IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

ERICH M. MARTIN

Appellant,

vs.

RAINA L. MARTIN

Respondent.

S.C. NO. 81810/82517
D.C. NO: D-15-509045-D

RESPONDENT'S ANSWERING BRIEF

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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. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. In the course of these proceedings leading up to this appeal, Respondent has been represented by the following attorneys:

a. Ramir M. Hernandez, Esq., BROOKS HUBLEY, LLP.

b. Matthew Friedman, Esq., FORD & FRIEDMAN.

c. Marshal S. Willick, Esq., WILLICK LAW GROUP, attorney of record for Respondent/Defendant.

d. Richard L. Crane, Esq., WILLICK LAW GROUP, attorney of record for Respondent/Defendant.

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

DATED this 9th day of July, 2021.

Respectfully Submitted By:
WILLICK LAW GROUP

//s//*Marshal S. Willick, Esq.*

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ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals per NRAP 17(b)(5). However, Respondent agrees that this matter should remain with the Nevada Supreme Court per NRAP 17(a)(11)&(12) as the issue implicates a matter of statewide public importance as to military retired pay, along with Appellant's challenges to this Court's prior decisions as to the validity of contractual agreements made in divorce settlements, the finality of agreements that are not appealed, and *res judicata*.

STATEMENT OF THE ISSUES[1]

1. Did the District Court err in determining that the term was *res judicata* given its recital in a final, unappealed, *Divorce Decree*?
2. Did the District Court err in enforcing a contract that was mutually agreed to by both parties?

[1] The "issues" that are listed in the Appellant's Opening Brief are either issues that were not decided by the lower court or assume false "facts"; where necessary, they are addressed below in footnotes or subheadings beneath the actual issues presented.

3. Did the District Court err in awarding Respondent $5,000 in *Pendente Lite* Fees?

JURISDICTIONAL STATEMENT

Pursuant to NRS chapter 125, the Family Court in Clark County had original jurisdiction to hear the divorce action filed by Appellant (Erich) against Respondent (Raina), and post-divorce litigation between those parties.

This Court is the appellate court for the district courts, and has subject matter jurisdiction to review the final decisions of those courts. Jurisdiction in this Court is pursuant to NRAP 3A(b)(1) and 3A(b)(8), under which an appeal may be taken from a district court final judgment, decree, or a special order after final judgment.

STATEMENT OF CASE

Appeal from an *Order* enforcing and finding as *res judicata* a stipulated contractual term in an integrated *Decree of Divorce* in which Appellant agreed to indemnify Respondent for any funds that he later waived from his military retirement pay in favor of receiving disability payments.

A consolidated Appeal is from an *Order* granting Respondent *pendente lite* fees to assist her in defending this appeal.

RESPONDENT'S NEED TO FILE A SEPARATE APPENDIX

Under NRAP 30, Appellant was required to attempt to reach agreement concerning a possible joint appendix. Appellant did not make any attempt at agreement or produce a proposed Appendix before filing his Opening Brief. We found a number of documents missing from Appellant's appendix (including at least one relevant Order and one Minute Order explaining what happened in what order), and it was not provided in file stamped order, making reference to the actual record difficult and in some cases impossible.[2]

As such, Respondent found it necessary to file a separate appendix that contained the entire record as described in NRAP 10.

[2] In a recent article, Justice Stiglich said that counsel should "err on the side of over-inclusion." Hon. Lidia Stiglich, *Appealing Appeals: Persuasive Appellate Case-Building and Best Practices*, Nev. Lawyer, June 2021, at 8-9 ("*Appealing Appeals*"). This should encompass at least all of the court orders leading to the result on appeal.

STATEMENT OF FACTS[3]

Erich and Raina were married on April 1, 2002, in North Carolina; they have one minor child, Nathan L. Martin, born August 24, 2010.[4]

The parties separated while stationed in Colorado.[5] They filled out and signed a military "Separation Agreement Worksheet" setting out all intended terms of their separation and intended divorce.[6] Those terms included sole custody of Nathan by Raina, supervised visitation by Erich, and that Raina was to receive 50% of all military retirement benefits and be named beneficiary of the military Survivor's

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[3] NRAP 28(b) provides that Respondent may provide a Statement of Facts if "dissatisfied" with that of the Appellant. The Statement of Facts in the *Opening Brief* is deficient for including mis-statements of the record, some false "facts," and omissions of critical material, including failing to even mention the parties' comprehensive Marital Settlement Agreement, while interjecting subjective opinion, alleged personal motivations not found in the record, many misleading and unsupported adjectives (e.g., "grudgingly," "involuntarily") and several unsubstantiated and irrelevant assertions. Accordingly, we request that this Court refer to this Statement of Facts instead.

[4] I RA 2; II RA 235.

[5] I RA 46-48.

[6] I RA 52-67.

Benefit Plan ("SBP").[7] In July, 2012, Raina moved to Las Vegas, Nevada, to be with her family.[8]

Erich filed his *Complaint for Divorce* in Clark County, Nevada, on February 2, 2015.[9] Raina filed her *Answer and Counterclaim* on February 25.[10] The same day, Raina filed a *Motion for Temporary Visitation and Child Support, and Temporary Spousal Support*.[11] Erich filed an *Opposition and Countermotion* and Raina filed a *Reply*.[12]

In their filings, Erich argued that the military separation agreement was "not enforceable" while Raina contended that by its own terms the military separation agreement was to be "binding and lasting."[13]

At the resulting hearing, the family court acknowledged the military separation agreement, but found that it was executed in Colorado, did not appear to be "final,"

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[7] I RA 54, 56, 60, 65-66.

[8] I RA 49.

[9] I RA 1-6.

[10] I RA 22-29.

[11] I RA 31-77.

[12] I RA 80-94, 110-118.

[13] I RA 84, 114.

and was not dated or notarized, and elected not to rely on it as enforceable.[14] The family court ordered child custody mediation, and referred all financial issues to separate mediation through the Settlement Masters Program.[15]

Both parties and their counsel participated in mediation on June 1, 2015, to resolve the financial and property issues of their divorce.[16] They discussed Erich's military benefits at length, including his intention to apply for a future disability rating from the military, resulting in an explicit promise by Erich that he would pay Raina any sums that the military did not pay her if and when he claimed that disability rating:

> Should Dad elect to accept military disability payments, Dad shall reimburse Mom for any amount her amount of his pension is reduced due to the disability status from what it otherwise would be.[17]

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[14] I RA 126.

[15] I RA 121-123, 125-129, 127.

[16] On appeal, Erich falsely claims that it is "unclear" what happened at mediation. AOB at 7. Nothing is unclear; the parties and their counsel met, discussed all issues, and signed written agreements on all parenting issues (I RA 174-177) and all financial issues (I RA 169-172).

[17] I RA 171 (Paragraph 8).

All of the terms of the Marital Settlement Agreement ("MSA") were reduced to writing and signed by the parties and their counsel.[18]

The next day (June 2), at the scheduled Case Management Conference, only attorney Frencesca Resch appeared, for Erich. She informed the Court that "the parties reached an agreement resolving all issues and a *Decree of Divorce* is forthcoming."[19] The court required the *Decree* to be submitted within 30 days.[20]

The *Decree* drafted by Erich's counsel put the terms of the MSA in court order form, detailing Raina's interest in Erich's military pension and any potential future disability award:

> One-half (½) of the marital interest in the Erich's military retirement, pursuant to the time rule established in Nevada Supreme Court cases *Gemma v. Gemma*. 105 Nev. 458, 778 P.2d 429 (1989) and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). The parties shall use Marshal S. Willick, Esq. to prepare a QDRO, or similar instrument to divide the pension. The parties shall equally divide the costs of preparing such an instrument. ***Should Erich select to***

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[18] I RA 169-172. Erich appeared remotely, and asked the mediator to sign the agreement on his behalf, noting his consent to all terms. I RA 172, 164.

[19] I RA 148.

