IN THE SUPREME COURT OF THE STATE OF NEVADA

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ERICH M. MARTIN Appellant, vs. RAINA L. MARTIN Respondent.	S.C. NO. 81810/82517 D.C. NO: D-15-509045-D

PETITION FOR REVIEW

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I. INTRODUCTION

The Nevada Court of Appeals ("COA") issued an *Order Affirming in Part, Reversing in Part, and Remanding* in this case on November 17, 2021. The COA misread the existing United States Supreme Court law on the subject, unnecessarily overruled a decision of this Court that has been controlling law since 2003, and has created a situation where the district courts can't reliably equally divide a marital estate if one of the parties is a military member. The case should be reviewed by the Supreme Court to correct those errors.

A. QUESTION PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in not affirming the District Court's *Order* that Erich and Raina's stipulated agreement (contract) to have Erich pay Raina any sums that she lost due to his election of disability benefits was valid and enforceable.

2. Whether the Court of Appeals erred in not enforcing the *Decree* as a matter of *res judicata* since Erich never appealed it.

B. REASONS THE REVIEW IS WARRANTED

The decision of the Court of Appeals conflicts with prior decisions of this Court[1] and the United States Supreme Court,[2] and involves fundamental issues of statewide public importance.[3]

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

[2] *Howell v. Howell*, 137 S. Ct. 1400, 581 US __, 197 L. Ed. 2d 781 (2017); *Mansell v. Mansell (Mansell II)*, 111 S. Ct. 237 (1990).

[3] NRAP 40B(a)(2), (3).

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II. FACTS

Erich and Raina were married in 2002 in North Carolina and have one minor child. They separated while stationed in Colorado and filled out a form confirming that Raina was to receive 50% of all military retirement benefits and be named beneficiary of the military Survivor's Benefit Plan ("SBP").[4]

Erich filed his *Complaint for Divorce* in Clark County, Nevada, in 2015; Raina filed an *Answer and Counterclaim*.[5] In preliminary motions, the family court found that the military separation agreement form was executed in Colorado and did not appear to be "final," so the court ordered separate mediations for child custody and for all financial issues.

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

[5] I RA 22-29.

Both parties and their counsel participated in mediation on June 1, 2015, to resolve the financial and property issues of their divorce.[6] 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.[7]

All terms of the Marital Settlement Agreement ("MSA") were reduced to writing and signed by the parties and their counsel.[8]

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[6] On appeal, Erich falsely claimed that it was "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 issues (I RA 169-177).

[7] I RA 171 (Paragraph 8).

[8] 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.

Erich's counsel appeared at the Case Management Conference and informed the court that "the parties reached an agreement resolving all issues and a *Decree of Divorce* is forthcoming."[9] 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). . . . ***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.***[10]

[9] I RA 148.

[10] II RA 246 [Emphasis added].

Alimony was expressly made modifiable, and the *Decree* terms were explicitly integrated – "each provision herein is made in consideration of all the terms in the Decree of Divorce as a whole."[11]

After further proceedings, both parties eventually signed the *Decree*, which was filed; no issue with the military retirement benefit terms was raised by any attorney or party.[12] *Notice of Entry* of the *Decree* was filed on November 10, 2015, by Erich's outgoing counsel.[13] No one filed a motion or appealed, and the *Decree* is long-since final and unappealable.

After further proceedings, an *Order Incident to Decree* ("OID") for the military retirement was drafted, signed and filed, providing:

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[11] II RA 248, 250.

[12] X RA 1770.

[13] II RA 258-280.

[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.[14]

. . . .

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 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.[15]

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[14] RA 473.

[15] III RA 474.

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.[16] The OID also is long since final and unappealable.

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, but when Erich applied for disability as planned a few months later, her direct payments stopped.

After further proceedings, the family court entered its *Order Regarding Enforcement of Military Retirement Benefits*[17] on August 11, 2020; *Notice of Entry* of that order and of the OID was filed the same day.[18]

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[16] III RA 475.

[17] VII RA 1315-1340.

[18] VIII RA 1341, 1367.

