IN THE SUPREME COURT OF THE STATE OF NEVADA

Erich M. Martin, Appellant, vs. Raina L. Martin, Respondent.	Case No.: 81810 *consolidated with* 82517

Appeals from the Eighth Judicial District Court, The Honorable Rebecca L. Burton Presiding.

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

For centuries, the federal government has provided a variety of benefits to veterans who serve our great country. In times of (relative) peace, the benefits of serving in the military incentivize enlistment. In times of conflict, veterans' benefits are compensation for the many sacrifices that come with service. Military benefits thus promote national security because a vigorous, dedicated military force is essential to the common defense and protection of the United States.

In furtherance of these important interests, federal law explicitly prohibits state courts from dividing veterans' disability benefits in the course of divorce proceedings. Although many parties have attempted to circumvent the relevant federal authorities, the Supreme Court of the United States has held on three separate occasions that neither creativity nor semantics may be used to obstruct the accomplishment of Congress' objectives. So, regardless their form, any orders which are tantamount to a division of a veterans' disability benefits are pre-empted.

In this case, the District Court ordered Erich Martin ("Erich"), a permanently disabled veteran, to indemnify his ex-wife, Raina Martin ("Raina") for the loss of the retirement payments that he necessarily had to waive in order to receive disability benefits. Although the District Court's incorporated some creative

theories, the Nevada Court of Appeals recognized that division of veterans' benefits is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Mansell*, 490 U.S. at 587, 109 S. Ct. at 2028. In overturning the District Court's decision, the Court of Appeals also relied upon a correction application of the Supremacy Clause, Supreme Court's controlling decision in *Howell v. Howell*, 581 U.S. ____, 137 S. Ct. 1400 (2017), and its own precedential decision in *Byrd v. Bryd*, 137 Nev. Adv. Op. 67 (Sept. 30, 2021).

In her Petition for Review, Raina insists that the Court of Appeals made grave errors of law that necessitate this Court's attention. In reality, the Court of Appeals' decision involved a straight-forward application of previously-established law. Accordingly, and as explained in more detail below, this Court should deny the Petition for Review.

II. FACTUAL BACKGROUND

Erich served in the United States Army for twenty years. For most of his career, Erich worked in Special Forces, in an elite unit that completed sensitive and difficult missions across the globe. During his service, Erich received a number of medals, ribbons, and badges. Unfortunately, as a result of his difficult military

career, Erich also sustained a number of permanent physical, mental, and neurological disabilities. *See, e.g.*, 4 AA 630

In April 2002, Erich married Raina. Throughout most of their marriage, Raina was a homemaker and/or a student. After taking time off to raise the couple's minor son, Nathan, Raina completed schooling to become a dental hygienist.[1]

The couples' relationship deteriorated for a number of reasons and, in February 2015, Erich filed for divorce. Although the divorce and post-decree proceedings have dragged on for seven long years, both Raina and Erich enjoy successful careers and the support of their new families.

III. PROCEDURAL HISTORY

A. EARLY PROCEEDINGS (2015-2017)

The Court entered a Decree of Divorce on November 5, 2015. 2 AA 230. The Decree provided, in relevant part, that Raina would receive as her separate property the marital home, bank accounts held in her name, a Mercedes GLK vehicle, all personal property in her possession and control, and "one-half (1/2) of the marital interest in the [sic] Erich's military retirement." 2 AA 240. "Should Erich select to accept military disability payments," the Decree further provided

[1] Raina was able to complete her schooling in large part because of Erich's GI Bill benefits.

that "Erich shall reimburse Raina for any amount of that her share of the pension is reduced due to the disability status." *Id*. Finally, the Decree granted Raina $1,000 a month for spousal support for a total of twenty-four months beginning June 2015. 2 AA 243-44.

After learning that Raina had entered into a registered domestic partnership, the District Court discontinued spousal support and ordered Raina to reimburse Erich for payments that were made after the date of the partnership. *See* 2 AA 300-314; 2 AA 315-21.

B. PROCEEDINGS AFTER ERICH'S RETIREMENT

Erich retired from the Army on July 31, 2019. After his retirement, the Department of Veterans Affairs rated Erich disabled and found him eligible for disabled retirement benefits. The Combat Related Special Compensation ("CRSC") Division of the Army also determined that Erich is eligible for Combat Related Special Compensation because of his serious, combat-related injuries. As required under federal law,[2] Erich then waived retirement pay in order to receive disability benefits from the Department of Veterans Affairs and Combat Related Special Compensation.

[2] To prevent double-dipping, disabled military retirees may only receive disability benefits to the extent that they waive a corresponding amount of the military retirement pay. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1402-03; *Mansell*, 490 U.S. at 583–84, 109 S. Ct. at 2025-26.