[20] *Id*.

accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status.[21]

Other *Decree* terms relevant to this appeal include that alimony was made modifiable, and that all of the terms recited were explicitly integrated, stating "each provision herein is made in consideration of all the terms in the Decree of Divorce as a whole."[22]

After the court's deadline to submit the decree had passed, the family court issued an *Order to Show Cause Re: Order from June 2, 2015, Hearing* on October 8.[23]

On October 13, Erich's counsel filed a *Motion to Withdraw as Counsel of Record*.[24] The supporting *Affidavit of Francesca Resch, Esq.*, stated that:

> Plaintiff [Erich] has refused to execute the *Decree of Divorce* resulting from an agreement reached at the settlement conference that took place on June 1, 2015, which was subsequently put on the record in the instant Court on June

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[21] II RA 246 [Emphasis added].

[22] II RA 248, 250.

[23] I RA 150-151.

[24] I RA 152-157.

2, 2015. In addition, Plaintiff has not responded to any recent communication attempts made to him by our firm regarding the execution of the same."[25]

Erich did not file an objection to his counsel's motion.

On October 15, Raina filed a *Motion to Enforce Settlement Agreement* which included a copy of the signed MSA and a copy of the draft *Decree of Divorce* prepared by Erich's counsel and already signed by Raina.[26] On October 20, Erich signed the *Decree of Divorce*.[27]

On October 28, the family court held a consolidated hearing on its *Order to Show Cause*, Raina's *Motion to Enforce*, and Erich's lawyer's *Motion to Withdraw*.[28] At this hearing, all sides agreed that the only issue arising after mediation was as to custody, since the parties' minor child had been moved to year-round school.[29]

Erich asked to speak to the court, and stated that his only problem with the mediated divorce terms related to custody and child support: "With regards to like the setup (indiscernible) the mediation, I – I feel like that kind of went completely the

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[25] I RA 155.

[26] I RA 161-197.

[27] II RA 277, 279.

[28] II RA 227; X RA 1760-1772.

[29] X RA 1763.

wrong way because there are several things such as like the timeshares and like how . . . we would pay for . . . ."[30]

When asked why he waited until Raina filed a motion before he signed the *Decree*, Erich claimed that he thought he had previously signed and returned it: "And – and that – and I didn't realize that they hadn't signed, and that's my fault. I can – I thought I had signed it and sent it back."[31] Erich then blamed his lawyers for supposedly not telling him that the *Decree* remained outstanding, claiming he "never received anything" until getting the court's *Order to Show Cause*, before again claiming that "I didn't even realize that I hadn't signed it. I'm – I'm sorry."[32]

The family court reviewed and approved the *Decree* with one change relating to custody.[33] The only disputed issue at the hearing was whether and how much Erich should pay in fees for not signing the *Decree* until after a motion was filed; no issue with the military retirement benefit terms was raised by any attorney or party.[34]

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[30] X RA 1768.

[31] X RA 1769.

[32] X RA 1770.

[33] II RA 251, 240.

[34] X RA 1770.

Since the *Decree* had been signed, Erich's counsel was allowed to withdraw.[35] *Notice of Entry* of the *Decree* was filed on November 10, 2015, by Erich's outgoing counsel.[36] No one filed a motion or appealed, and the *Decree* is long-since final and unappealable.

About six months later, on May 5, 2016, Erich filed a *Motion for Order to Show Cause*,[37] mainly addressing child visitation and travel issues. On June 28, Raina filed her *Opposition*,[38] and a countermotion claiming that Erich had not cooperated in getting the necessary military retirement order filed.[39]

Erich filed a *Reply* on July 6,[40] claiming that the military does not require a "QDRO" to divide military retirement,[41] and falsely claiming that the *Decree* did not

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[35] II RA 229.

[36] II RA 258-280.

[37] II RA 281-304.

[38] II RA 312-391.

[39] II RA 318.

[40] II RA 392-404.

[41] II RA 397. This is partially true as an order dividing a military pension is not called a "QDRO." It is called a Military Benefits Division Order (MBDO) or, in statutory language, an Order Incident to Decree ("OID"). *See* 10 U.S.C. § 1408(a). However labeled, a specific *Order* dividing the pension is required.

specify who was to prepare the pension division order, but explicitly confirming his agreement to "abide by the Decree" and "effectuate" the military retirement division.[42]

At the hearing on July 12, the court ordered both parties to submit all necessary information to QDRO Masters to prepare an *Order Incident to Decree* ("OID"), and to pay half the cost of preparation of the order, as required by the *Decree*.[43]

They did so, and the OID[44] included the following provisions in accordance with the terms of the MSA and the stipulated *Decree of Divorce*:

> [Military retirement benefits] also includes all amounts of retired pay Erich actually or constructively waives or forfeits in any manner and for any reason or purpose, including but not limited to any post-divorce waiver made in order to qualify for Veterans Administration benefits, or reduction in pay or benefits because of other federal employment, and any waiver arising from Erich electing not to retire despite being qualified to retire.[45]
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> . . . .
>
> If Erich takes any action that prevents, decreases, or limits the collection by Raina of the sums to be paid hereunder (by application for or award of

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[42] II RA 397; see II RA 245.

[43] III RA 406-407, 480.

[44] III RA 470-478.

[45] RA 473.

> disability compensation, combination of benefits with any other retired pay, waiver for any reason, including as a result of other federal service, or in any other way), he shall make payments to Raina directly in an amount sufficient to neutralize, as to Raina, the effects of the action taken by Erich. Any sums paid to Erich that this court Order provides are to be paid to Raina shall be held by Erich in constructive trust until actual payment to Raina.[46]

The OID explicitly reserved jurisdiction for the district court to issue "such further orders as are necessary to enforce the award to Raina," including an award of alimony.[47] There is a long line of authority upholding such alimony reservations.[48]

At the return hearing on September 22, Raina's counsel complained that Erich had not yet signed and returned the OID.[49] Erich's counsel, Mr. Kelleher, promised to promptly do so:

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[46] III RA 474.

[47] III RA 475. These explicit reservations of jurisdiction are important, since some courts have held that where parties do ***not*** provide for mechanisms through which to address a waiver of retirement benefits, trial courts are unable to do so. *See*, *e.g.*, *Stojka v. Stojka*, 2017 Md. App. LEXIS 1095, 2017 WL 5036322 (even after *Hurt v. Hurt-Jones*, 168 A.3d 992 (Md. 2017) (compensation to wife through other property or support should be considered), trial court could not indemnify wife if the parties *waived* their right to have a court adjust the equities between them by way of monetary award or the transfer of ownership interest in other assets or benefits).

[48] *See*, *e.g.*, *In re Marriage of McGhee*, 131 Cal. App. 3d 408, 182 Cal. Rptr. 456 (Ct. App. 1982); *In re Marriage of Sheldon*, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (Ct. App. 1981).

[49] III RA 419-420.

> The other issue that we have, Your Honor, which is – and – and are housekeeping. We are – are very clear about them. First of all, as to the QDRO, my client's paid – he – he has paid QDRO Masters for his half of that. I don't know where the order is, ***but we're happy to – you know, we'll sign off.*** We'll review it and then obviously sign off on it."[50]

When the court directly asked Erich if he had signed the OID, he confirmed that he had not yet done so based on his unrelated concerns about Raina's boyfriend:

> Oh, I haven't signed off yet, Your Honor, because I wanting to discuss with Raina during the – the mediation proceedings in regards to the fact that she has been living with Tony (ph) for like years prior to us actually even being divorced. And based on the fact that she was in a domestic partnership and has kind have been, you know, drawing from both pots, both mine and her boyfriend, Anthony Rickards (ph), along with the fact that I've provided like a hundred thousand dollars' worth of like money towards her college, and I have paid like $3,500 a month for almost three years – that she should be willing to . . . back down."[51]

The court was unimpressed by Erich's holding up the stipulated order based on unrelated matters:

> Hold on. Those are all issues that are – you had a decree. This is a piece of the decree, the divorce decree. It needs to be completed. I want it postmarked

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[50] IX RA 1715 [Emphasis added].