The *Order* noted 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, but found that permanent alimony could not be ordered until after Notice of Entry.[19] It noted the analogous facts in *Mansell*,[20] in which 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*.[21]

The family 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

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[19] VII RA 1315-1317. As noted, that NOE has since been filed.

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

[21] VII RA 1320-1321.

their stipulated OID, specifically agreeing that the form of reimbursement could be by way of alimony.[22]

Turning to *Howell*, the family court noted that the decision dealt with court-*imposed* indemnification, not an 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, finding the order here consistent with *Howell*, and that multiple states had ruled similarly. The court found this Court's opinion in *Shelton*[23] 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

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[22] VII RA 1322.

[23] *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).

contracts,[24] 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.[25]

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 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.[26]

After briefing, the Court of Appeals issued an *Order Affirming in Part, Reversing in Part, and Remanding* on November 17, 2021, without hearing oral

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[24] VII RA 1325-1329.

[25] VII RA 1333-1335.

[26] VII RA 1336-1338.

argument, affirming the *pendente lite* fee award, but finding that the contracted indemnification was not permitted under *Howell*, that this Court's holding in *Shelton* was overruled by *Howell*, that *res judicata* did not apply, and that alimony should be reviewed upon remand.

A more complete recitation of the facts is contained in the Respondent's Brief.

III. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH PRIOR DECISIONS OF THE NEVADA SUPREME COURT, AND THE UNITED STATES SUPREME COURT

A. The Relevant Cases

In *Mansell* in 1989, the United States Supreme Court declared military disability pay could not be divided as community property. On remand, the California divorce court required Mr. Mansell to continue making payments to Mrs.

Mansell anyway under the terms of their final, unappealed *Decree of Divorce* as a matter of *res judicata*.[27]

Mr. Mansell petitioned for certiorari challenging the order that he was required to continue making payments, but his petition was rejected because the issue of *res judicata* is a matter of state law "over which we [the federal courts] have no jurisdiction."[28]

In *Shelton*[29] in 2003 – long after *Mansell* was the controlling authority – this Court dealt with the issue of a contractual agreement for the division of military retired pay, when the parties' agreement:

> designated both Roland's military retirement pay and military disability pay as community property, although the agreement awarded all of the disability pay

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[27] *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).

[28] *Mansell*, 490 U.S. at 586 n.5.

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

to Roland. The parties, who negotiated the terms without the aid of counsel, agreed that Roland, individually, would be allotted "half of [his] military retirement pay in the amount of $500 and military disability pay in the amount of $174." Maryann would be allotted the other "half of HUSBAND'S military retirement pay in the amount of $577, until her demise." At the time of the divorce, Roland had an outstanding military pension of $1,000 per month, and a disability payment of $174 per month based upon a determination that he was ten percent disabled.

This Court found:

> Although states are precluded by federal law from treating disability benefits as community property, states are not precluded from applying state contract law, even when disability benefits are involved. The district court's order is reversed and this matter is remanded to the district court for further proceedings consistent with this opinion.

In 2017, *Howell* affirmed *Mansell*. Parties' agreements were not involved in *Howell*, which just added that whether the disability occurs before or after the divorce, a Court can't just ***order*** the division of a disability benefit. But the Court

also added that it is the responsibility of parties to "take account" of the contingency of a future disability waiver in their divorce decree to protect the interests of all concerned:

> We recognize, as we recognized in *Mansell*, the hardship that congressional pre-emption can sometimes work on divorcing spouses. See 490 U. S., at 594. But we note that 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. See *Rose v. Rose*, 481 U. S. 619, 630-634, and n. 6 (1987); 10 U.S.C. §1408(e)(6).

In other words, *Mansell* was the controlling law when this Court decided *Shelton*, and was simply affirmed, not changed, by the United States Supreme Court in *Howell*. There has been no change. The U.S. Supreme Court refused cert in both *Shelton* and *Mansell II* because enforcement of a final, unappealed divorce decree requiring payments notwithstanding a disability application is a matter of state-law-controlled *res judicata*, and the Court has said nothing at all restricting the ability of parties to "take account" of that possibility by contract.

