 21.090, *see Bero-Wachs v. Law Office of Logar & Pulver*, 123 Nev. 71, 75, 157 P.3d 704, 706 (2007), we have not addressed whether a division of property in a divorce case is an affirmative recovery to which a lien may attach. In light of our disposition of this case, this question is not fairly presented, and we decline to examine it on a hypothetical basis.

[7]The court quotes NRS 18.015(3) but incorrectly cites to NRS 18.015(2).



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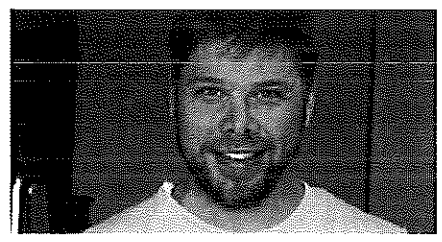
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existed any proceeds to which the lien could attach."[8] *Id.* at 670. It therefore declined to adjudicate and enforce the lien.

We agree with *Schlang*, and hold that under NRS 18.015(3), the lien attaches to a judgment, verdict, or decree entered, or to money or property recovered, *after* the notice is served. This interpretation harmonizes NRS 18.015(3)'s attachment provisions with NRS 18.015(2)'s requirement that a lien be perfected by proper notice. *See Tonopah Lumber Co. v. Nev. Amusement Co.*, 30 Nev. 445, 455, 97 P. 636, 639 (1908). ("[A] lien can only legally exist when perfected in the manner prescribed by the statute creating it . . . ." (internal quotation omitted)). Thus, if an attorney waits to perfect the lien until judgment has been entered and the proceeds of the judgment have been distributed, the right to the charging lien may be lost. *See Sowder*, 977 P.2d at 1038.

Basic notice and fairness requirements support this interpretation. Nevada attorneys must notify their clients in writing of any interest the attorney has that is adverse to a client. RPC 1.8(a); *In re Singer*, 109 Nev. 1117, 1118, 865 P.2d 315, 315 (1993). Other courts have found that charging liens constitute adverse interests and applied a similar written notice rule. *See Fletcher v. Davis*, 90 P.3d 1216, 1221 (Cal. 2004). NRS 18.015(3) promotes these policies by requiring an attorney to serve notice and perfect a charging lien in a timely manner.

Diligent perfection of the lien under NRS 18.015(3) ensures that the client, the client's opponent in the litigation, and others have notice of the attorney's lien and may conduct the litigation and deal with

[8]The *Schlang* court cited *In re Nicholson*, 57 B.R. 672 (D. Nev. 1986) (discussing when an attorney lien attaches to property).



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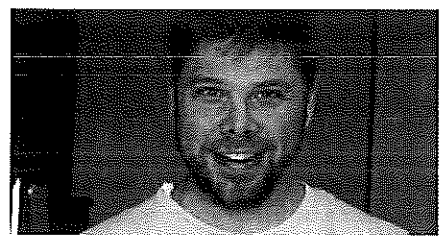

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any recovery it produces accordingly. A timely motion to adjudicate and enforce the charging lien under NRS 18.015(4) also enables the court to evaluate the lien while it has jurisdiction over any affirmative recovery, while the attorney's performance is fresh in its mind, and before the judgment is satisfied and the proceeds are distributed. *See Weiland v. Weiland*, 814 So. 2d 1252, 1253 (Fla. Dist. Ct. App. 2002) (holding that notice was untimely where the attorney waited to establish the lien until approximately two months after the case concluded); *Sowder*, 977 P.2d at 1038 (holding that a law firm waived its right to assert its charging lien when it waited several months after the property was distributed to assert its charging lien). *See also Anderson v. Farmers Coop. Elevator Ass'n, Inc.*, 874 F. Supp. 989, 992 (D. Neb. 1995) (quashing the attorney charging lien because notice of the lien was untimely, made after the property had been transferred to the opposing party); *Libner v. Maine Cnty. Comm'rs Ass'n*, 845 A.2d 570, 573 (Me. 2004) (holding that no lien may be imposed without direct and specific notice to the fund of an opposing party or its carriers that a lien is asserted before the proceeds are disbursed). It would be unreasonable and unfair to clients and to third parties to allow attorneys to claim a lien on any judgment at any time, no matter how much time has passed since the case concluded.