[51] IX RA 1754-1755.

in the mail no later than 5:00 p.m. Friday signed. We need to get that QDRO executed, okay?[52]

Erich responded: "Understood, Your Honor."[53]

Erich returned the signed OID, which was filed on November 14, 2016.[54] At no time during the hearings of July 12 or September 22 was there any argument of any kind from anyone concerning the military retirement benefit ***terms*** of the MSA, the *Decree*, or the OID.[55] Neither party filed a motion to alter or appeal the orders from July 12 or September 22, 2016, or from the *Decree* or the OID, all of which are long since final and unappealable.

From 2016 through 2019, the parties returned to court repeatedly, mainly in continuing squabbles over child custody and support terms, but there were no proceedings related to the division of military retirement until 2020.[56]

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[52] IX RA 1755; III RA 420. The OID was erroneously referred to as a "QDRO" throughout the proceedings by various participants in the proceedings.

[53] IX RA 1755.

[54] III RA 470-478.

[55] Despite this history, Erich repeats on appeal (AOB at 11) the false assertion that he "did not voluntarily assent" to the terms spelled out in all three documents he negotiated, signed, and never contradicted or complained about in any filing or hearing over several years.

[56] See RA volumes IV, V, VI.

Erich retired from the military in late 2019, and Raina received her first payment from the Defense Finance and Accounting Service (DFAS) in November 2019, in the amount of $844.08. She received the same payment in December 2019, and in January of 2020 she received $845.43, which included an annual COLA.[57]

In mid-January 2020, DFAS contacted Raina explaining that since Erich was no longer receiving retired pay, she would not be receiving any further money.[58]

Raina then contacted Erich about the retirement, but in violation of court orders[59] he refused to provide any information to her. Raina contacted DFAS, which responded by verifying that Erich had opted for full disability under the Combat Related Special Compensation (CRSC) program, which meant that he had waived all retirement pay in exchange for tax free payments from the Veteran's Administration, and that DFAS would no longer be sending Raina any further funds.[60]

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[57] VI RA 1046; VII RA 1317-1318.

[58] VI RA 1046.

[59] III RA 474.

[60] VI RA 1046-1047.

After receiving the response from DFAS, Raina contacted Erich in March and asked how retirement payments would be paid moving forward and how the back payments would be made-up. Erich responded that under the decision in *Howell v. Howell*[61] he was not required to pay her and he would not be paying.[62] Raina sent Erich a copy of the *Decree* and reminded him that they had agreed that he would pay any difference if he opted for a disability. He ignored the request for payment.[63]

On May 1, 2020, Raina filed a *Motion to Enforce*,[64] which Erich opposed "in proper person" on May 28,[65] making a number of false assertions of fact and law.[66] Raina filed a *Reply* on June 10, pointing out the plentiful law around the country by which a contract to make payments in the event a disability award is taken is

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[61] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017).

[62] VI RA 1046; VII RA 1318.

[63] VI RA 1047.

[64] VI RA 1043-1060.

[65] VI RA 1107-1119. The filing was obviously ghost-written without disclosure in violation of Nevada Formal Ethics Opinion #34. On appeal, his counsel calls the submission "impressive." AOB at 11.

[66] For example, denying (at RA 1113) that the MSA and the *Decree* included terms requiring Erich to compensate Raina if he elected to take disability compensation. See I RA 171; II RA 245.

enforceable, and that these parties explicitly made and repeatedly confirmed such a contract in their MSA, *Decree*, and OID.[67]

On June 12, Mr. Kelleher filed a *Notice of Appearance of Counsel*,[68] followed by a "Supplement" on June 15 – the day before the hearing – re-arguing Erich's position on all matters, including the military retirement benefits issue.[69]

The district court entertained argument from counsel on June 16 concerning the unresolved military retirement pay. Upon court inquiry, Erich's counsel advised that Erich was fully satisfied with the existing briefing on this issue,[70] but Raina's counsel asked for an opportunity to respond to Erich's late-filed *Supplement*, was given permission to file a *Reply* to it,[71] and did so.[72] No further argument was held.

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[67] VII RA 1196-1210.

[68] VII RA 1254-1255.

[69] VII RA 1256-1269.

[70] X RA 1801.

[71] VII RA 1272; X RA 1803.

[72] VII RA 1280-1291.

On August 11, 2020, the family court entered its *Order Regarding Enforcement of Military Retirement Benefits*.[73] *Notice of Entry* of that order and of the OID was filed the same day.[74]

The *Order Regarding Enforcement* started with the words of the stipulated *Decree* and OID, going over the language in both documents, and noting the explicit reservation of jurisdiction to compensate Raina by way of an award of alimony or otherwise if Raina's share of the military retirement benefits was lost by reason of Erich's election of disability benefits.[75]

The court squarely addressed Erich's claim that he did not sign the OID "voluntarily," rejecting the contention on the basis of the court's review of the hearing video during which Erich had no objection to the terms of the order, but had

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[73] VII RA 1315-1340.

[74] VIII RA 1341, 1367. For no reason apparent from the record, Erich filed another *Notice of Entry* of the OID about two months later. VIII RA 1456.

[75] VII RA 1315-1317. Erich falsely claims (AOB at 12) that permanent alimony was "denied"; the family court was clear that its order was a temporary, without prejudice denial of the mechanism based solely on the lack of a Notice of Entry, which has already been remedied.

not signed and returned it because of his unhappiness with "other unrelated unresolved matters."[76]

The court provided a summary of the development of the law governing military retirement benefits from 1981 to the present, detailing the analogy of this case to the facts of *Mansell*,[77] in which the parties' divorce had pre-dated both the *McCarty* decision[78] and the Uniformed Services Former Spouses Protection Act.[79]

As the family court noted, in the *Mansell* case itself, the United States Supreme Court held that state courts could not divide military retired pay, but on remand Mr. Mansell was required to continue making payments to Mrs. Mansell under the terms of their final, unappealed *Decree of Divorce* as a matter of *res judicata*.[80]

The United States Supreme Court had footnoted in the *Mansell* decision that the issue of *res judicata* is a matter of state law "over which we have no

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[76] VII RA 1317.

[77] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[78] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[79] 10 U.S.C. § 1408, *et seq*. VII RA 1318-1321.

[80] VII RA 1320-1321.

jurisdiction,"[81] and the Court rejected Mr. Mansell's petition for certiorari challenging the order that he was required to continue making payments as he had stipulated to do in his final, unappealed divorce decree.[82] The family court noted that neither *Mansell* nor *Howell* involved an explicit contractual indemnification provision, "leaving enforceability of such a provision unresolved."[83]

The family court noted that the Martins negotiated their divorce long after *McCarty*, the USFSPA, and *Mansell*, and their lawyers were familiar with the decades-old statutory and case law. The court found that the parties explicitly "contemplated the probability that Erich would eventually waive his military retired pay for veteran's disability benefits" and contracted for indemnification in both their stipulated *Decree* and in their stipulated OID, specifically agreeing that the form of reimbursement could be by way of alimony.[84]

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[81] VII RA 1321, *quoting Mansell*, 490 U.S. at 586 n.5.

[82] VII RA 1321, quoting *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 230, 265 Cal Rptr. 227, 233 (Ct. App. 1989), on remand from 490 U.S. 581, 109 S.Ct. 2023 (1989).

[83] VII RA 1321.

[84] VII RA 1322.

Turning to *Howell*, the family court noted that the decision dealt with court-imposed indemnification, not the agreement of parties or a reservation of jurisdiction to award alimony, and quoted the United States Supreme Court's specific invitation to do exactly that in such circumstances:

> [A] family court, when it first determines the value of a family's assets, remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support.[85]

The family court found that the Martins' express agreement for contractual alimony was consistent with what the United States Supreme Court directed parties and courts to do.[86]

The family court then turned to the national case law issued after *Howell*, and noted the few cases cited by Erich in which courts had interpreted *Howell* "broadly" so as to disallow "a remedy in any form if the purpose of that remedy is to replace in

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[85] VII RA 1323, quoting *Howell*, 137 S.Ct. At 1406.

