

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KILGORE,
Appellant/Cross-Respondent,

vs.

ELENI KILGORE,
Respondent/Cross-Appellant.

Case No.: 73977

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APPELLANT'S REPLY BRIEF

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Argument

1. An Expert Witness' Opinion on Questions of Law Are Not Entitled to Deference

Usually, expert witnesses testify to specific facts and apply their opinion as to the facts based on their expertise. In the instant case, the trial court heard expert testimony from Mr. Marshall Willick on statutory construction and other legal issues. Mr. Willick's determinations as to those legal issues are still held to the same standard of review as the district court's determinations would have been. *Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct.*, 130, ___ Nev. 118, 319 P. 3d 618, 621 (2014) ("Statutory interpretation and application is a question of law subject to our de novo review, even when arising in a writ proceeding.") Respondent makes numerous references to the expert testimony of Mr. Willick, but his opinion is not an authority that this Court is bound to, nor are Mr. Willick's opinions on statutory construction or any other questions of law entitled to any deference. *Ogawa v. Ogawa*, 125 Nev. 660, 221 P. 3d 699 (2009).

2. The District Court Did Not Err in Declining to Order Cross-Respondent to Designate Cross-Appellant as Survivor Beneficiary

The designation of "survivor beneficiary" is not an asset in the context of NRS 125.150(1)(b) and this Court has made it clear that whether or not an option with a survivor beneficiary plan is even designated is within the sole discretion of

1 the PERS member. *Henson v. Henson*, 130 Nev. 814, 820 P. 3d 933, 937 (2014).

2 Furthermore, for there to be any right to be designated a plan survivor beneficiary,
3 specific language stating as such must have been incorporated into the decree. *Id.*
4 at P. 3d 934 (“an allocation of a community property interest in the employee
5 spouse's pension plan does not also entitle the nonemployee spouse to survivor
6 benefits.”)
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9 It should also be noted that Respondent herself has a survivor beneficiary
10 designated, and it is not Appellant. JA-000868:12-000869:10. The same arguments
11 Respondent relies upon in seeking an order compelling herself named as
12 Appellant’s survivor beneficiary would necessarily entitle Appellant as being
13 named as Respondent’s survivor beneficiary.
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16 **3. *Doan* And What Constitutes Mistake or Fraud Under NRS 125.150(3)**

17 Respondent relies on Appellant’s testimony that vacation and sick pay were
18 not discussed and omitted from the decree. But a lay witness’ testimony on legal
19 issues should not be conflated with how the law actually controls. In the instant
20 case, Appellant argues that the lack of discussion between Parties does not, *per se*,
21 trigger the “mistake” or “fraud” requirement that would trigger NRS 125.150(3).
22 Appellant points to the example in *Doan v. Wilkerson*, 130 Nev. Adv. Op. 48, 327
23 P. 3d 498 (2014), which discusses that the inclusion of supporting documentation
24 could be used to bely the notion that “mistake” or “fraud” occurred in a case,
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1 notwithstanding the fact that Parties didn't verbally or in writing discuss an asset.
2 To the extent that NRS 125.150(3) abrogates or disapproves *Doan*, it does not
3 necessarily obviate the sound reasoning articulated by the *Doan* Court in holding
4 that "attached statements of earnings and leave" and "W-2 wage and tax
5 statements" constituted disclosure. *Id.* at P. 3d 503.
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8 **4. On the District Court Ordering Cross-Respondent to Pay Cross-**
9 **Appellant an Amount Consistent With His Income Towards Arrearages**

10 Parties have issue with the district court's order requiring payments to
11 Respondent consistent with *Henson, Id.* Appellant argues the district court erred in
12 ordering any payments because Appellant has a right to work until his retirement
13 account reaches full maturity. Respondent argues the district court erred in refusing
14 to order Appellant to pay the full amount she claims she is entitled to. The district
15 court, however, is in fact awarding the full amount demanded by Respondent to
16 accrue as arrearages; it is merely taking into consideration Respondent's inability
17 to pay and exercising its discretion in limiting the amount Respondent must pay
18 towards those arrearages each month. JA-001316:2-24. In Nevada, NRS 125.240
19 grants district courts broad discretionary authority to enforce its orders before or
20 after judgment by any means "it deems necessary." *Lamb v. Lamb*, 83 Nev. 425,
21 428, 433 P. 2d 265, 267 (1967); see also, *In re Chartz*, 29 Nev. 110, 85 P. 352
22 (1907.) In addition, the Court has the inherent authority to maintain control over
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1 the proceedings before it. S.C.R. 99(2); *Young v. Ninth Jud. Dist. Ct.*, 107 Nev.
2 642, 646-47, 818 P. 2d 844, 846-47 (1991).

3 **5. A Qualified Domestic Relations Order Must Be Consistent with The** 4 **Decree of Divorce**

5 Respondent argues that the decree and Qualified Domestic Relations Order
6 ('QDRO') have preclusive effect. This is partially supported by *res judicata*
7 arguments, and partially on the grounds that Parties signed the QDRO's "freely."
8 But QDRO's are not a contract Parties entered into freely; rather, the language of
9 the QDRO's was carefully prepared to be consistent with the PERS statutory
10 scheme and the decree of divorce. *Henson*, at 820 P. 3d 936-7 ("a QDRO must
11 conform to the divorce decree.") Furthermore, the QDRO and decree do not use
12 the phrase "first eligibility" as Respondent asserts, but rather, refer to "first
13 possible date". This language is precisely the language Appellant found to be
14 ambiguous, and tasked the district court and this Court with interpreting. *Henson*,
15 at 820 P. 3d 936 ("Because a district court's interpretation of a divorce decree
16 presents a question of law, this court reviews such an interpretation de novo.");
17 citing *Ormachea v. Ormachea*, 67 Nev. 273, 291-92, 217 P.2d 355, 364-65
18 (1950) (providing that a district court's construction and interpretation of the legal
19 operation and effect of one of its divorce decrees presents a question of law.)
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Appellant’s opening brief grapples with cases¹ that Respondent insists control in their entirety, despite Appellant having pointed out serious areas requiring clarification² or a departure from *stare decisis* altogether. Appellant need not reargue these principles on reply. NRAP 28(c) (“The appellant may file a brief in reply to the respondent’s answering brief [] and must be limited to answering any new matter set forth in the opposing brief.”) But, Appellant will take this opportunity to clarify that the underlying principle supporting his urging this Court to entertain a departure from *stare decisis* as much as for clarification on regarding *stare decisis* are supported by the underlying policy regarding the division of assets, debts, and of community property; namely, to “make both parties [] equal in the event that they [] separate.” JA-000699:6-24 (citing NRS 125.150.)

/s/ Betsy Allen
Betsy Allen, Esq.

² I.e. a lack of distinguishing between “early retirement” and “full maturity”, as whether to recognize a gray area in between those periods.

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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.

/s/Betsy Allen
Betsy Allen, Esq.

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