Here, LoBello perfected its lien eight months after the stipulated divorce decree was entered and the property was distributed—well after the time a lien could have attached to any of the property governed by that settlement.[9] Moreover, the custody settlement did not

[9]*Compare Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980) (the court loses jurisdiction over property divided by a divorce

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modify the property distribution in the divorce decree or otherwise bring that property back into dispute. Most importantly, LoBello admits that all outstanding issues were resolved before it filed or tried to perfect the lien, and it did not show that any recovery was still pending resolution or other legal action. *Cf. Fein v. Schwartz*, 404 S.W.2d 210, 227 (Mo. Ct. App. 1966) (holding that where property remained to be transferred after the conclusion of a case, the lien was timely perfected before the transfer of property even though notice was served after the conclusion of the case). By the time LoBello filed and tried to perfect its lien, there was nothing to which the lien could have attached.[10]

This court is not unsympathetic to LoBello's situation. But when an attorney seeks a charging lien—a unique lien enforced by unique methods—the attorney must comply with the particular requirements of the statute. *Cf. Sowder*, 977 P.2d at 1038. If LoBello wishes to pursue its claims through other means, it may do so. However, LoBello may not rely

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*. . . continued*

decree where the parties wait for longer than six months to modify the decree), *with Collins v. Murphy*, 113 Nev. 1380, 1384-85, 951 P.2d 598, 600-01 (1997) (holding that it was unfairly prejudicial and an error to adjudicate a motion for attorney fees filed after the deadline for filing a notice of appeal had passed), *superseded by rule amendment, In the Matter of Amendments to the Nevada Rules of Civil Procedure*, ADKT No. 426 (Order Amending Nevada Rule of Civil Procedure 54, February 6, 2009).

[10]Even though LoBello's contract stated it would have a lien on any recovery if Leventhal failed to pay fees, at best this evidenced an intent to claim a charging lien if Leventhal defaulted on payment and LoBello gained recovery on Leventhal's behalf. *See Sowder*, 977 P.2d at 1038.



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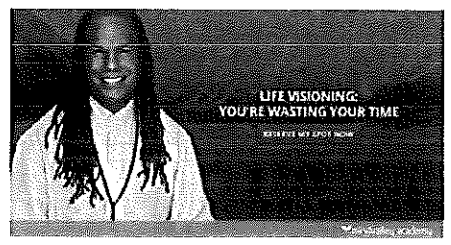


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on perfecting and prosecuting a charging lien filed eight months after the final decree is entered, when the case was completely concluded.

Accordingly, we reverse.

Pickering, C.J.
Pickering

We concur:

Hardesty, J.
Hardesty

Saitta, J.
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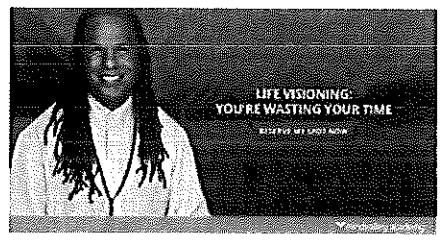