[86] VII RA 1323-1324.

full lost military retired pay,"[87] but also noted that those minority opinions had been roundly criticized by legal scholars as "unnecessarily overbroad."[88]

As noted by the family court, the weight of published authority agrees with the academic literature that the actual holding in *Howell* is "quite narrow," allowing courts to "take the suggestion of the U.S. Supreme Court by becoming creative in their remedies after *Howell* or finding alternative theories to avoid an unfair result."[89]

Going over those cases, the family court noted the line of authority under *Rose*,[90] which was cited and specifically re-affirmed in *Howell*, under which a state court can enforce support orders, by contempt or otherwise, even if the only known source of funds of the obligor is disability pay.[91] The court noted other post-*Howell* cases approving the award of compensatory alimony, vacating and reallocating assets, and enforcing contractual indemnification or payment orders because "nothing in the

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[87] VII RA 1324-1325.

[88] VII RA 1325 n.1, citing law review articles collecting and analyzing the cases.

[89] VII RA 1325.

[90] *Rose v. Rose*, 481 U.S. 619, 630–634, and n.6 (1987).

[91] VII RA 1326.

USFSPA or *Mansell* prevents a veteran from voluntarily contracting to pay a former spouse a sum of money that may originate from disability payments."[92]

The family court noted that several of the cases cited by Erich included instructions on remand for trial courts to determine whether payment provisions in final, un-appealed decrees, were *res judicata* like the decree was found to be in *Mansell*, so that payment under the terms of those orders was required regardless of a later change in the law.[93]

Turning to the specific facts of this case, the family court found that the stipulated *Decree* was a contract enforceable under the line of authority established by this Court, the terms of which were not ambiguous nor unconscionable, illegal, or in violation of public policy, and that the parties did exactly what *Howell* suggested and took precautions to "consider and address the possibility of waiver" by way of a contractual indemnification agreement.[94]

The family court rejected Erich's claim that the contracted term was unenforceable, noting that the cases he cited all concerned Social Security" – which

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[92] VII RA 1326-1327.

[93] VII RA 1325-1329.

[94] VII RA 1330.

is ***not*** community property – not military retired pay – which ***is*** community property – that was waived to receive benefits that could not be divided.[95] The court found this Court's opinion in *Shelton*[96] controlling, "because it expressly embraced the contract theory in military disability indemnification cases."

The family court found the agreement that Erich reimburse Raina for all sums she lost to be enforceable under both the line of the authority enforcing such contracts,[97] and the line of authority that a final, unappealed divorce decree requiring such payments is *res judicata* of the payment obligation that can and should be enforced, finding that the issue was identical to that in the prior litigation, the initial ruling was final and on the merits, the parties were the same, and the issue was necessarily litigated.[98]

Finally, the family court found that it could not immediately order the payments paid by way of alimony because at that time there was no notice of entry on file for

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[95] VII RA 1329-1332.

[96] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), *cert. denied*, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004).

[97] VII RA 1325-1329.

[98] VII RA 1333-1335.

the OID, but that Erich owed the arrears for all sums he had not paid to date, and to pay the contractually-stipulated sum from that date forward.[99]

On September 9, 2020, Erich filed a timely *Notice of Appeal* from only the *Order Regarding Enforcement*.[100]

On September 30, Raina filed a *Motion for Attorney's Fees and Costs Pendente Lite*.[101] It included a complete discussion of the disparity of income between the parties (essentially three to one), Erich's ability to pay,[102] argument as to the basis for the award of fees,[103] and a *Brunzell* factor analysis.[104]

Erich filed a *Motion for Stay Pursuant to NRCP 62(d)*,[105] asserting that his express promises as set out in the MSA, the stipulated *Decree*, and the OID, were somehow "not comparable to a settlement agreement and certainly no [*sic*] the

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[99] VII RA 1336-1338.

[100] VIII RA 1398.

[101] VIII RA1444-1454.

[102] VIII RA1447. See *Miller v. Wilfong,* 121 Nev. 619, 119 P.3d 727 (2005); *Wright v. Osburn,* 114 Nev. 1367, 1370, 970 P.2d 1071, 1073 (1998).

[103] *Id*. See *Miller v. Wilfong*, 121 Nev. 619, 119 P.3d 727 (2005); NRS 125.150.

[104] VIII RA 1448-1450.

[105] VIII RA 1469-1479.

product of mutual assent" and that Raina should not receive her promised and ordered share of the community property given "the support Raina receives from her domestic partner."[106] He opposed Raina's request for fees *pendente lite*.[107] Raina filed a *Reply* and opposed Erich's request for a stay,[108] to which Erich filed a *Reply*.[109]

The district court held a hearing on November 3, 2020, on the cross-requests for a stay and for fees and issued an order on December 31.[110] The court found that fees *pendente lite* were warranted because the costs of appeal was less of a financial burden for Erich than for Raina and the parties had a significant disparity of income.[111] The court granted the stay of ongoing payments during the appeal, on condition that the sums owed to Raina be paid into Erich's counsel's trust account with a monthly report to Raina's counsel that the amounts had been paid.[112]

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[106] VIII RA 1475, 1488.

[107] VIII RA 1485-1542.

[108] IX RA 1551-1559, 1560-1572.

[109] IX RA 1575-1585.

[110] X RA 1831.

[111] X RA 1833, 1835-1836.

[112] X RA 1834, 1837; XI RA 2069, 2071.

On February 12, 2021, Erich filed a *Notice of Appeal* claiming to be appealing the *pendente lite* fees order, but attached the wrong order.[113] On March 8, Erich filed an *Amended Notice of Appeal*.[114]

STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

Errors of law are reviewed *de novo*.[115] Questions of constitutional or statutory construction are also reviewed *de novo*.[116]

As to any discretionary rulings, a court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous."[117] An open and obvious error of law can also be an abuse of discretion.[118] A court can err in the exercise of personal judgment and does so to a level meriting

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[113] X RA 1927-1937.

[114] XI RA 1992-2034.

[115] *Moseley v. Dist. Ct.*, 124 Nev. 654, 188 P.3d 1136 (2008); *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 197 P.3d 1051 (2008).

[116] *See Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000).

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

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

reversal when ***no*** reasonable judge could reach the conclusion reached under the circumstances.[119]

This Court will reverse for abuse of discretion a decision that "lacks support in the form of substantial evidence,"[120] which is "evidence that a reasonable person may accept as adequate to sustain a judgment."[121] Attorney's fees are reviewed for an abuse of discretion.[122]

Here, after retirement, Erich applied for and was granted a 100% disability from his service in the United States Army. On further application, Erich was awarded Combat Related Special Compensation (CRSC), resulting in a full waiver of the disposable retired pay from the Defense Finance and Accounting Service (DFAS) that was to be divided in accordance with the terms of the parties' stipulated *Decree of Divorce*.

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[119] *Leavitt v. Siems*, 130 Nev. 503, 330 P.3d 1 (2014); *Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P. 2d 1147 (1979); *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942).

[120] *Stratosphere Gaming Corp. v. Las Vegas*, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004).

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

[122] *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

When Erich refused to pay to Raina the funds as promised in the MSA, and the *Decree*, and the OID, she filed a motion to enforce. The family court found that Erich and Raina were free to contract for any payments they wished between them and ruled that the terms of the *Decree* were *res judicata* as they were never appealed from or modified.

The United States Supreme Court expressly suggested in *Howell* that lawyers and courts should do exactly what was done here – provide for the contingency that military retired pay might be waived for disability, by providing for an initial or recalculation of alimony to take into account that potential waiver. This Court has repeatedly approved exactly that methodology in cases for 40 years, in line with the majority of cases from other jurisdictions and the entirety of expert legal commentary.[123]

Even if somehow the contracted payments were inappropriate under *Howell* – and they are not – the final, unappealed *Decree* is *res judicata* as to these parties and

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[123] *See* Note, A Change in Military Pension Division: The End of Court-Adjudicated Indemnification — *Howell v. Howell*, 44 Mitchell Hamline L.R. 1064, 1089 (2018); *Military Pension Division Cases Post-Howell: Missing the Mark, or Hitting the Target?* Journal of the American Academy of Matrimonial Lawyers, Vol. 31, Mar 13, 2019, pg 513 ["AAML Journal"].

just as in the *Mansell* case itself, the payments as promised and ordered should be made.[124]

Additionally, the family court found that Erich's income was some three times that of Raina and ordered that she receive $5,000 in *pendente lite* fees (one-fourth of the flat fee she was charged). That modest ruling was well within the family court's discretion and should be affirmed.