As a result of Erich's waiver, the Department of Veterans Affairs determined that Raina was no longer entitled to one half of Erich's monthly payment. Raina then filed a "Motion to Enforce" in which she requested indemnification for the loss of the retirement pay or, alternatively, permanent spousal support. 3 AA 339-356. Citing federal law, especially the Supreme Court's decision in *Howell*, Erich vigorously opposed the motion. 3 AA 367-79 (Response); 380-444 (Exhibits).

On August 11, 2020, the District Court issued a post-decree Order Regarding Enforcement of Military Retirement Benefits. 4 AA 610-33. In the order, the District Court acknowledged that federal law prohibits state courts from ordering the division of a veteran's disability benefits. 4 AA 613-18, 630. However, after finding that Erich and Raina "voluntarily" agreed to the indemnification provisions that were incorporated into the decree, the District Court concluded that *Howell* had no impact on the parties' ability to "freely contract." 4 AA 624-25, 631. Though neither party raised or briefed the issue, the District Court also held in the alternative that res judicata (claim preclusion) supported its decision. 4 AA 657-59. And, while the District Court rejected Raina's request for permanent spousal support, it concluded that Erich must make a lifetime of monthly indemnification payments to Raina 4 AA 661.

C. THE COURT OF APPEALS' DECISION.

Erich timely appealed. Shortly after the parties completed their appellate briefs, the Court of Appeals published the opinion in *Byrd v. Bryd*, 137 Nev. Adv. Op. 67, ___ P.3d ___ (Sept. 30, 2021).

On November 17, 2021, the Nevada Court of Appeals issued a unanimous Order Affirming in Part, Reversing in Part, and Remanding in which it held that the District Court erred by ordering Erich to reimburse Raina for his waived military retirement pay. In so ruling, the Court of Appeals acknowledged the role of the Supremacy Clause and correctly noted that "[t]he Supreme Court [of the United States] has consistently held that states cannot order a veteran to indemnify or reimburse an ex-spouse for retirement pay waived to receive disability benefits." Citing *Byrd*, the Court of Appeals further explained that controlling Nevada law "recognize[s] that federal law is clear that an indemnification provision is invalid, due to the order's effect, regardless of how it is styled." As in *Byrd*, the Court of Appeals also reasoned that the Supreme Court of Nevada's 2003 decision in *Shelton* could not properly be used to circumvent the more recent, controlling law in *Howell*.

Finally, while the Court of Appeals noted that loss of military retirement pay may be a relevant consideration in addressing spousal support, the Court declined

to address whether the District Court erred in denying Raina's request for permanent spousal support because "the issue is not before us on appeal."[3]

Raina now seeks the Supreme Court of Nevada's review of the Court of Appeals' order.

IV. LEGAL STANDARD.

Pursuant to NRAP 40B, a party aggrieved by a decision of the Court of Appeals may file a petition for review with the Clerk of the Supreme Court of Nevada. Importantly, petitions for review are not a matter of right. NRAP 40B. Instead, the Supreme Court of Nevada has significant discretion in determining whether its review is warranted. And, in assessing petitions for review, the Supreme Court of Nevada generally considers the following non-exhaustive factors:

> (1) Whether the question presented is one of first impression of general statewide significance;
>
> (2) Whether the decision of the Court of Appeals conflicts with a prior decision of the Court of Appeals, the Supreme Court, or the United States Supreme Court; or

[3] Raina did not file a cross-appeal challenging the Order Regarding Enforcement of Military Retirement Benefits.

(3) Whether the case involves fundamental issues of statewide public importance."

NRAP 40B(a).

V. LEGAL ARGUMENT

Petitions for review are not lightly granted. Although the Supreme Court of Nevada certainly can review any decision that is of interest to a majority of the Justices, the Nevada Judiciary *2021 Annual Report* evidenced how rarely such petitions have been granted in the last several years. *See* https://nvcourts.gov/AOC/Templates/documents.aspx?folderID=33553 at page 29. These statistics make sense because Nevada's Appellate Courts do not have the time or resources to revisit previously-decided matters. Relatedly, if sour grapes were sufficient cause for Supreme Court review, the Court of Appeals' successes would be severely undermined.

Here, Erich agrees that the standards applicable to disabled veterans' benefits are an issue of statewide and national importance. However, this Court should deny Raina's Petition for Review because the Court of Appeals correctly applied the relevant legal standards. Public policy concerns also do not support this Court's review because a parade of terribles will not follow from the Court of Appeals' unpublished disposition.

A. FEDERAL LAW PROTECTS DISABLED VETERANS AND THEIR HARD-EARNED BENEFITS.

The Supremacy Clause of the United States Constitution provides that federal law is "the supreme Law of the Land." *See* Art. VI, cl. 2. Although states usually have significant authority over family issues, division of veterans' benefits is "one of those rare instances where Congress has directly and specifically legislated in the area of domestic relations." *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989).

Under federal law, a veteran's net disposable retirement pay may be divisible as community property. However, because disability payments are not retirement pay, states cannot divide disability payments as community property. Relatedly, where a veteran necessarily waives retirement pay as a condition of receiving disability payments, states may not treat the waived benefits as community property. *Id*. at 594-95, 109 S.Ct. at ___. In other words, state courts may not force a round-about division of disability benefits by focusing on the loss of retirement benefits that would have been otherwise available.