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# EXHIBIT 14

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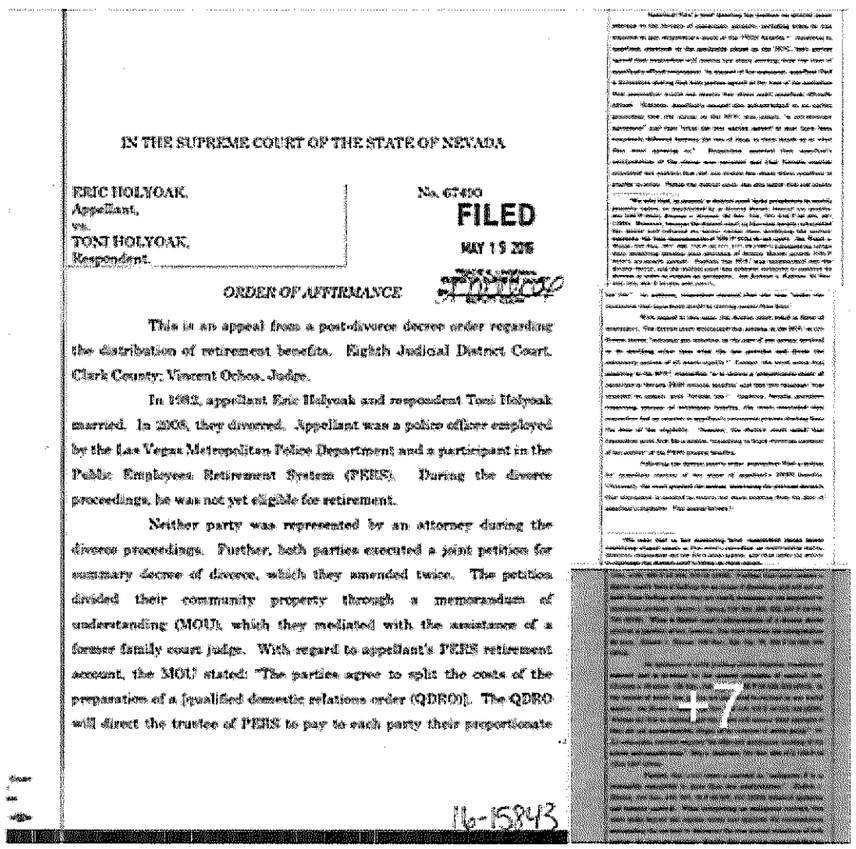

IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC HOLYOAK,
Appellant,
vs.
TONI HOLYOAK,
Respondent.

No. 67450

FILED

MAY 19 2016

*ORDER OF AFFIRMANCE*

This is an appeal from a post-divorce decree order regarding the distribution of retirement benefits. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

In 1982, appellant Eric Holyoak and respondent Toni Holyoak married. In 2006, they divorced. Appellant was a police officer employed by the Las Vegas Metropolitan Police Department and a participant in the Public Employees' Retirement System (PERS). During the divorce proceedings, he was not yet eligible for retirement.

Neither party was represented by an attorney during the divorce proceedings. Further, both parties executed a joint petition for summary decree of divorce, which they amended twice. The petition divided their community property through a memorandum of understanding (MOU), which they mediated with the assistance of a former family court judge. With regard to appellant's PERS retirement account, the MOU stated: "The parties agree to split the costs of the preparation of a [qualified domestic relations order (QDRO)]. The QDRO will direct the trustee of PERS to pay to each party their proportionate

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IN THE SUPREME COURT OF THE STATE OF NEVADA

ERIC HOLYOAK,
Appellant,
vs.
TONI HOLYOAK,
Respondent.

No. 67490

FILED

MAY 19 2016

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BY
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*ORDER OF AFFIRMANCE*

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share of the account at the time [appellant] retires." Ultimately, the parties disputed the meaning of this clause before the district court.

Appellant filed a brief detailing his position on several issues relevant to the division of community property, including when he was required to pay respondent's share of the PERS benefits.[1] According to appellant, pursuant to the applicable clause in the MOU, both parties agreed that respondent will receive her share starting from the time of appellant's official retirement. In support of his argument, appellant filed a declaration stating that both parties agreed at the time of the mediation that respondent would not receive her share until appellant officially retired. However, appellant's counsel also acknowledged in an earlier proceeding that the clause in the MOU was simply "a one-sentence agreement" and that "what the two parties agreed to may have been completely different between the two of them in their minds as to what they were agreeing to." Respondent asserted that appellant's interpretation of the clause was incorrect and that Nevada caselaw supported her position that she can receive her share when appellant is eligible to retire. Before the district court, she also noted that one reason

[1]We note that, in general, a district court lacks jurisdiction to modify property rights, as established by a divorce decree, beyond six months. *See* NRCP 60(b); *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980). However, because the district court in this case merely interpreted the decree and enforced its terms, rather than modifying the parties' interests, the time requirements of NRCP 60(b) do not apply. *See Walsh v. Walsh*, 103 Nev. 287, 288, 738 P.2d 117, 117-18 (1987) (interpreting rather than modifying pension plan provision of divorce decree outside NRCP 60(b)'s six-month period). Further, the MOU was incorporated into the divorce decree, and the district court has inherent authority to construe its decrees in order to remove an ambiguity. *See Kishner v. Kishner*, 93 Nev. 220, 225, 562 P.2d 493, 496 (1977).