ARGUMENT

Analysis of VA waivers after *Howell* requires understanding the context of the Court's ruling. *Howell* did not involve an agreement by the parties for the husband to pay back any waived money, and the opinion said nothing about the enforceability of any such agreement. The Court's ruling was actually very narrow, addressing a state's ability to impose indemnification; the decision did not address *res judicata* in

[124] The existence of a final unappealed decree can be important, as there are some courts that have indicated that if *Howell* was issued during current divorce litigation, they would have the court consider its impact on an agreement in that litigation. *See Russ v. Russ*, 2021-NMSC-014, 485 P.3d 223, 2021 N.M. LEXIS 12, 2021 WL 1220719, reversing 456 P.3d 1100 (N.M. Ct. App. 2019).

any way and contained neither a ruling nor dicta on the issue of contractual indemnification regarding VA waivers.[125]

I. IT IS *RES JUDICATA* THAT ERICH OWES REIMBURSEMENT PAYMENTS TO RAINA

This Court has faced exactly this issue several times, and it should be resolved here the same way it was resolved in the prior cases, for exactly the same reasons.

In *Duke v. Duke*,[126] the parties had divorced in 1980 and the *Decree* called for the wife to receive 35% of the husband's military retired pay. After the decision in

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[125] Erich falsely asserts that the family court"ordered indemnification." AOB at 17-22, 28-30. Here, the district court found that Erich and Raina were free to contract in any way they desired. The district court also found that the terms in the final, unappealed *Decree* established the law of the case. "The 'law of the case' doctrine holds that when a court decides upon a rule of law, that decision should generally control the same issues throughout the subsequent stages in the same case." Steven Baicker-McKee, William M. Janssen & John B. Corr, Federal Civil Handbook 1079 (2010) (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391 (1983)). The doctrine of law of the case prevents further litigation of these issues and cannot be avoided by more detailed and precisely focused arguments. *See Hall v. State*, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[126] *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982).

McCarty,[127] the husband refused to make any payments to the wife, claiming that federal law stated that she was not entitled to anything.[128]

At the district court, the wife moved to enforce arrearages, and the husband claimed that the court was powerless to enforce the *Decree* in light of the federal case law stating that military retirement benefits belonged to the veteran alone. The district court disagreed, and the husband appealed.

This Court, noting that the husband had not appealed from the *Decree*, was direct and explicit:

> Nothing in *McCarty* . . . suggests that the Supreme Court intended its decision to apply retroactively to invalidate, or otherwise render unenforceable, prior valid and unappealed state court decrees. . . . *McCarty* does not alter the res judicata consequences of a divorce decree which was final before *McCarty* was filed.[129]

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[127] *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

[128] Until passage of the USFSPA in 1983, *McCarty* had held that military retirement benefits could not be treated as marital or community property for any purpose, a much more sweeping holding than the non-disability versus disability distinction later made in the USFSPA.

[129] *Duke v. Duke*, 98 Nev. at 149, citing federal and state authority from elsewhere.

This Court issued an unpublished order in *Krone v. Krone*,[130] under the reasoning in *Duke*, requiring a husband to continue making payments contracted in the parties' marital settlement agreement, which was ratified by their final, unappealed divorce decree, despite issuance of the *Mansell* decision, as a matter of *res judicata*.

The *Shelton*[131] case involved a couple who divorced ***after*** *McCarty* and passage of the USFSPA, in which the husband ceased making the stipulated payments to the wife and claimed that *Mansell I*[132] prevented the courts from enforcing the payment term. This Court, citing *Mansell II*,[133] noted that "states are not preempted from enforcing orders that are res judicata,"[134] and enforced the contracted-for equal division of payments received by the husband.

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[130] *Krone v. Krone*, No. 27235 (Order Dismissing Appeal and Cross-Appeal, May 26, 1996), unpublished disposition.

[131] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), cert. denied, 541 U.S. 960, 124 S.Ct. 1716, 158 L.Ed.2d 401 (2004).

[132] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

[133] *In re Marriage of Mansell*, 217 Cal. App. 3d 219, 230, 265 Cal Rptr. 227, 233 (Ct. App. 1989), on remand from 490 U.S. 581, 109 S.Ct. 2023 (1989).

[134] 119 Nev. at 496, 78 P.3d at 509, citing case law from throughout the country.

The United States Supreme Court denied certiorari in *Shelton*, as it had in *Msansell II*, apparently for the reason explained in *Mansell I* and noted by the family court in this case: "the issue of *res judicata* is a matter of state law over which [federal courts] have no jurisdiction."[135] *Howell* affirmed *Mansell*, and said nothing whatsoever about the *Mansell I* holding on *res judicata*; no known federal decision has issued criticizing the reasoning of or legal bases relied upon by this Court in *Shelton*.[136] Since then, this Court has repeatedly stressed the importance of *res judicata* in divorce actions.[137]

Over the years there have been many efforts by military members to cease payments required by final, unappealed divorce decrees, based on later federal cases; they have failed, with fair uniformity, on *res judicata* grounds. In one particularly notable federal case (referencing many such cases from throughout the country), the United States Claims Court carefully examined a class action brought by groups of former military members divorced before or after the relevant cases, whose divorce

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[135] VII RA 1321, *quoting Mansell*, 490 U.S. at 586 n.5.

[136] Notably, the only reason an alimony form of remedy was not utilized in the alternative in *Shelton* was that, in that case, the trial court "lacked jurisdiction to hear a request for alimony when alimony had been waived in the final divorce decree." The relevance of that distinction is examined below.

[137] *See*, *e.g.*, *Doan v. Wilkerson*, 130 Nev. 449, 328 P.3d 498 (2014).

decrees divided the military retirement benefits, and who sought to reduce or eliminate payments to their former spouses.[138]

The federal Claims Court soundly rejected all such contentions, and the federal Circuit Court affirmed with equal unanimity, despite the decision in *Mansell I* during the appeal. The opinion recounted the retirees' "odysseys through the state and federal courts challenging state court decrees dividing their retired pay" and noted that the retirees "were unable, as a final matter, to convince any of these courts that division of their retirement pay was unconstitutional or legally improper."[139]

Erich argues (AOB at 22-23) that *Howell* applies "retroactively," but that false "issue" is sophistry. The actual question is whether *Howell* said anything to alter the holding in *Mansell I* that issues of *res judicata* are outside the scope of its holdings, which is why Mr. Mansell was required to continue making payments to Mrs. Mansell after the decision in the *Mansell* case itself. None of the cases cited by Erich

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[138] *See Fern v. United States*, 15 Cl. Ct. 580 (1988) (denying retiree's attempts to circumvent judgments in favor of their former spouses in all three categories of cases), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

[139] *Id.*, 15 Cl. Ct. at 592.

involved a military member who, years after a final, unappealed divorce decree, stopped making payments required by that decree.[140]

Several of the reported cases upholding contractual indemnification in unappealed divorce decrees as *res judicata* are virtually identical to this case. For example, in *In re Marriage of Weiser*,[141] the Washington court found, exactly as Judge Burton did in this case, that the husband was barred from attacking the unappealed final decree because the decree and his motion involved (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4)

[140] Even if there was such a case, *res judicata* is a matter of state law, and states may vary in their desired application of the doctrine. Nevada, like California, Washington, and many others, has held that *res judicata* prevents a military member from challenging an unappealed decree requiring such payments, as explained in *Shelton* and *Mansell II*, and the United States Supreme Court has refused to entertain challenges to those holdings.

