IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KILGORE,
Appellant/Cross-Respondent,

vs.

ELENI KILGORE,
Respondent/Cross-Appellant.

Case No.: 73977

APPELLANT'S OPENING BRIEF

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NRAP 16.1 Disclosures

Appellant is a natural person.

Routing Statement

This appeal raises a novel question of law concerning ambiguities with existing case law as to when a spouse is entitled to receive a community property share of divided retirement assets and should be retained by the Supreme Court of Nevada. NRAP 17(a)(14).

Jurisdictional Statement

The district court entered the dispositive *Findings Of Fact, Conclusions Of Law And Orders From Evidentiary Hearing And Status Check Hearing* on August 2, 2017. The order is appealable. NRAP 3A(b)(8). Appellant is aggrieved by the order. NRAP 3A(a). See also *Bates v. Nevada Sav. & Loan Association*, 85 Nev. 441, 456 P. 2d 450 (1969) ("an aggrieved party is one whose personal right is injuriously affected by the adjudication[.]") Original jurisdiction is established in the Eighth Judicial District Court of the State of Nevada. *Notice of Appeal* was timely filed on September 6, 2017.

Statement of the Issues

1. Whether the district court erred in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets before he has developed the account to full maturity, thereby imposing a de facto early retirement penalty; and,

2. Whether the district court erred in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets without allowing for an offset of his community property share of Respondent's divided retirement assets; and,
3. Whether the district court erred in ordering a division of Appellant's vacation/sick time.

Statement of the Case

Both Appellant and Respondent are members of the Public Employee's Retirement System ('PERS'); Appellant by virtue of his employment in law enforcement with Las Vegas Municipal Court Marshal service and Respondent by virtue of her employment as a teacher with the Clark County School District. Both parties are both vested in PERS, though neither is fully matured at this time. JA-000394:2-10.

Appellant can retire but only with early retirement "penalty" resulting in a reduction in benefits, as full maturity on the account has not been achieved; Respondent can retire, but an early direct retirement penalty would apply, as opposed to the *de facto* penalty imposed by forcing Appellant's retirement prior to the maximized years of service. Existing law provides one party must pay the other the community property share of divided retirement assets once the party is eligible to retire; but, the law is unclear whether a pension-holder who has not achieved full maturity of a retirement account can continue to work.

Appellant had vacation/sick pay accrual that Parties litigated but did not adjudicate. The district court erred in considering the assets omitted and ordering them divided, over **four years** after the original decreed divided all the martial assets.

Statement of the Facts

Parties married December 15, 1992. Parties divorced March 13, 2013. The decree of divorce divided all marital assets and debts duly considered. Parties have a community property interest in each other's PERS benefits. Respondent made a formal written demand for payment on her portion of Appellant's benefits in March of 2015. Appellant resisted, insisting on continuing his employment until his benefits fully matured and objecting as he was still under a court order to pay child support based upon his income as a Marshal. Additionally, Appellant also contends that Respondent should be ordered to pay her portion of her community property interest in Appellant's interest in her PERS. Respondent further demanded a division of Appellant's deferred compensation and vacation/sick pay, purporting that the assets were omitted. Appellant refused, arguing that the assets were not omitted.

The district court opened limited, post-judgment discovery. JA-000315:10-12. After several hearings, the district court ordered Appellant to make payments on Respondent's community property interest of his PERS benefits, but refused to order Respondent to make same payments to Appellant. JA-001542:3-8.The

district court further ordered that the deferred compensation and vacation/sick pay were omitted assets, and that Respondent was entitled to a division of same.

Summary of the Argument

Parties' rights collide where Appellant has yet to achieve full maturity on his PERS and is still obligated to pay child support based on his full income, in addition to the retirement income. Respondent demands receipt of her community property share immediately, thus forcing an early retirement (prior to full maturity of benefits) or live with less than half of his income. JA-001524:17-24. JA-001525:8-12. Appellant should not be compelled to make payments on a community property share of a divided retirement asset that has not fully matured. This results in a *de facto* penalty. JA-000394:2-10. Even if it does, Appellant would then be entitled to an offset on the payments due to the fact that he has an interest in his community property share of Respondent's divided retirement assets.

Furthermore, Respondent is not entitled to sick leave accrued by Appellant where she waited until years after entry of the decree and it was property litigated.

Argument

Standard of Review

"Question[s] of law [are] subject to de novo review." *Ogawa v Ogawa*, 125 Nev. 660, ___, 221 P 3.d, 699, 704 (2009). "The district court's factual findings, however, are given deference and will be upheld if not clearly erroneous and if supported by substantial evidence." *Id*.

