

Case No. 73977

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KILGORE  
Appellant

v.

ELENI KILGORE  
Respondent

AND

ELENI KILGORE  
Cross-Appellant

v.

RICHARD KILGORE  
Cross-Respondent

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**Reply Brief to Answering Brief to Cross-Appeal**

From the Eighth Judicial District Court, Family Division  
The Honorable Cheryl B. Moss, District Judge  
District Court Case No. D-12-459171-D

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RESPONDENT ANSWERING BRIEF  
CROSS-APPELLANT'S OPENING BRIEF

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## **INTRODUCTION**

This cross-appeal concerns whether the district court erred in refusing to compel Richard to commence payment of Eleni's community property to share of the defined contribution plan Richard's name even though he reach his first eligibility for retirement.<sup>1</sup> It appears from a review of Richard's Brief as though Richard has intermingled argument connected with his Reply Brief with argument intended for his Answering Brief. Eleni will attempt to address each accordingly.

## **STATEMENT OF ISSUES ON CROSS-APPEAL AND ARGUMENT**

### **I. WHETHER THE DISTRICT COURT ERRED IN REFUSING TO COMPEL RICHARD TO COMMENCE PAYMENT OF ELENI'S COMMUNITY PROPERTY SHARE OF THE DEFINED CONTRIBUTION PLAN IN RICHARD'S NAME EVEN THOUGH RICHARD REACHED HIS FIRST ELIGIBILITY FOR RETIREMENT**

#### **A. Richard Claims That An Expert Witness' Opinion on Questions of Law Are Not Entitled to Deference**

Richard claims that the jointly stipulated expert witness, Marshal Willick, Esq.'s, opinions were not entitled to deference. Answering Brief at page 1. The allegation by Richard should be seen as a non-starter. Mr. Willick gave his expert

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<sup>1</sup> In his Answering Brief, Richard omits including a Table of Contents. Nevada Rule of Appellate Procedure 28(c) states that “. . . a reply brief shall comply with Rule 28(a)(1)-(2) and (10) and must be limited to answer any new matter set forth in the opposing brief. Nevada Rule of Appellate Procedure 28(a)(2) requires a Table of Contents

opinion that Eleni should have been paid her share of the PERS defined benefit plan in Richard's name, upon her first eligibility for retirement.<sup>2</sup>

On the very first day of the evidentiary hearing Marshal Willick, Esq. was stipulated to by Richard as to being an expert witness as to PERS law, survivor beneficiary law, and child support law.<sup>3</sup>

Richard's agreement that Mr. Willick was an expert without any limitations as to those subjects may be construed as waiver prohibiting a district court giving weight to his opinions. *See Mahban v. MGM Grand Hotels, Inc.*<sup>4</sup> (a waiver is the intentional relinquishment of a known right).

Estoppel may apply as well. In *Topaz Mutual Co. v. Marsh*<sup>5</sup> the Supreme Court stated that "[e]quitable estoppel functions to prevent the assertion of legal rights that in equity and good conscience should not be available due to a party's conduct"). Richard cannot be permitted to complain of the problem he creates of agreeing that Mr. Willick is an expert and then complain that the district court might rely upon some of the opinions the expert to which he stipulated supplies.

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<sup>2</sup> 4 JA-000648 *Transcript*

<sup>3</sup> 4 JA-00645 *Transcript*

<sup>4</sup> 691 P.2d 421, 424, 100 Nev. 593, 596 (1984)

<sup>5</sup> 108 Nev. 845, 853, 839, 606, 611 (1992)

In addition to the above, Richard fails to provide any citation to the record to support his claim that the district court gave Mr. Willick's opinion any undue weight.

