IN THE SUPREME COURT OF THE STATE OF NEVADA

ERICH M. MARTIN,

Appellant,

vs.

RAINA L. MARTIN,

Respondent.

Case No. 81810

AMERICAN ACADEMY OF MATRIMONIAL LAWYERS AMICUS CURIAE IN SUPPORT OF REVERSAL OF THE COURT OF APPEALS DECISION

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NRAP 26.1 DISCLOSURE

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 justices of this court may evaluate possible disqualification or recusal.

1. All parent corporations and publicly-held companies owning 10 percent or more of the party's stock: None.

2. Names of all law firms whose attorneys have appeared for the party or amicus in this case (including proceedings in the district court or before an administrative agency) or are expected to appear in this court:

Kainen Law Group, PLLC/American Academy of Matrimonal Lawyers- National

Willick Law Group

Marquis Aurbach

Brooks Hubley, LLP

Ford & Friedman

3. If litigant is using a pseudonym, the litigant's true name: None.

Dated this 2 day of May, 2022.

By: _____

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INTEREST OF THE *AMICUS CURIAE*

The interest of *Amicus Curiae* concerns the right of divorcing parties to voluntarily enter into enforceable settlement contracts providing for the final division of their property, including indemnification provisions involving military retirement benefits. The *Amicus Curiae* submits that the public policy of states in favor of property settlements is co-extensive with the duty of each spouse to fulfill those mutual contract obligations, negotiated and resolved as a final judgment.

The American Academy of Matrimonial Lawyers ("AAML") is a national organization of nearly 1,650 matrimonial attorneys practicing in the United States[1]. The AAML was founded in 1962 by highly-regarded family law attorneys "to encourage the study, improve the practice, elevate the standards and advance the cause of matrimonial law, to the end that the welfare of the family and society be

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[1] In its order entered February 14, 2022, this Court invited "the Family Law Section of the State Bar of Nevada and any other amicus to participate in this matter as amicus curiae by filing a brief addressing the issues raised in this appeal."

This brief does not necessarily reflect the views of any judge who is a member of the American Academy of Matrimonial Lawyers. No inference should be drawn that any judge who is a member of the Academy participated in the preparation of this brief or reviewed it before its submission. The American Academy of Matrimonial Lawyers does not represent a party in this matter, is receiving no compensation for acting as amicus, and has done so *pro bono publico*.

protected." The AAML has published numerous articles[2] in furtherance of the ordering by parties of the disposition of their property. The AAML has adopted resolutions addressing military retirement benefits and military-related divorce matters and has submitted detailed position papers to Congress regarding the Uniformed Services Former Spouses Protection Act and related issues, among other issues related to military divorces.

SUMMARY OF THE ARGUMENT

This matter between the plaintiff-husband, Erich M. Martin ("Erich") and the defendant-wife, Raina L. Martin ("Raina") involves an agreement that, *inter alia,* divided Erich's military retirement pay between them. The decree of divorce incorporating that agreement was signed by both parties, their attorneys, and the court, and provided that, should Erich elect to receive military disability benefits in lieu of retirement pay, such that Raina's share of his retirement pay is reduced, Erich shall reimburse her to the extent of that reduction. The order incident to divorce issued by the court also provided that the court would retain jurisdiction to enforce the award to Raina of military retirement benefits through the issuance of an award of alimony.

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[2] The *Journal of the American Academy of Matrimonial Lawyers* is a scholarly law review published semiannually by the AAML in conjunction with the University of Missouri Kansas City School of Law, which is available at https://aaml.org/page/AAMLJournal.

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The existence of an agreed decree providing that Raina would be made whole in the event that Erich's election to receive military disability benefits reduced her share of his regular retirement pay is key to the resolution of this matter. The contingency for which the parties had provided—*i.e.*, that Erich's election of disability benefits could eliminate retirement payments to Raina—came to pass, and litigation ensued. The matter now comes before this Court due to a decision of the Nevada Court of Appeals that holds, in relevant part, that the U.S. Supreme Court decision in *Howell v Howell*, ___ US ___, 137 S Ct 1400 (2017), precluded the indemnification that Raina seeks here.

This conclusion is erroneous. Based upon key differences between the facts of this matter and those existing in *Howell*—and upon the fact that the U.S. Supreme Court, in another decision addressing military retirement and disability pay, *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989), did not reach the issue of whether federal law prohibited parties from agreeing upon indemnification in the event that a party waived military retirement pay in favor of disability benefits—there is no basis upon which to conclude that U.S. Supreme Court precedent precludes enforcement of the indemnification provision here. Such indemnification was the express intention of the parties, and well-established precedent in Nevada makes it clear that the parties' intention as expressed in their agreement (or in agreed judgments) should prevail. The principles of *res judicata* and judicial estoppel compel requiring a party who has agreed to assume an

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obligation to abide by that obligation. Such a conclusion has been widely adopted and approved by courts in numerous states and reflects the public policy favoring agreements that effectuate a private ordering by parties, particularly in a domain such as domestic relations law, long the purview of state law.