B. How the Court of Appeals Erred

The point is that the United States Supreme Court has explicitly held that parties ***should*** do what the parties to this case ***did***: anticipate the possibility of the disability and take appropriate action by agreement.[30] It was incorrect for the COA to find that this Court's decision in *Shelton* was no longer good law.

As this Court held in *Shelton*, the distinction between parties agreeing to a contingency and a court simply ordering a result is critical. Mark E. Sullivan, Esq.,[31] in *The Death of Indemnification*,[32] put it this way:

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[30] *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, but could do so if they contracted to retain jurisdiction to do so.

[31] Col. Mark E. Sullivan (USA-Retirement.) is a national expert in military retirement benefits in Raleigh, N.C. Col. Sullivan is the author of *The Military Divorce Handbook* (American Bar Association, 2nd Ed. 2011).

[32] *See* https://www.nclamp.gov/publications/silent-partners/the-death-of-indemnification/. *See also* Victoria Arends, *Military Pension Division Cases Post-Howell: Missing the Mark, or Hitting the Target* 31 JOURNAL OF THE AMERICAN

The *Howell* case was decided based on an order by the trial court in the absence of a contractual reimbursement clause. It's one thing to argue about a judge's power to require, under principles of fairness and equity, a duty to indemnify. It's another matter entirely to require a litigant to perform what he has promised in a contract. Unless and until the Court makes a different ruling, the indemnification clause in a settlement or a separation agreement ought to provide some protection. It is always a good practice for the former spouse's attorney to include language for an indemnification clause in the property settlement, language which requires the retiree to pay back or reimburse the former spouse for any reduction in the share or amount of retired pay that is divided.

This indemnification phrasing can be done with a straightforward pay-back requirement, such as: "If there is any reduction in the plaintiff's share or amount of retired pay, the defendant will immediately reimburse and indemnify her for any loss which she suffers due to such reduction."

In some cases reimbursement requirements might involve a clause specifying alimony, spousal support or maintenance to make up the difference. Such a

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ACADEMY OF MATRIMONIAL LAWYERS, at 513 (AAML 2019); *State Court Treatment of Military and Veteran's Disability Benefits: A 2004 Update*, National Research Group, Inc., at https://www.divorcesource.com/research/dl/military/04may76.shtml.

clause could then be enforced through a garnishment from the retired pay center.

Since the parties to this case agreed to the indemnification language and even agreed to using alimony as a means of completing their agreement, *Howell* is inapposite.[33] An agreement to settle pending divorce litigation constitutes a contract and is governed by the general principles of contract law.[34] In the context of family law, parties are permitted to contract in any lawful manner.[35] "Parties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy."[36]

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[33] *See Cassinelli v. Cassinelli*, 20 Cal. App. 5th 1267, 229 Cal. Rptr. 3d 801 (Cal. Ct. App., Mar. 2, 2018); *Hurt v. Jones-Hurt*, 168 A.3d 992 (Md. Ct. Spec. App. 2017).

[34] *Grisham v. Grisham*, 128 Nev. 679, 289 P.3d 230, 234 (2012); *Anderson v. Sanchez*, 132 Nev. 357, 373 P.3d 860 (2016); *see also Holyoak v. Holyoak*, No: 67490, Order of Affirmance (Unpublished Disposition, May 19, 2016).

[35] *Holyoak*, *supra*, citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009).

[36] *Id*.

The COA misread *Howell* in stating that the case does not allow for "any" form of indemnification, when it *actually* only addressed court orders in the *absence* of agreed terms. As the family court noted, 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."[37]

The national case law issued after *Howell* does contain a few anomalous decisions in which courts interpreted *Howell* "broadly" so as to disallow "a remedy in any form if the purpose of that remedy is to replace in full lost military retired

[37] VII RA 1325.

pay,"[38] but those minority opinions have been roundly criticized by legal scholars as "unnecessarily overbroad."[39]

Other post-*Howell* cases have approved the award of compensatory alimony, or reallocation of assets, and have enforced contractual indemnification or payment orders because, as this Court held in *Shelton*, nothing in the USFSPA, or *Mansell*, ***or*** *Howell*, prevents a veteran from voluntarily contracting to pay a former spouse a sum of money that may originate from disability payments.[40]

If this Court grants review, it is likely that national Amicus counsel will request permission to file a brief to assist this Court in reviewing the national consensus on this issue, and understanding the thoughts of the leading national experts in the area.