Indeed, in *Howell v. Howell*, 581 U.S. ____, 137 S. Ct. 1400 (2017), the Supreme Court of the United States confirmed that federal preemption applies regardless of the semantics in a given case. There, the state court treated a veteran's retirement pay as community property to be split with his ex-wife. *Id*.,

137 S. Ct. at 1402. After the divorce, the veteran waived retirement pay to receive disability benefits. *Id*. The state court then ordered the veteran to indemnify his former spouse for the loss caused by his waiver. *Id*. The Supreme Court held that requiring indemnification violated federal law and that the indemnification orders were preempted. In so ruling, the Court saw "nothing in this circumstance that ma[de] the reimbursement award to [ex-wife] any the less an award of the portion of the military retirement pay that [veteran] waived in order to obtain disability benefits." *Id.* at 1405. The Court further held that describing the family court order as "reimbursement" or "indemnification" rather than a divide of property was a meaningless matter of semantics and nothing more. *Id.* at 1406. After all, the purpose in ordering reimbursement was "to restore the amount previously awarded as community property, *i.e.*, to restore that portion of retirement pay lost due to the postdivorce waiver." *Id*. So, "[r]egardless of their form, such reimbursement and indemnification orders displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Accordingly, because state courts cannot vest or award that which "they lack the authority to give," the Supreme Court concluded, "[a]ll such orders are thus pre-empted." *Id*.

In this case, the District Court's order effectively required dollar-for-dollar indemnification based upon Erich's receipt of the disability benefits that he earned

through his personal sacrifices. In overturning the District Court's decision, the Court of Appeals correctly cited to *Howell* in holding that such indemnification provisions are invalid "due to the orders effect, regardless of how it is styled." To the extent Raina still insists that indemnification is permissible on alternative theories such as res judicata, her arguments are contrary to the basic principles of preemption.

B. NEVADA LAW MUST BE CONSISTENT WITH FEDERAL LAW.

In *Byrd*, the Court of Appeals overturned a district court order which required indemnification as an "offset" for the loss of the non-veteran spouse's interest in the veteran's retirement benefits. After examining *Howell*, the Court of Appeals determined that all such orders – whether guised as indemnity, an offset, or alimony – are 'exactly what federal law forbids."

In her Petition for Review, Raina argues that *Byrd* was wrongly decided. The problem, of course, is that the primary forum for challenging *Byrd* would have been a petition for review in that case. Once remittitur issued in Byrd, the decision then became a controlling precedent for future Court of Appeals decisions. Accordingly, in following the legal standard established in its previous published opinion, the Court of Appeals correctly followed routine appellate procedure.

It is true, of course, that an intermediate court cannot overrule the precedent previously established in a higher court. However, in arguing that *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), is the controlling authority in Nevada, Raina fails to recognize that blind adherence is not required where, as in this case, there is a superseding authority. Indeed, as the Court of Appeals explained in *Byrd*, the decision in *Shelton* predated *Howell* by more than a decade. Because *Howell* confirmed and clarified the scope of federal preemption – a topic within the Supreme Court's jurisdiction, adherence to the rule stated in Howell is simply more correct than adherence to an outdated state court authority.

C. NO PARADE OF TERRIBLES WILL FOLLOW FROM THE COURT OF APPEALS' DECISION.

It is well-established that the Court of Appeals' unpublished orders are not precedent in Nevada. Although unpublished orders certainly can be informative, it is also improper to cite to unpublished orders unless a rare exception such as issue preclusion applies. As the Court of Appeals decision in this case is unpublished, it is unreasonable to believe that any widespread fallout will result from the decision.

Moreover, while public policy concerns are secondary to legal principles, Raina's concerns regarding potential limitations on Nevada's district courts are misplaced because the loss of military retirement benefits absolutely is an appropriate consideration in addressing spousal support. At the same time, even if

Nevada courts believe it is unfair for disabled veterans to retain all of their disability benefits, states cannot properly second guess Congress' plainly stated national security objectives.

VI. CONCLUSION

The Court of Appeals made a correct, well-reasoned decision in this matter. Thus, for the foregoing reasons and the reasons stated in his opening brief, Erich respectfully submits that this Court should deny the Petition for Review.

Dated this 27th day of January, 2022.

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CERTIFICATE OF COMPLIANCE

1. I hereby certify that this answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this document has been

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2. I further certify that this answer complies with the page- or type-volume limitations of NRAP 40B because it is either:

☐ proportionally spaced, has a typeface of 14 points or more and contains 2855 words; or

☐ does not exceed _____ pages.

Dated this 27th day of January, 2022.

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I hereby certify that the foregoing **ANSWER TO PETITION FOR REVIEW** was filed electronically with the Supreme Court of Nevada on the 27th day of January, 2022. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

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