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for accepting a low amount in spousal support "was her understanding that she would receive her portion of the PERS retirement for the rest of her life." In addition, respondent claimed that she was "under the impression that [appellant] would be retiring sooner than later."

With regard to this issue, the district court ruled in favor of respondent. The district court determined that nothing in the MOU or the divorce decree "indicates any intention on the part of any person involved to do anything other than what the law provides and divide the community portion of all assets equally." Further, the court noted that according to the MOU, respondent "is to receive a 'proportionate share' of [appellant's] Nevada PERS pension benefits" and that this language "was intended to comply with Nevada law." Applying Nevada precedent concerning election of retirement benefits, the court concluded that respondent had an interest in appellant's retirement pension starting from the date of his eligibility. However, the district court noted that respondent must first file a motion "requesting to begin receiving payment of her portion" of the PERS pension benefits.

Following the district court's order, respondent filed a motion for immediate election of her share of appellant's PERS benefits. Ultimately, the court granted the motion, reiterating its previous decision that respondent is entitled to receive her share starting from the date of appellant's eligibility. This appeal follows.[2]

---

[2]We note that in her answering brief, respondent raises issues concerning alleged errors in this court's precedent on survivorship rights. However, respondent did not file a cross-appeal, and thus lacks the ability to challenge the district court's ruling on these issues.



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Generally, this court reviews the district court's division of community property for an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). Further, this court reviews a district court's factual findings for an abuse of discretion, and will not set aside those findings unless they are clearly erroneous or not supported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). When a district court's interpretation of a divorce decree involves a question of law, however, this court reviews the interpretation de novo. *Henson v. Henson*, 130 Nev., Adv. Op. 79, 334 P.3d 933, 936 (2014).

An agreement to settle pending divorce litigation constitutes a contract and is governed by the general principles of contract law. *Grisham v. Grisham*, 128 Nev., Adv. Op. 60, 289 P.3d 230, 234 (2012). In the context of family law, parties are permitted to contract in any lawful manner. *See Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). "Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Id.* An enforceable contract requires "an offer and acceptance, meeting of the minds, and consideration." *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005).

Further, this court views a contract as "ambiguous if it is reasonably susceptible to more than one interpretation." *Shelton v. Shelton*, 119 Nev. 492, 497, 78 P.3d 507, 510 (2003) (internal quotation and footnote omitted). When interpreting an ambiguous contract, this court looks beyond the express terms and analyzes the circumstances surrounding the contract to determine the true mutual intentions of both parties. *Id.* (footnote omitted). Finally, this court has recognized that an



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interpretation that "results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract." *Id.* (internal quotation and footnote omitted).

With regard to retirement benefits, those earned during a marriage qualify as community property, even if they are not vested. *Gemma v. Gemma*, 105 Nev. 458, 460-61, 778 P.2d 429, 430 (1989). While the effect of a contract on the timing of a nonemployee spouse's receipt of benefits has not yet been explored, this court has discussed the issue of when a nonemployee spouse is entitled to request his or her share of benefits. In particular, we have held that the nonemployee spouse has a right to his or her share of the employee spouse's benefits starting from the date of eligibility for retirement. *Id.* at 464, 778 P.2d at 432. Moreover, NRS 125.155 gives the court discretion to consider directing the employee spouse to pay the nonemployee spouse his or her share of PERS benefits at the first eligible retirement date or to order that the nonemployee spouse wait until the employee spouse actually retires. *See* NRS 125.155(2).

Here, while part of the district court's analysis is mistaken, the outcome of its order is correct. The clause in the MOU provides that "[t]he QDRO will direct the trustee of PERS to pay to each party their proportionate share of the account at the time [appellant] retires." The district court did not expressly acknowledge the ambiguity of this clause, but we conclude that it is ambiguous because it is reasonably susceptible to more than one interpretation. Appellant interprets the phrase "at the time [appellant] retires" as an agreed-upon determination of the time when respondent is eligible to receive her share. In contrast, respondent contends that the phrase, within the context of the entire clause, pertains



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to the time of disbursement of the payments; the clause is merely a procedural instruction to the trustee of PERS to pay the proportionate share after appellant retires. Respondent asserts that the clause does not prohibit her from directly seeking her share from appellant, which is how pre-retirement payments are standardly made. Accordingly, the calculation of the proportionate share is based on the employee spouse's eligibility for retirement, and if the employee spouse does not retire when he is eligible, he must pay the nonemployee spouse the amount that the nonemployee spouse would have received if the employee spouse had retired at that time.