[141] *In re Marriage of Weiser*, 475 P.3d 237 (Wash. Ct. App. 2020).

the same quality of persons for or against whom the decision is made as did a prior adjudication.[142] All required findings were made by Judge Burton.[143]

Erich nevertheless attacks *Shelton* (AOB at 34-37), falsely claiming that "the weight of persuasive authority" requires it – without noting that all of the expert commentary and great majority of cases state otherwise. He also claims that *Shelton* was issued before *Howell*, which is true but irrelevant, since *Shelton* was decided after and discussed at length *Mansell I*, which *Howell* simply affirmed.

Finally, Erich's claim that he was not given an opportunity to brief the *res judicata* cases (AOB at 42) is false; the reasoning was explicitly raised in the cases raised by both sides, and Erich's attorney was offered the opportunity to file a further brief and declined to do so.[144]

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[142] For similar analyses and conclusions *see*, *e.g.*, *Edwards v. Edwards*, 132 N.E.3d 391 (Ind. Ct. App. 2019); *In re: Marriage of Chigi and Diclerico*, ___ P.3d ___, 2019 Wash. App. LEXIS 1994, 2019 WL 3415926 (Wash. Ct. App. 2019) (motion to "clarify" spousal maintenance term barred by issue preclusion); *Boutte v. Boutte*, 304 So. 3d 467 (La. Ct. App. 2020) (former husband barred by *res judicata* from re-litigating requirement to continue making payments to former spouse regardless of disability application).

[143] *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008). In this case the exact "claim" and "issue" in question – contractual indemnification – is spelled out on the face of the MSA, and both the *Decree* and OID, between the same parties, in the same case. The term was "necessarily litigated and decided."

[144] X RA 1801.

Erich makes the unsupported claim (AOB at 37) that *Shelton* is "outdated and unworkable," but makes no showing of any kind how that is true, as it has properly worked to prevent unjust deprivation and unjust enrichment for 20 years.

II. THE FAMILY COURT PROPERLY ENFORCED THE PARTIES' STIPULATED CONTRACT[145]

The majority of post-*Howell* decisions do not involve either *res judicata* or any consideration of enforcement of contracts and simply hold that *Howell* disallows the

[145] This is another place (AOB 37-40) where Erich's statement of the issue contains multiple false assertions of fact, since he asks whether a contract can be enforced "where Erich was forced to sign the Decree of Divorce and related QDRO despite his objections and inability to negotiate material terms." As detailed above, Erich entirely ignores the existence of the stipulated MSA; he was not "forced" to sign the *Decree* (when asked, Erich responded that he thought he "had already done so"); and Erich freely negotiated all terms, which were written by his own attorney, who appeared in court to report that all points were resolved by voluntary stipulation. There is zero evidence that Erich ever "objected" to any of the military retirement and contractual indemnification terms of the *Decree* or OID – until he sought to renege and find a way to cheat Raina out of the benefits he promised to indemnify.

court ordered division of disability payments,[146] which general holding is not at issue here.[147]

The "contractual" concept for indemnification is central. Indemnity is "a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."[148] Contractual indemnification never came up in the *Howell* case because ***there was no*** agreement to indemnify involved, just a property settlement for a 50/50 division of the pension, which had been approved by the court.

The distinction is important. In *Mansell*,[149] cited in *Howell*, the husband had argued that federal law did not allow for agreement by the parties to divide those

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[146] See generally *Hamrick v. Beth* (*In re Hamrick*), 627 B.R. 619 n.10, 2021 Bankr. LEXIS 1112 n.10, 2021 WL 1554249; *Foster v. Brooks*, 2018 U.S. Dist. LEXIS 223256; *Tarver v. Reynolds*, 2019 U.S. Dist. LEXIS 138858, 2019 WL 3889721; *Brown v. Brown*, 260 So. 3d 851, 2018 Ala. Civ. App. LEXIS 54, 2018 WL 1559790; *Jordan v. Jordan*, 480 P.3d 626, 2021 Alas. LEXIS 15, 2021 WL 526276; *In re Marriage of Tozer*, 2017 COA 151, 410 P.3d 835, 2017 Colo. App. LEXIS 1537, 2017 WL 5897807; *Vlach v. Vlach*, 556 S.W.3d 219, 2017 Tenn. App. LEXIS 717, 2017 WL 4864991.

[147] We note without further comment that Erich does not acknowledge this, or cite or analyze the majority of authority or any of the expert analysis, ignoring Justice Stiglich's warning not to "cite a foreign authority without acknowledging that it is a minority view." *Appealing Appeals*, *supra*, at 9.

[148] Restatement (SECOND) of Judgments § 1 (1982).

[149] *Mansell*, 490 U.S. at 582-84.

benefits, but the Court declined to consider or address those arguments, leaving such agreements open for later decision. As detailed above, on remand, the spouse was ordered to continue receiving the contracted-for portion of the disability pay.

In other words, the Supreme Court left open the ability of parties to contract for indemnification of the spouse with an agreement to pay the spouse a portion of the VA disability compensation or the waived retired pay. In fact, *Howell* itself instructs attorneys and courts to take that "contingency" into account and draft decrees of divorce accordingly:

> Family courts remain free to take account of the contingency that some military retirement pay might be waived or take account of reductions in value when calculating or recalculating the need for spousal support.

Thus, *Howell* on its face allows parties and courts to consider the potential loss of the military retirement benefits and to take remedial action in decrees. This is completely compatible with Nevada law, which has long expressly embraced the contract theory in military disability indemnification cases.[150]

Here, Raina and Erich ***did*** expressly contemplate the possibility of Erich taking some disability at the time he was to retire, and created a contract that provided for

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[150] *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (Nev. 2003).

the direct indemnification by Erich to Raina if the contingency actually arose. In other words, they "took account of this contingency" at the time of divorce as the United States Supreme Court said that they should.[151]

Specifically, their agreement and decree includes the specific contract that, "Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status." This is the contractual agreement that did not exist in the decree at issue in *Howell*, and provides a specific contractual remedy agreed by the parties, not imposed by a court.

This issue has been studied in depth by members of the American Academy of Matrimonial Lawyers (AAML); the issue of contractual agreement was thoroughly analyzed in a recent volume of its Journal, in which the *Howell* decision was dissected and determined to be actually a very narrow decision which applies ***only*** to

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[151] *Howell* also indicates that, with or without a specific contracted remedy, divorce courts can impose a spousal support award but can't "just" impose a dollar for dollar alimony. While the opinion is not very specific, some other courts have held that in the absence of an explicit agreement a court would have to take into account all of the required alimony factors and determine what alimony amount would be fair and equitable, resulting in an alimony award that could be greater or less than the amount lost due to the waiver of retired pay. *See*, *e.g.*, *Cassinelli II*, *Marriage of Cassinelli*, 20 Cal. App. 5th 1267, 229 Cal. Rptr. 3d 801 (Ct. App. 2018).

cases in which there is no underlying agreement, and leaves open the possibility of contractual agreements.[152] In other words, *Howell* does not apply to this case.

A Texas court explained why such contracts do not run afoul of *Howell*:

> A property settlement agreement incorporated into a divorce decree is treated as a contract in Texas, and its meaning is governed by the law of contracts. *McGoodwin*, 671 S.W.2d at 882. Rudolph has not pleaded any theory in avoidance of the contract's provision for alternative distributions to Jamieson in the event of his waiver of retired pay or receipt of other separation compensation.[153]

In Nevada as well, a property settlement agreement is a contract and enforcement of such a contract is governed by normal principles of contract law.[154] As such, when a party contracts to pay a certain amount to another person, the source of the funds to be used has no bearing on the requirement to pay.[155] As this Court

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[152] See AAML Journal, *supra.*

[153] *Rudolph v. Jamieson*, ___ S.W.3d ___ (Tex. Ct. App. No. 03-17-00693-CV, 2018).

[154] *Grisham v. Grisham*, 128 Nev. 679, 289 P.3d 230 (2012); *May v. Anderson*, 121 Nev. 668, 672 n.1, 119 P.3d 1254, 1257 (2005).