An abuse of discretion is "[a] clear ignoring by the court of [applicable legal principles], without apparent justification." *Hotel Last Frontier v. Frontier Prop., Inc.*, 79 Nev. 150, 154, 380 P. 2d 293, 294 (1963).

Whether the district court erred in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets before he has developed the account to full maturity

Appellant has, from the onset of this case, declined to retire, and rightfully so. JA-000279:3-4. Appellant has expressed an interest in continuing to work until he has achieved full maturity in PERS. This is Appellant's life time career. He is entitled to finish his career wherein his benefits are full maximized and not when Respondent thinks he should retire. JA-000880:10-JA-000881:20. Parties are obligated to distribute community property shares of their respective divided retirement assets per the "time rule". JA-000003:25-27. *Gemma v. Gemma*, 105 Nev. 458, ___, 778 P. 2d 429, 431 (1989) (defining the "time rule"). Respondent made a formal written demand to begin receiving her community property share of Appellant's divided retirement assets. *Henson v. Henson*, 130 Nev. ___, ___, 334 P. 3d 933, 934 (2014) ("the nonemployee spouse must first file a motion in the district court requesting immediate receipt of those benefits"). JA-001207:5-21 (recognizing that the time of payout occurred on formal written request.) See also JA-001208:12-15. See also JA-001540:20-23.

Not only is the Appellant punished by the case law previously set forth by this Court, public policy dictates that Appellant be allowed to maximize his

benefits in PERS. When law enforcement and fire (the two main groups affected by the retirement policy set forth by this court) are forced into retirement prior to the maximization of benefits, the state, county and municipalities are forced to hire new recruits, who will require training and also benefits. The forced retirement this Court propagates in prior cases will cost the State hundreds of thousands of dollars and existing experience in two public safety sectors of the community that demand diligence and experience.

The difference between the amount PERS would pay is based on a "base pay" computation, which will continue to mature if Appellant is able to continue working. JA-000880:10-JA-000881:20. Respondent has argued that existing law does not allow Appellant to choose when to retire, which is contrary to public policy and any rational thought process. *Gemma*, 778 P. 2d at 432. The *Gemma* Court based this on the "control" it would vest with the pension-holder. *Id*. ("We do not believe that [Appellant] should have such control over when [Respondent] will begin to receive her community interest in retirement benefits.")

Thus, the *Gemma* Court concluded that payment on any community property share of PERS would occur when the pension-holder was "eligible" to retire but utterly failing to define the term eligibility. *Id*. at 430. The eligibility threshold is not clearly defined. Appellant's decision to continue working well into his eligibility is not an arbitrary or capricious exercise of "control", but rather, for the purpose of maximizing maturity on the PERS account. JA-000880:10-JA-

000881:20. Appellant has accrued 27 years of work-credit. If forced to retire now, he will receive $5100.00. If allowed to accrue the full 30 years of work-credit, he will receive $5400.00. This would be beneficial to both Appellant and Respondent, as it would result in a larger payout amount. This is consistent with the underlying principle that requires computation of the amount of the community asset to be divided to be based on its development over the career, not merely over the marriage. *Sertic v. Sertic*, 111 Nev. 1192, 901 P. 2d 148, 151 (1995) ("the salary base should be determined during the pension holding spouse's *career* and not during the marriage.") JA-000474:12-13.

Compelling payment on Respondent's community property share of Appellant's retirement assets also allows Respondent to exploit both immediate payment and gradual enhancement of the PERS account payouts Appellant achieves as he continues to work towards full maturity, thus giving Respondent a double reward of instant gratification and increase in benefits, yet penalizing Appellant. This is effectively an early-retirement penalty, and could not possibly have been the intention of the *Gemma* Court. This would also have a disparate impact on police and fire, as these are the groups most likely to be eligible for early retirement; a vast majority of which can be forced into early retirement by an ex-spouse and suffer a comparative reduction in benefits. Likewise, the public policy impact cannot be ignored, as police and fire would be effectively coerced out of

public service, resulting in increased turnover, and a reduction in services as well as increased training costs.