In this case, appellant's interpretation ultimately lacks merit because it results in a harsh and unreasonable contract. The record does not sufficiently show that respondent intended to wait until appellant officially retired to collect her share, and this court has repeatedly held that the nonemployee spouse has a right to her share as soon as the employee spouse is eligible to retire. Upon consideration of the circumstances surrounding the MOU and in light of precedent from this court, we conclude that respondent's interpretation results in a fair and reasonable contract. Even though the district court dismissed the ambiguous nature of the clause in the MOU, its decision was nevertheless correct. *See Rosenstein v. Steele*, 103 Nev. 571, 575, 747 P.2d 230, 233 (1987) ("[T]his court will affirm the order of the district court if it reached the correct result, albeit for different reasons"). Thus, the district court properly ruled that respondent was entitled to receive her share starting from the time that appellant was eligible to retire. Accordingly, we



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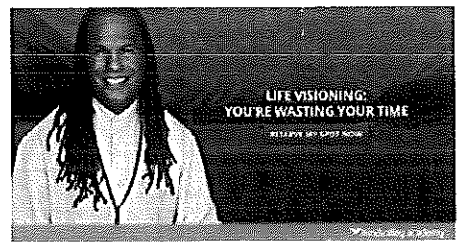

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**ORDER** the judgment of the district court AFFIRMED.

Parraguirre, C.J.
Parraguirre

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Vincent Ochoa, District Judge
Carolyn Worrell, Settlement Judge
Neil J. Beller, Ltd.
Willick Law Group
Eighth District Court Clerk



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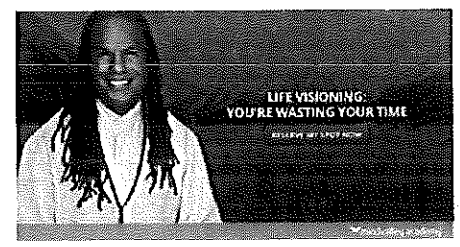


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PICKERING, J., dissenting:

The parties mediated the issues regarding dissolution of their marriage before Robert E. Gaston, who served for eight years as a district court judge, family court division, before establishing an alternative dispute resolution service dedicated to civil and domestic court cases.[1] Their mediation culminated in a written settlement agreement, prepared under the supervision of Judge Gaston, which they signed on May 20, 2008. Addressing retirement/investment accounts, specifically, Eric's retirement account with PERS, the settlement agreement states that the parties will split the costs of preparing a QDRO, and that the QDRO "will

---

[1]*See Settlement Judge Biographies: Robert E. Gaston*, Nev. Cts., http://nvcourts.gov/Settlement_Program/Biographies/Gaston,_Robert_E_/ (last visited May 12, 2016). I thus do not agree that the parties did not know what they were signing. Right above their signatures, in fact, the following paragraph appears:

> The above Memorandum of Understanding reflects agreements formulated in mediation on the 20th day of May, 2008. By signing this document each party stipulates and agrees that they have carefully read this document, and the document accurately reflects the agreement that each party has entered into on this day, and that each party voluntarily signs this agreement without undue influence, coercion or threat. Both parties represent that they are of sufficient capacity to understand and enter into this agreement. The parties agree that this Memorandum of Understanding represents what each believes to be a fair and reasonable resolution of the issues. Both parties acknowledge the fact that they had the right to have legal counsel, but have waived that right.