In addition, that Eleni should have been receiving her community property share of the pension upon Richard's first eligibility for retirement, was agreed to by the district court on December 14, 2014, a year and a half before Mr. Willick testified when the district court stated, ". . . when you first become eligible and she has a community interest in the divorce she should be having a distribution. . . he can't hold out until he's like 70 years old, and not collect then she's not getting her portion."<sup>6</sup>

Then there is still the longstanding controlling case law. In *Sertic v. Sertic*<sup>7</sup>, *supra*, the Supreme Court ordered that the "normal distribution of a spousal share of a retirement is to be upon first eligibility for retirement, and that 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."<sup>8</sup>

There is also *Gemma v. Gemma* that Nevada was adopting the law of California commonly referenced as the "*Gilmore*"<sup>9</sup> rule so that the wage earner's

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<sup>6</sup> 2 JA-000277 *Transcript*

<sup>7</sup> 111 Nev. 1194, 901 P.2d 148 (1995)

<sup>8</sup> 8 JA-001550

<sup>9</sup> *In re Marriage of Gilmore*, 29 Cal.3d 418 (1981)

unilateral actions could not deprive the spouse of sums otherwise payable<sup>10</sup> Specifically in *Gemma*, the Court stated, “the employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”<sup>11</sup>

**B. Richard Claims That The District Court Did Not Err in Declining to Order Cross-Respondent to Designate Cross-Appellant as Survivor Beneficiary**

This issue was not raised in Eleni’s Opening Brief. It is not known why Richard is trying to raise the issue in his Answering Brief.

**C. Richard’s *Doan* Argument**

After Richard first answers Eleni’s Opening Brief on her cross-appeal regarding Mr. Willick’s testimony, and then addressing an issue that Eleni did not raise in her Opening Brief on cross-appeal, the issue of designating a survivor beneficiary, Richard then, in an apparent Reply Brief, addresses *Doan v. Wilkerson*,<sup>12</sup> NRS 125.150(3), and omitted assets as it relates to omitted vacation and sick pay. See Reply/Answering Brief at pages 1-3.

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<sup>10</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); see also, *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

<sup>11</sup> quoting *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980)

<sup>12</sup> 130 Nev. Adv. Op. 48, 327 P.3d 498, (June 26, 2014).

Per Nevada Rules of Appellate Procedure 28(c), after a Reply Brief is filed, “Unless the court permits, no further briefs may be filed.” No permission has been granted for further briefs.

**D. Richard Claims That He Should Not Have to Make Payment of Eleni’s Community Property Share of the Defined Benefit Plan in His Name**

Richard claims that is acceptable for arrears to accrue and deprive Eleni of her portion of her community property because, he cannot “afford” to pay. *See* Answering Brief at pages 3-4. The claim by Richard ignores,

(1) The district court’s own statement made by it on December 31, 2014, when it stated, “. . . when you first become eligible and she has a community interest in the divorce she should be having a distribution. . . he can’t hold out until he’s like 70 years old, and not collect then she’s not getting her portion,”<sup>13</sup>

(2) The existing case law of *Sertic v. Sertic*,<sup>14</sup> *Gemma v. Gemma*,<sup>15</sup> *Fondi v. Fondi*,<sup>16</sup> which requires payment to be made upon first eligibility for retirement.

(3) Ignores the plain terms of the Decree of Divorce and the Qualified Domestic Relations Order agreed to by the parties that required Richard to pay Eleni

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<sup>13</sup> 2 JA-000277 *Transcript*

<sup>14</sup> 111 Nev. 1194, 901 P.2d 148 (1995)

<sup>15</sup> 105 Nev. 458, 778 P.2d 429 (1989)

<sup>16</sup> 106 Nev. 856, 802 P.2d 1264 (1990)

on the first possible date which is upon his first eligibility for retirement. *See Rivero v. Rivero*<sup>17</sup> (agreements of the parties are to be enforced as long as they are not unconscionable or violate public policy).

(4) Ignores NRS 125B.150(1)(b),<sup>18</sup> which requires an equal distribution of community property absent compelling reasons. As stated, no compelling reasons were stated, and the Decree of Divorce was never appealed and is *res judicata*. The district court should be seen as being without the ability to effectuate an unequal division of community property after the time for appeal has passed.