Ultimately, this case presents a scenario where a serious departure from *stare decisis* must be considered. "Legal precedents of this Court should be respected until they are shown to be unsound in principle[.]" *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, ___, 173 P. 3d 734, 743 (2007). See also *Rupert v. Stienne*, 90 Nev. 397, ___, 528 P. 2d 1013, 1015 (1974) ("The doctrine of *stare decisis* must not be so narrowly pursued that the body of the common law is forever encased in a straight jacket.") See also *Sargeant v. Sargeant*, 88 Nev. 223, ___, 495 P. 2d 618, 623 (1972) ("Blind adherence to the requirements of *stare decisis* is not consonant with justice.") This Court's articulation of the "time rule" satisfies the purpose of NRS 125.155 but is in no way constrained by it. This Court's concern over the "control" a pension-holder would have in deciding to continue working where there would be no benefit to the non-employee spouse is sound. But nowhere in our existing case law is it considered that a pension-holder may continue to work to increase the maturity of a retirement account; an action which would be to the benefit of both pension-holder and non-employee spouse. It is unlikely that this Court meant to punish a faction of the working public, namely law enforcement and fire, by allowing an ex-spouse to either force a retirement before maximized PERS payments or undercutting a salary to the point of poverty. Which is exactly what the District Court was forced to do in this case.

Furthermore, this Court has not considered a scenario where the non-employee spouse is demanding payment on a retirement account to spite the pension-holder. In the instant case, Respondent would gain little to no money on receiving her payment of her community property share of Appellant's retirement assets; this is because Parties income would change such that the inverse effect on Respondent's child support would negate a substantial portion of what she would receive by obtaining payment of her community property share of Appellant's retirement assets.

By focusing intently on the "control" a pension-holder might exercise in deciding when to retire, this Court has overlooked the "control" a non-employee spouse might exercise in demanding payment. A spiteful exercise of discretion can occur from either ex-spouse. Compare *Folks v. Folks*, 77 Nev. 45, 47, 359 P. 2d 92, 93 (1961) ("[approving] the district court's exercise of discretion not to enter judgment where the movant would not have been benefitted by an uncollectible judgment, but the obligor would have been greatly prejudiced in the eyes of his superiors in the military.") This Court should take the opportunity to elaborate that a pension holder who is eligible to retire can continue to work if doing so would further enhance the community asset share of a retirement account to the benefit of both himself and his or her nonemployee spouse, or at the very least expand the district court's discretion in such circumstances.

Whether the district court abused its discretion in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets without allowing for an offset of his community property share of Respondent's divided retirement assets

What complicates this matter is the fact that often times two (2) working spouses will hold retirement accounts, and the older spouse who will achieve retirement eligibility sometimes several years before the younger spouse. When Respondent demanded her community portion, Appellant countered, demanding same. JA-000938:8-22. See also JA-001147:12- JA-001148:6, JA-001163:18-22, JA-001164:2-5. Even if Appellant is required to begin making payments on Respondent's community property share of his retirement asset, the district court abused its discretion in refusing to allow an offset with respect to his community property share of Respondent's retirement asset. This outcome effectively amounts to an unequal division of community property because one spouse will be receiving payments on retirement assets while the other spouse receives nothing or substantially less. Compare NRS 125.150(1)(b) (forbidding unequal distribution of a community property asset absent a "compelling reason"). See also *Lofgren v. Lofgren*, 112 Nev. 1282, ___, 926 P. 2d 296, 297 (1996).

In cases where one party is several years older than the other, it is conceivable that the younger spouse will receive payments and the older spouse dies before receiving one cent. This Court should expand existing case law to provide that if one spouse demands payment on a community property share of a

retirement asset consistent with the “time rule”, the other spouse may simultaneously demand offsets on those payments if he or she also holds a community property share of a retirement asset held by the demanding spouse that is subject to the “time rule” as well.

The district court’s existing order threatens to require Appellant to make payments that constitute in excess of 90% of his income. RA-001316:2-24. Sustaining this outcome would only force Appellant into an untenable situation where he would be facing contempt of court motions as he would only have a small portion of his disposable income available to purchase his daily essentials. This Court once considered a similar scenario in *Fernandez v. Fernandez*, 126 Nev. 28, 222, ___ P. 3d 1031, 1032 (2010):

> The trial court held that it was "not bound" by NRS 125B.145 because the parties "previously agreed in a stipulation and order modifying the Decree of Divorce that neither party [would] seek modification of child support." In the trial court's view, this made the child support order nonmodifiable, so long as the father had "sufficient means (assets and/or income) to meet the agreed upon child support obligations."
> […]
> The father's motion presented facts that, if true, qualified for relief. He did not need to wait until he was missing court-ordered child support payments or in financial peril before being heard under NRS 125B.145 and its related statutes, NRS 125B.070 and NRS 125B.080.

"Legal precedents of this Court should be respected until they are shown to be unsound in principle[.]" *ASAP Storage, Inc. v. City of Sparks*, *Id*. This Court should expand Nevada case law in a manner that allows the district court the

discretion to require pension-holders to offset each other's community property interests where one pension-holder becomes eligible and is compelled to begin making payments to the other.