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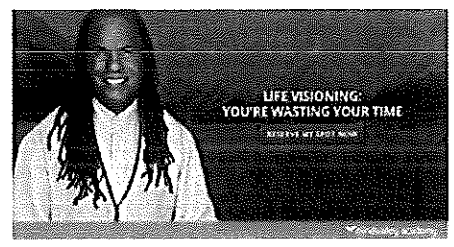


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direct the trustee of PERS to pay each party their proportionate share of the account at the time Eric retires." A straightforward reading of this clause suggests that the payments occur "at the time Eric retires," not, as the majority would have it, at the time Eric becomes eligible to retire.

"A settlement agreement is a contract governed by general principles of contract law"; when a settlement agreement's "language is unambiguous, this court will construe and enforce it according to that language." *The Power Co. v. Henry*, 130 Nev., Adv. Op. 21, 321 P.3d 858, 863 (2014). As I do not see the settlement agreement as ambiguous, I would enforce it as written. I therefore respectfully dissent.

Pickering, J.
Pickering



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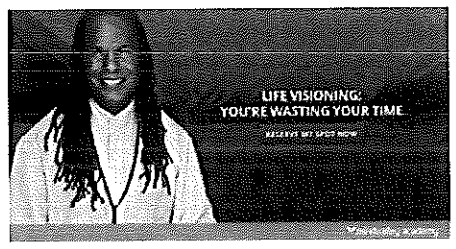


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Date: 1/6/17 20:29 (GMT-08:00)
To: stevewsanson1985@gmail.com
Subject: Re: Case Subject

Dear Steve Sanson,
This is to notify you that we have received a privacy complaint from an individual regarding your content.

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https://www.youtube.com/watch?v=zdMg5wl70Yg

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We would like to give you an opportunity to remove or edit the private information within the content reported. You have 48 hours to take action on the complaint. If you remove the alleged violation from the site within the 48 hours, the complaint filed will then be closed. If the potential privacy violation remains on the site after 48 hours, the complaint will be reviewed by the YouTube Team and may be removed pursuant to our Privacy Guidelines.

Alleged violations commonly occur within the video content. YouTube offers a Custom Blurring tool, which allows you to blur anything in your video, including individuals or information. For more information on this blurring feature, visit the Creator Blog and Help Center. Alleged violations may also occur in the title, description or tags of your video. YouTube offers metadata editing tools which you can access by going to My Videos and clicking the Edit button on the reported video. Making a video private is not an appropriate method of editing, as the status can be changed from private to public at any time. Because they can be turned off at any time, annotations are also not considered an acceptable solution.

We're committed to protecting our users and hope you understand the importance of respecting others' privacy. When uploading videos in the future, please remember not to post someone else's image or personal information without their consent. Personal information includes, but is not limited to, Social Security number, National Identification number, bank account number or contact information (e.g. home address, email address). For more information, please review our Privacy Guidelines.

Steve Sanson
President Veterans In Politics International
PO Box 28211
Las Vegas, NV 89126
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**To:** devildog1285 <devildog1285@cs.com>
**Subject:** IP Counter Notification Form #620138334841917
**Date:** Fri, Jan 20, 2017 10:52 pm

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Hi Steve,

The Facebook Team received a report from you. For reference, your complaint number is: #620138334841917.

Please note that this channel is only for reports of alleged infringements or violations of your legal rights, such as copyright or trademark. If you filed that type of report, no further action is necessary. However, if you contacted us through this channel about another matter, you might not receive a response.

If you're not confident that your issue concerns intellectual property rights, please consult the Intellectual Property section of our Help Center for additional information:

IP Help Center: https://www.facebook.com/help/intellectual_property/

Note that we routinely provide the contact information included in reports about alleged infringements/violations of legal rights, including email address, to the user that posted the content being reported.

For help with matters other than infringement/violation of your legal rights, the links below may be helpful:

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- Abuse (including spam, hate speech and harassment): https://www.facebook.com/help/263149623790594/
- Pages (including admin issues): https://www.facebook.com/help/pages/
- Unauthorized photos or videos: https://www.facebook.com/help/428478523862899
- Login issues: https://www.facebook.com/help/login
- Help for users who have been disabled or blocked: https://www.facebook.com/help/warnings

If the links above do not contain the information you're looking for, you may want to search the Help Center for more assistance: https://www.facebook.com/help/

As a reminder, if your submission contains a report of alleged infringement/violation of your legal rights, no further action is necessary. We will look into your matter shortly.