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<sup>17</sup> 125 Nev. 410, 429, 216 P.3d 213, 227 (2009)

<sup>18</sup> NRS 125.150(1)(b) states,

1. In granting a divorce, the court:

...

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, including, without limitation, any community property transferred into an irrevocable trust pursuant to NRS 123.125 over which the court acquires jurisdiction pursuant to NRS 164.010, except that the court may make an unequal disposition of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

**E. Richard's Claim That The Qualified Domestic Relations Order Is Not Consistent With the Decree of Divorce Should Be Addressed**

The Decree of Divorce filed March 13, 2013, provided for division of defined benefit plan in Richard's name via a Qualified Domestic Relations Order.<sup>19</sup>

On June 24, 2015, the Qualified Domestic Relations Order dividing the pension in Richard's name and giving Eleni her community property share was filed.<sup>20</sup> The Qualified Domestic Relations Order was executed by *both* Richard and Eleni.<sup>21</sup>

In the Qualified Domestic Relations Order executed by both Richard and Eleni it was stated, “[t]he retirement system is specifically directed to pay the benefits as determined herein directly to the Alternate Payee at the first possible date.”<sup>22</sup> (Emphasis added). The first possible date, is the first date of eligibility, there is no other construction, given the district court's statements, and *Sertic, supra*, *Gemma, supra*, and *Fondi, supra*, all of which indicate that payments should commence upon first eligibility.

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<sup>19</sup> 1 JA-000003-1 JA000004

<sup>20</sup> 3 JA-000518 to 3 JA-000522

<sup>21</sup> 3 JA-000523

<sup>22</sup> 3 JA-000520

Of course and in addition, *Rivero v. Rivero, supra*, provides that the parties are free to contract and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy. There was nothing unconscionable, illegal, or in violation of public policy to the terms to which Richard agreed.

Because Richard agreed to make payments upon the first possible date directly to Eleni, until he retired, the date the demand was formally made was the date payments to Eleni should have commenced. *See Henson v. Henson*<sup>23</sup> (payments become due when demand for the payments are first made)

#### **F. Richard's *Stare Decisis* Argument Should Be Addressed**

After engaging in further arguments in answering Eleni's Opening Brief regarding her community property interest in the defined benefit plan in Richard's name being divested by the district court, it appears that Richard engages in *stare decisis* arguments in reply to Eleni's Answering Brief to his Opening Brief. *See Reply/Answering Brief at page 5.*

As indicated, per Nevada Rules of Appellate Procedure 28(c), after a Reply Brief is filed, "Unless the court permits, no further briefs may be filed." No permission has been granted for further briefs.

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<sup>23</sup> 130 Nev. Adv. Op. 79 (Oct. 2, 2014)

## CONCLUSION

In conclusion, as stated in Eleni's Opening Brief, the district court erred by (1) refusing to enforce the stipulated Decree of Divorce that required a time rule share division, (2) refusing to enforce the terms of the stipulated Qualified Domestic Relations Order voluntarily entered into by the parties requiring payment upon first eligibility, (3) refusing to enforce the existing case law under *Sertic, supra*, *Gemma, supra*, and *Fondi, supra*, that requires payment upon to the non-employee spouse upon first eligibility for retirement, and (4) creating an unequal division of community property in an un-appealed Decree of Divorce by refusing to enforce those the terms to which the parties voluntarily agreed.

DATED this 19<sup>th</sup> day of November 2018

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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Time 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 does not exceed 30 pages and/or contains no more than 14,000. The brief contains 1,798 words
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 that 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 upon 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 19<sup>th</sup> day of November 2018

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## **CERTIFICATE OF SERVICE BY ELECTRONIC FILING**

I hereby certify that I am an employee of the PAGE LAW OFFICE and that on the 19<sup>th</sup> day of November 2018, I did serve by way of electronic filing a true and correct copy of the above and foregoing RESPONDENT'S REPLY BRIEF ON CROSS-APPEAL on the following:

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