I.

U.S. SUPREME COURT DECISIONS DO NOT PRECLUDE ENFORCEMENT OF EXPRESS INDEMNIFICATION PROVISIONS OF AGREED DECREES AND ORDERS

The determination of the Court of Appeals in this case must be viewed against the background of U.S. Supreme Court decisions in matters involving military retirement and disability pay and their interplay with matrimonial settlements and determinations. There are two Supreme Court decisions which involve the "VA waiver" (*i.e.*, the waiver of retired pay to receive tax-free disability compensation under 38 U.S.C. §§5304-5305). Neither proscribes an agreement by spouses to compensate for the loss of pension-share payments due to the VA waiver; and neither precludes the enforcement of express contractual indemnification terms in a marital settlement.

The first of these decisions was *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989)(*Mansell I*). In *Mansell I*, the parties settled their property division through an agreement. Husband agreed to pay Wife 50% of his total military retired pay, including any amount that he waived in order to receive

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disability benefits. Four years later, Husband asked the court to eliminate the provision requiring him to share his total retirement pay with Wife, as he had waived retirement benefits in favor of disability benefits. The trial court denied his motion and he appealed. Ultimately, the U.S. Supreme Court granted his appeal, its decision doing three things:

First, it reversed the rulings below. The Court held that military retired pay is divisible as community property, but military retired pay waived to receive VA disability compensation is beyond the reach of a state court to divide. *Id.* at 594-95.

Second, the Court never reached the issue of whether the parties were prohibited from agreeing to a property division which included indemnification for the VA waiver. *Id.* at 587, Note 6. Even though *Mansell I* involved a property settlement agreement that was incorporated into an agreed decree, Wife's appellate arguments were not based upon any contractual or equitable principles; they were confined to various theories construing federal law, all of which were rejected by the Supreme Court. Thus, *Mansell I* did not hold that the parties in a divorce settlement cannot agree to indemnification and reimbursement in the event of a VA waiver.

Finally, the Court made it clear that the doctrine of *res judicata* can bar the re-litigation of such issues. As it commented in footnote 5:

> In a supplemental brief, Mrs. Mansell argues that the doctrine of res judicata should have prevented this pre-*McCarty* property settlement

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> from being reopened. [citation omitted]. The California Court of Appeal, however, decided that it was appropriate, under California law, to reopen the settlement and reach the federal question.... Whether the doctrine of res judicata, as applied in California, should have barred the reopening of pre-*McCarty* settlements is a matter of state law over which we have no jurisdiction. The federal question is therefore properly before us.

Id. at 586. The Court acknowledged that if a state court found that *res judicata* barred re-litigation of these issues, that would be a final resolution of the issue.

On remand, the California Court of Appeals found that the trial court did not exceed its jurisdiction issuing the decree incorporating the divorce agreement dividing total military retirement payments, and thus Husband lacked a basis for later attacking the judgment. The Court found that Husband had consented to such division when he signed the property settlement, agreeing to share his total military retired pay, not just the "disposable retired pay" left after the VA waiver. It upheld the original order, finding that the decision denying modification was based on *res judicata*, not upon the division of the pension after trial. *Mansell v. Mansell*, 217 Cal. App. 3d 219, 265 Cal. Rptr. 227 (1989)(*Mansell II*). When Husband took the case back up to the U.S. Supreme Court, the certiorari petition was denied. 498 U.S. 806, 111 S. Ct. 237, 112 L. Ed. 2d 197 (1990).

The court in *Mansell II* also touched upon principles of judicial estoppel which would lead to the same result. The *Mansell II* court found that "[e]ven if Husband were correct in contending the division of his gross retired pay would otherwise have

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been an act in excess of jurisdiction, he consented to said act when he signed the stipulated property settlement agreement, and he is therefore barred from complaining." 217 Cal. App.3d at 230.

The *Mansell* case does *not* support the claim that parties may not agree on the division of total retired pay, or that they may not agree that the retiree will indemnify the former spouse for a reduction in pension-share payments due to the VA waiver. Enforcement of the parties' agreement is not barred or restricted by the *Mansell* decision.

The second U.S. Supreme Court case to address this issue is *Howell v Howell*, ___ US ___, 137 S Ct 1400 (2017), which holds that courts may not order reimbursement for former spouses whose share of military retired pay has been decreased due to the VA waiver. However, *Howell* did not involve an agreement for indemnification, as is the case here; nor did it involve a settlement clause which, as in *Mansell*, provided specifically for division of *all* retired pay.