Furthermore, the District Court, pursuant to Nevada Supreme Court precedent, was forced to order payment of retirement, child support and a judgment for retirement payments not made. The effect of the order for child support (statutory) and retirement (case law) effectively caused Appellant to be deprived of the ability to live. The District Court, after carefully evaluating living expenses of both parties, stayed the retirement payments but reduced the bulk to judgment thus punishing Appellant YET AGAIN and thwarting any possibility of purchasing a home and/or investing in things which can further stabilize his life, post-divorce.

Whether the district court erred in ordering a division of Appellant's vacation/sick time.

Initially, *res judicata* principles, namely claim preclusion[1], triggered to preclude a spouse from bringing an asset before the court to be divided where it could have been raised prior to the divorce. *University of Nevada v. Tarkanian*, 110 Nev. 581, ___, 879 P. 2d 1180, 1191 (1994) ("[T]here are two different species of res judicata []: issue preclusion and claim preclusion.") See also *Tomlinson v Tomlinson*, 102 Nev. 652, ___, 729 P. 2d 1363, 1364 (1986)

[1] This is also known as "merger and bar".

("[B]ecause [Appellant] failed to raise this issue in 1971, she is precluded by the doctrine of *res judicata* from subsequently raising it in 1986.") This court later elaborated that "[t]he right to bring an independent action for equitable relief is not necessarily barred by *res judicata*." *Amie v. Amie*, 106 Nev. 541, ___, 796 P. 2d 233, 234 (1990). This is the case even where an ex-spouse "did not timely pursue a motion for relief from a divorce decree" under NRCP 60(b), but only where "exceptional circumstances [justify] equitable relief." *Doan v. Wilkerson*, ___ Nev. ___, ___, 327 P. 3d 498, 499 (2014). JA-000495:5-10.

Respondent asserted that Parties failed to consider Appellant's sick/vacation leave and therefore, because it was also omitted from the decree, it could now be brought before the district court and divided as an omitted asset. JA-000319:15-21. Appellant disagreed. JA-000794:8-24 and JA-000796:5-11. See also JA-001145:5-14. At various times during proceedings, Respondent and the district court focused on whether or not Appellant "discussed" the sick/vacation leave. The district court used Respondent's testimony on cross-examination as a basis with which to find that the assets were not litigated or adjudicated, and concluded that Appellant owed a one-half share of the assets to Respondent. But this not the law. This Court recognized that an asset could be deemed considered and litigated by virtue of the information having been available and submitted. *Doan*, 327 P. 3d at 502. "[Respondent] attached statements of earnings and leave from the FAA, which indicated that he received earnings for retirement.") See also JA-000531:16-26 and

JA-000531:16-27:6-11. Just as occurred in *Doan*, Appellant attached statements of earnings, which contained detailed information on both the deferred compensation and sick/vacation leave. Thus, the district court erred in considering the deferred compensation and sick/vacation leave as omitted assets.

Even if the sick/vacation leave are deemed not litigated or adjudicated, they should not be consider community property. RA-000593:8-10. They amount to prospective wages that are paid when an employee, at some day in the future, is sick, goes on vacation, or takes a pay credit. Because they are earned after the decree of divorce has been entered, they are his sole property.

Conclusion

THEREFORE, Appellant hereby requests that:

1. This Court reverse the decision of the district court, with instructions to allow Appellant to continue working without making payments on his retirement assets until he has achieved maximum maturity on the retirement assets; or in the alternative, with instructions to allow Appellant to offset payments on his retirement assets with his community property interest in Respondent's retirement assets; and,
2. This Court vacate the decision of the district court that divided Appellant's sick leave and vacation pay; and,

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3. For an award of costs; and,

4. For such further relief as this Court deems necessary and just.

DATED THIS _23rd_ day of July, 2018.

Betsy Allen_____
Betsy Allen, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in size 14 font of Times New Roman.

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 proportionately spaced, has a typeface of 14 points or more, and contains 4147 words and does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this day of July, 2018.

Betsy Allen, Esq.
Nevada State Bar No. 6878

NRAP 25(d) CERTIFICATE OF SERVICE

I, Betsy Allen, Esq., do hereby declare that I am over the age of 18 and not a party to this action, and that I have placed a true and correct copy of this *Brief* into a sealed envelope and mailed it, postage prepaid, *via* United States Postal Service, addressed as follows:

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SERVED THIS _23rd day of July, 2018.

___Betsy Allen_____
Betsy Allen, Esq.