[155] Any other holding could render recipients of disability pay unable to contract at all: a disabled veteran would not be able to contract for the purchase of a car, a house, or be eligible to carry credit cards as no one would contract with a person who could claim they have no obligation to pay with disability funds.

held in *Shelton*, the source of the funds is irrelevant.[156] This is the same situation as is presented in this case. Erich contracted to pay Raina her share of the benefits.

We concede that there are a few jurisdictions which have come to the opposite conclusion and elected, at least for now, to read *Howell* superficially and over-broadly so as to prohibit contract and even *res judicata* considerations,[157] but they are in the minority and we believe, along with the weight of expert analysis, that those jurisdictions will at some point re-align with the majority view espoused by this Court in *Shelton*.

It is important to note that Erich specifically contemplated paying Raina any amounts that were waived due to disability. Specifically, the *Decree of Divorce* submitted to the Court for summary disposition states:

> Should Erich select to accept military disability payments, Erich shall reimburse Raina for any amount that her share of the pension is reduced due to the disability status.

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[156] *Shelton*, *supra*, quoting from *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *see also Gross v. Wilson*, 424 P. 3d 390 (Alaska 2018) (While state courts do not have any power to "equitably divide veterans' disability benefits received in place of waived retirement pay," the master's recommendation simply enforced a contractual obligation requiring Gross to pay Wilson a specific amount from any of his resources. . . . "Even if the payments originated from Gross's disability pay, nothing in the USFSPA or *Mansell* prevents a veteran from voluntarily contracting to pay a former spouse a sum of money that may originate from disability payments").

[157] *See Mattson v. Mattson*, 903 NW 2d 233 (Minn. Ct. App. 2017).

This is a contractual agreement between Raina and Erich. It is unambiguous and not subject to any other interpretation. He has the obligation to make payments directly to Raina in any amount that she loses as a result of his unilateral action. Where he gets the money is immaterial to the question as to whether he is required to pay.

Since Erich provides no reason why the contract should be ignored under Nevada law, he is without an argument as to why he should not continue payments that were being made directly by DFAS.

A. Public Policy Supports Upholding Parties' Agreements

Erich's brief suggests the remarkable proposition that "public policy" supports permitting him to lie in repeated sworn promises, cheat his former spouse out of her half of benefits earned during marriage, and steal her property for himself.[158] Erich claims that it is "wholly unfair" to require him to honor his multiple sworn promises and agreements.[159]

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[158] AOB at 31-37.

[159] AOB at 31; *cf*. I RA 65, 171; II RA 245; III RA 473-475. In fact, as the family court found, it would be "unfair to Raina to take away the precaution she negotiated and leave her without the ability to negotiate a substitute when it is much

Along the way, Erich falsely claims that he was "unrepresented" and did not "voluntarily" agree to the explicit contractual indemnification term.[160] In fact, Erich was represented by competent counsel throughout the mediation, and his attorney drafted the explicit promises Erich made to compensate Raina for any losses she would suffer if he chose to waive the divisible retirement benefits in favor of non-divisible disability benefits, after Erich extracted a reduced term of alimony in an integrated agreement.[161]

Erich makes many other misrepresentations of both fact and law, as when he claims that this Court's case law states that if there is any kind of disability, it is "categorized as separate property."[162] Actually the very case he cites states on its face that the retirement component of any benefits marked "disability" are community

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too late to do so." VII RA 1335. This Court made the same finding in *Shelton*, agreeing with the theme of cases nationally finding it "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."

[160] AOB at 11, 12; VIII RA 1429 (falsely claiming that "Without the benefit of counsel, Erich was forced to sign the Decree.")

[161] I RA 169; II RA 235, 245, 248, 250.

[162] AOB at 32.

property, with only benefits received in *excess* of the retirement payable based on the same service properly designated as separate property.[163]

In fact, it is the public policy of Nevada that parties' agreements are to be given full legal effect,[164] and that "An interpretation which results in a fair and reasonable contract is preferable to one that results in a harsh and unreasonable contract."[165] This record, read *without* selective deletions, contains at least four written promises by Erich, both when *pro se* and when represented by multiple attorneys, to fully indemnify Raina from any loss of benefits if he waived retirement benefits in favor of disability benefits.

Every U.S. Supreme Court opinion finding any level of preemption has warned of the harm to both individuals and society of depriving spouses of their share of the community property, and in *Howell* the Court urged counsel and courts to take steps to anticipate the possibility of such a waiver and build in protections for a spouse like Raina.

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[163] *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989).

[164] *See*, *e.g.*, *Grisham*, *supra*, *May v. Anderson*, *supra*.

[165] *Shelton*, *supra*, 119 Nev. at 497, 78 P.3d at 510.

These parties did so – at least four separate times, and if there is a public policy to be served here, it is honesty and the avoidance of wrongful enrichment. Jingoism and flag-waving appeals for unequal justice, wrongful deprivation, and unjust enrichment have no place in this, or any other, appeal.

Justice Stiglich's article, noted above, warns counsel not to "quote the record in misleading ways,"[166] and this Court has previously warned counsel that doing so is "not proficient advocacy," but fraud on the Court and a violation of ethical rules warranting professional discipline.[167] Erich's brief is problematic.

III. HERE, AN ALIMONY FORM OF COMPENSATION IS PROPER

As detailed above, alimony was only unavailable to the district court in *Shelton* because it had been explicitly waived upon divorce, leaving the parties solely to the contract theory. In this case, however, the agreement for only limited-term alimony was part of an expressly-integrated divorce decree requiring Erich to make

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[166] *Appealing Appeals*, *supra*, at 9.

[167] *See Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 808 P.2d 512 (1991) (omitting pertinent part of deposition violated SCR 172(1)(a)&(d) and merited referral to Bar for discipline).

reimbursement payments to Raina,[168] and his violation of that condition would permit the trial court to make further awards of alimony accordingly, as the United States Supreme Court explicitly recommended in the *Howell* decision itself.

Additionally, the long-final and unappealed OID in this case explicitly reserves jurisdiction to the family court to make an award of alimony as a remedy in the event that payments were not made, and that order can be entered on remand.[169] An explicit reservation of jurisdiction has no time limit or expiration; there are at least 32 Nevada opinions involving reservations of jurisdiction, going back to at least the 1940s, and they all appear to address such reservations as indefinite in duration.[170]

Nevada law has long held that an award of compensatory permanent alimony to make up for military retirement that cannot be paid directly is perfectly acceptable

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[168] Even if the orders did not include an express alimony reservation, the integrated agreement would have allowed Raina to make an alimony claim once Erich reneged on his agreement to make reimbursement payments. *See*, *e.g.*, *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (explaining effect of integrated agreements), but the express reservation of jurisdiction for further alimony means this issue need not be reached here.

[169] As detailed above, the family court only did not do so as part of its decision because of the lack of a *Notice of Entry* of the OID, which was cured. Erich's claim (AOB at 30) that alimony was "denied" is a mischaracterization of the record.

[170] *See*, *e.g.*, *Winn v. Winn*, 86 Nev. 18, 467 P.2d 601 (1970); *Smith v. Smith*, 100 Nev. 610, 691 P.2d 428 (1984).

and such alimony awards are unaffected by the remarriage of the recipient.[171] Both of those rulings are the same, post-*Howell*, in California[172] and elsewhere.[173]

Many appellate courts have held that *Howell* does not affect the state courts' consideration of disability benefits for the purpose of determining or re-determining

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[171] See *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994); where the Supreme Court held that NRS 125.150(5) requiring termination of alimony payments in the event of the death of either party or remarriage of the payee did not apply to awards of "permanent alimony" found to be property settlement payments in exchange for wife's interest in husband's military pension, which federal law prohibited from being directly paid as property.

[172] *See*, *e.g.*, *Marriage of Cassinelli*, 20 Cal. App. 5th 1267 (2018), 229 Cal. Rptr. 3d 801 (Ct. App. 2018) (husband who waived retirement benefit to collect combat-related special compensation ordered to pay wife amount she would have received in retirement pay under terms of marital settlement agreement).