Thanks for contacting Facebook,

The Facebook Team
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**From:** Facebook <notification+kngg45mn@facebookmail.com>
**To:** devildog1285 <devildog1285@cs.com>
**Subject:** A Message from Facebook
**Date:** Fri, Jan 20, 2017 8:13 pm

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Hello,

We've removed or disabled access to the following content that you posted on Facebook because we received a notice from a third party that the content infringes their copyright(s):

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Email: jabrams@theabramslawfirm.com
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If an agreement is reached to restore the reported content, please have the complaining party email us with their consent and include the report number.

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We strongly encourage you to review the content you have posted to Facebook to make sure that you have not posted any other infringing content, as it is our policy to terminate the accounts of repeat infringers when appropriate.

For more information about intellectual property, please visit our Help Center:

https://www.facebook.com/help/370657876338359/

Thanks,

The Facebook Team

**From:** Facebook <notification+kngg45mn@facebookmail.com>
**To:** devildog1285 <devildog1285@cs.com>
**Subject:** A Message from Facebook
**Date:** Fri, Jan 20, 2017 8:13 pm

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Hello,

We've removed or disabled access to the following content that you posted on Facebook because we received a notice from a third party that the content infringes their copyright(s):

"Have you seen our latest news?"
http://conta.cc/2dXY3Qb

If you believe that this content should not have been removed from Facebook, you can contact the complaining party directly to resolve your issue:

Report #: 307875176275756
Rights Owner: Jennifer Abrams / The Abrams & Mayo Law Firm
Email: jabrams@theabramslawfirm.com
Copyrighted Work: Other

If an agreement is reached to restore the reported content, please have the complaining party email us with their consent and include the report number.

Facebook complies with the notice and takedown procedures defined in section 512(c) of the Digital Millennium Copyright Act ("DMCA"). If you believe that this content was removed as a result of mistake or misidentification, you can submit a DMCA counter-notification by filling out our automated form at http://www.facebook.com/legal
/copyright.php?howto_appeal&parent_report_id=307875176275756.

We strongly encourage you to review the content you have posted to Facebook to make sure that you have not posted any other infringing content, as it is our policy to terminate the accounts of repeat infringers when appropriate.

For more information about intellectual property, please visit our Help Center:

https://www.facebook.com/help/370657876338359/

Thanks,

The Facebook Team

**From:** Vimeo <rights@vimeo.com>
**To:** devildog1285 <devildog1285@cs.com>
**Subject:** Your video has been removed
**Date:** Tue, Jan 24, 2017 12:45 pm

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To ensure delivery, add **no-reply@vimeo.com** to your address book.

vimeo

## Hello Steve Sanson,

Your video "Nevada Attorney Attacks Clark County Family Court Judge in Open Court" has been removed for violating our Guidelines.

Reason: Violating a third party's privacy

For more information on our content and community policies, please visit https://vimeo.com/help/guidelines.

If you believe this was an error, please reply to this message as soon as possible to explain. (Please be aware that Vimeo moderators take action as violations come to our attention. "I see other people do it" is not a valid explanation.)

Sincerely,
Vimeo Staff

TM + © 2017 Vimeo, Inc.
555 West 18th Street, New York, NY 10011
Terms | Privacy Policy

**From:** Megen MacKenzie <megen.mackenzie@endurance.com>
**To:** devildog1285 <devildog1285@cs.com>
**Subject:** Constant Contact Account
**Date:** Wed, Feb 1, 2017 11:26 am

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Dear Mr. Sanson,

Due to a number of legal complaints that Constant Contact has received regarding your account, we must suspend services. We have received multiple allegations of copyright and trademark infringement which are a violation of our terms and conditions. Per our Terms and Conditions we reserve the right to terminate your services at any time, please see "section 8. Termination."

I've provided a copy of our terms and conditions here for your reference:

https://www.constantcontact.com/legal/terms

Please contact me with any questions.

Thank you,

--

Megen MacKenzie
Legal Compliance Coordinator
Constant Contact
3675 Precision Dr,
Loveland, CO 80538
Email: mmackenzie@constantcontact.com
Phone: (970) 203-7345
Fax: (781) 652-5130
Web: www.constantcontact.com