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[38] VII RA 1324-1325.

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

[40] See *In re Marriage of Weiser*, 475 P.3d 237 (Wash. Ct. App. 2020); *Matter of Marriage of Kaufmanz*, 485 P.3d 991 (Wash. Ct. App. 2021); *Boutte v. Boutte*, 304 So. 3d 467 (La. Ct. App. 2020).

The COA's distinction of *Shelton* because it involved a joint petition is illogical. A joint petition is expressly merged into a resulting *Decree*[41]; here there was a separate express MOU, showing the parties' specific agreement to the contracted result. The COA's approval of *Day*[42] while disapproving *Shelton* which was decided some 40 years later was an error of law.

The COA's summary footnoted conclusion that *res judicata* "did not apply" in this case is error. As pointed out by the family court after surveying decisions from around the country, ***most*** courts have reached that a final, unappealed divorce decree should be given *res judicata* effect that *Howell* does not alter any more than *Mansell* did.[43] There is no reason for Nevada to ignore that consensus.

This Court should review and correct the errors of law by the COA.

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[41] NRS 125.182-184.

[42] *Day v. Day*, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964).

[43] VII RA 1325-1329.

IV. THE COURT OF APPEALS RELIED ON OUTDATED FACTS CONCERNING MILITARY RETIREMENT

At page 5, the COA incorrectly recited its belief about the "forms" of military retirement benefits, listing them as nondisability, disability, and reserve retirement.

This has not been true for over a decade. If a military member is rated by the VA as 50% or greater disabled, he is entitled to receive full retirement pay ***and*** Concurrent Retired Disability Pay (CRDP) from the VA. The CRDP is tax free while the retirement benefits are taxable. Reserve retirement is the same as regular retirement, with the only difference being when payments begin. Such fundamental errors of fact indicate that the COA is unaware of how the military retirement system works, and contributed to error in how to interpret decisions concerning it.[44]

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[44] The COA relied heavily on its recent decision in *Byrd v. Byrd*, 137 Nev. ___, ___P.3d ___ (Ct. App. Adv. Opn. 60, Sep. 30, 2021). However, that decision was distinguishable on several relevant points and has its own errors, which also can be addressed and corrected if this Court accepts this Petition for Review.

V. THIS CASE INVOLVES FUNDAMENTAL ISSUES OF STATEWIDE PUBLIC IMPORTANCE

Both Nevada statutory law[45] and this Court's holdings[46] have stressed the importance of making an actual equal division of community property upon divorce.

When, as here, the majority of community property is the benefits expected from military retirement, it is impossible to achieve an equal division if the member subsequently waives the entirety of his pension benefits for a disability award without a mechanism to "take account of the contingency that some military retirement pay might be waived, or . . . take account of reductions in value" as the *Howell* Court suggested be done, and was done here.

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[45] NRS 125.150(b).

[46] *See Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

Agreements and decrees which do so should be affirmed as a matter of public policy. As the United States Supreme Court has stressed, preemption should only be found when it is "positively required by direct enactment,"[47] and it is ***not*** required when steps that the Court has itself directed be taken have in fact been taken.

VI. CONCLUSION

Raina Martin requests that the decision made by the Court of Appeals be reviewed by the Nevada Supreme Court for correction of error.

Respectfully submitted,
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[47] *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), *quoting Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979).

CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the formatting, typeface, and type-style requirements of NRAP 32(a)(4)–(6) because it was prepared in Word Perfect 2021 with a proportionally spaced typeface in 14-point, double-spaced Times New Roman font.

2. I certify that this brief complies with the type-volume limitations of NRAP 40B(d) because it contains 3,944 words, excluding exempted tables, etc.

3. I certify that I have read this brief, that it is not frivolous or interposed for any improper purpose, and that it complies with all applicable rules of appellate procedure and that if it does not, I may be subject to sanctions.

DATED this 3rd day of December, 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 3rd day of December, 2021, the document entitled *Petition for Review* was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows, to the attorneys listed below at the address, email address, and/or facsimile number indicated below:

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