[173] *See*, *e.g.*, *Jennings v. Jennings*, 2017 Ohio 8974 [2017 Ohio App. Lexis 5406] (2017) (post-*Howell*, a trial court can take the military spouse's disability benefits into account in awarding support to the civilian spouse).

child or spousal support, or to make awards of other property.[174] California was the first to make this observation post-*Howell* in *In re Marriage of Cassinelli*, *supra*:

> [T]he United States Supreme Court's comments in *Howell* … support the conclusion that a court may include VA disability benefits as a source of income to be considered in awarding spousal support.

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[174] See *Phillips v. Phillips*, 347 Ga. App. 524, 820 S.E.2d 158, 2018 Ga. App. LEXIS 555, 2018 WL 4783392 (a family court determining the value of a family's assets may take account of the contingency that some military retirement pay might be waived, and thus take account of reductions in value when it calculates or recalculates the need for spousal support); *In re Marriage of Weiser*, 475 P.3d 237 (Wash. Ct. App. 2020) (stipulated agreement incorporated in decree requiring husband to indemnify wife if he selected waiver, and providing for alimony as form of compensation, was *res judicata* prohibiting trial court from revisiting the terms of the agreement); *Jensen v. Jensen* (*In re Jensen*), 2019 Iowa App. LEXIS 739, 939 N.W.2d 112, 2019 WL 3714817 (disability payments may be considered for other purposes in a dissolution, such as "the equitable granting of alimony or support"); *In re Babin*, 56 Kan. App. 2d 709, 437 P.3d 985, 2019 Kan. App. LEXIS 6, 2019 WL 406515 (it is permissible for the court to consider the financial impact of disability pay when dividing assets and ordering spousal support); *Braxton v. Braxton*, 2020 Pa. Dist. & Cnty. Dec. LEXIS 2066 (Penn. Super. Ct. 2020); *Hurt v. Jones-Hurt*, 233 Md. App. 610, 168 A.3d 992, 2017 Md. App. LEXIS 889 (the impact of *Howell* may in a particular case constitute a change in circumstances entitling a court to revisit an alimony award, which is "always subject to reconsideration and modification in the light of changed circumstances," citing to *Heinmuller v. Heinmuller*, 257 Md. 672, 676-77, 264 A.2d 847 (1970)); *Carpenter v. Carpenter*, 2020 Mich. App. LEXIS 780, 2020 WL 504778(several state courts continue to hold that veterans' disability benefits could be considered as income for child support purposes. *See, e.g., Lesh v Lesh*, 257 NC App 471; 809 SE2d 890 (2018); *Nieves v Iacono*, 162 A.D.3d 669; 77 N.Y.S.3d 493 (2018)"); *Alwan v. Alwan*, 70 Va. App. 599, 830 S.E.2d 45, 2019 Va. App. LEXIS 170, 2019 WL 3292334 (the United States Supreme Court stated that it "need not and . . . [will] not decide" how a state court can "take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value when it calculates or recalculates the need for spousal support").

Erich claims that spousal support is "unavailable" because Raina's short term of regular alimony was terminated when she entered into a domestic partnership.[175] The very face of the alimony statute notes that there can be multiple forms of alimony in a single case,[176] and there are actually at least seven different theoretical bases for alimony, which operate independently and in the alternative.[177]

In any event, these parties explicitly stipulated to a reservation of jurisdiction for a further award of alimony in the event of a retirement benefits waiver,[178] exactly as the United States Supreme Court said could and should be done as a precaution in cases like this one. On remand, an order for permanent alimony should be entered as the parties stipulated.

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[175] AOB at 30-31.

[176] *See* NRS 125.150, noting the availability and separate tests for rehabilitative alimony.

[177] *See*, *e.g.*, *Kogod v. Cioffi-Kogod*, 135 Nev. ___, 439 P.3d 397, 400 (Adv. Op. 9, 2019); Marshal Willick, *Kogod Contradictions, Practical Problems, and Required Statutory Fixes: Part 1*, 33 Nev. Fam. L. Rep., Fall 2019/Winter 2020, at 1.

[178] III RA 475.

IV. THE PENDENTE LITE FEE AWARD WAS WELL WITHIN THE FAMILY COURT'S DISCRETION

A district court has jurisdiction to award attorney fees *pendente lite* for the costs of an appeal under NRS 125.040 and *Griffith v. Gonzales-Alpizar*,[179] in which this Court directed district courts to review the financial situation of the parties and whether the party with lesser resources is forced by the other party to defend the Court's decision.

In analyzing the legislative history of NRS 125.040 and 80 years of precedent, this Court in *Griffith* focused on the phrase "suit for divorce," and concluded that appellate proceedings growing out of a divorce case are included under that definition. Specifically, that a divorce action remains "pending" after entry of a divorce decree for various purposes, including enforcement of prior orders.

Here, Raina sought to enforce the terms of the *Stipulated Decree* and Erich has nearly $17,000 of monthly income, about a third of which is tax free, while Raina lives on less than a third of that amount, leading to the family court's common-sense observations that there is a "very large disparity of incomes" between them and that an award of fees is reasonable because "at the end of the day [it is] going to affect her

[179] *See Griffith v. Gonzales-Alpizar*, 132 Nev. 392, 373 P. 3d 86 (2016).

greater financially," especially since "she has been affected by Covid more than Erich who is still making his full time income."[180]

Though there was no specific requirement to provide an analysis of the *Brunzell*[181] factors for a request for *pendente lite* fees, we provided one out of an abundance of caution within our *Motion*[182] which was reviewed by the court prior to the hearing on the matter.[183]

The family court's evaluation properly included the ability of the Appellant to pay the fees, the disparity in income between the parties, and the probabilities of prevailing. Given the issues involved in this appeal, the need for substantial briefing, and the likelihood of oral argument, the modest award of $5,000 was certainly within

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[180] X RA 1857; VII RA 1335, fn. 3. Unfortunately, we often see that a party in a far superior economic position to the other can abuse both the trial and appellate process as a financial bludgeon to do further injury to the poorer party. *See* Marshal Willick, Legal Note Vol. 28 *Attorney's Fees and Burden Shifting*, posted at https://www.willicklawgroup.com/vol-28-attorneys-fees-and-burden-shifting/.

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

[182] VIII RA 1448-1450.

[183] XI RA 2058-2059.

the discretion of the district court.[184] This Court has held that unless an abuse of discretion is determined, "an award of attorney fees in divorce proceedings will not be overturned on appeal."[185]

CONCLUSION

Even in the absence of express contractual indemnification clauses, *Howell* allows state courts to review and alter the property distribution or to award alimony as a result of the lost benefits. However, what a court might do in the absence of an express agreement is not relevant here because in ***this*** case the parties anticipated the issue and entered into a contract specifying exactly how to protect Raina's interest.

That final, unappealed, stipulation for express indemnification was stated in the parties' MSA, and in their stipulated *Decree*, and in their OID. The application of *res judicata* to enforce such agreements was upheld in both *Shelton* and *Mansell II*, and

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[184] As we informed the family court, we capped the fees charged to Raina at $20,000 given her economic position. XI RA 2075-2076. Our office has already tracked more than 200 hours spent on this appeal, with a billable value of some $80,000.

[185] *Miller v. Wilfong*, 121 Nev. 619, 622, 119 P.3d 727, 729 (2005).

no legal, equitable, or other principal has been suggested, in *Howell* or anywhere else, questioning the legitimacy of those precedents.

The decision upholding enforcement of the *Decree* should be affirmed, and this matter should be remanded for formal adoption of the stipulated alimony so as to make Raina whole as the parties long ago agreed.

Dated this 9th day of July, 2021.

Respectfully submitted,
WILLICK LAW GROUP

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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 2021, 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:

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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 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 9th day of July, 2021.

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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 9th day of July, 2021, documents entitled *Respondent's Answering Brief* were 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, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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