The parties in *Howell* divorced in 1991 and the court, consistent with the parties' agreement, directed that Wife receive 50 percent of the military retired pay. Husband retired from the Air Force in 1992. Thirteen years later Husband obtained VA disability compensation, which reduced Wife's share of his retired pay. Wife petitioned the trial court for enforcement of the order for pension division, and to require Husband to reimburse her for her lost payments. The trial court granted her

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petition over Husband's objection, and its decision was affirmed by the Supreme Court of Arizona. Husband petitioned for review by the U.S. Supreme Court, which held that, under the Uniformed Services Former Spouses' Protection Act ("USFSPA"), a judge may not order reimbursement to a former spouse for money lost due to the VA waiver of retirement pay in favor of disability pay.

The Court of Appeals decision here holds that the U.S. Supreme Court has barred any indemnification at all, citing the language in *Howell* that "[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. All such orders are thus pre-empted." *Howell*, 581 U.S. at __, 137 S. Ct. at 1406. This argument ignores the context of the language in *Howell*, which involved a ruling following a contested hearing.

The *Howell* Court's opinion did not hold that the parties could not agree to indemnification (which was not at issue in that case). This is a matter of state law, based on terms of the parties' contract and on *res judicata*, as *Mansell* made clear. Neither *Mansell* nor *Howell* requires the conclusion that the parties are barred from anticipating problems which may occur in compliance with their agreement and, providing for a remedy if such a breach occurs, and no federal interest is harmed by allowing parties to do just that.

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The cases in the Supreme Court dealing with VA disability compensation and its effect on divisible retired pay--*Mansell*, *Howell*, and the initial pre-USFSPA decision, *McCarty v. McCarty*, 453 U.S. 210, 101 S.Ct. 2728 (1981) --all dealt with the right of a servicemember under federal law to stop a state court from dividing certain benefits under the rubric of equitable distribution or community property. They did not, however, address preemption of contract law, only preemption of property division.

Where a servicemember has already agreed to orders that divide a federal military pension benefit and provide remedies for an anticipated breach, the issue is whether that party can later violate that order with impunity and obtain an order that prohibits enforcement of that same agreed order. No U.S. Supreme Court decision supports that outcome. There is no federal interest promoted by allowing military spouses to abrogate those commitments and violate those orders. Thus, under Nevada law, the answer must be "no".

II.

NEVADA STATE LAW WILL ENFORCE THE PARTIES' INTENTIONS

It is within the context of such U.S. Supreme Court precedent that the state law of Nevada must be examined, to determine whether the Court of Appeals decision in this matter should stand. It is hereby submitted that it should not.

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Under Nevada law, "[p]arties are free to contract, and the courts will enforce their contracts if they are not unconscionable, illegal, or in violation of public policy." *Harrison v. Harrison,* 132 Nev. 564, 567, 376 P.3d 173, 175 (2016) (citing *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009)). Marital settlement agreements are contracts; however, a settlement agreement merged into a divorce decree loses its status as an independent agreement and can no longer be addressed pursuant to contract law. That fact notwithstanding, courts routinely apply contract interpretation principles to agreement-based decrees in order to ascertain the intent of the parties in clarifying judgment ambiguities (*i.e.,* where a judgment based upon the parties' agreement may be interpreted in a way that conflicts with the parties' intent). *Mizrachi v. Mizrachi,* 132 Nev. 666, 675, 385 P.3d 982, 988 (2016).

The *Mizrachi* decision relied upon two specific principles. First, where an agreement becomes a final judgment, "the intention of the parties, as expressed in the agreement should be made effective." *Aseltine v. Second Judicial Dist. Ct.,* 59 Nev. 269, 274, 62 P.2d 701 (1936). Second, even though the language of the judgment or decree itself may be unambiguous, ambiguity exists where there is a difference between the parties' intention and the potential interpretation of the judgment:

> The legal operation and effect of a judgment must be ascertained by a construction and interpretation of it. This presents a question of law for the court. Judgments must be construed as a whole, and so as to give effect to every

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> word and part. The entire judgment roll may be looked to for the purpose of interpretation.

Id. at 702 (internal citation omitted).

The *Mizrachi* decision involved a dispute between the parties as to what they intended. The court viewed that question as being so paramount to resolution of the dispute that it remanded the case for an evidentiary hearing to determine what the parties actually intended by the judgment language used.

The importance of effectuating the parties' intent also prevails where federal law is involved in a manner that thwarts the intended effect of an agreed judgment. The matter of *Siragusa v. Siragusa,* 108 Nev. 987, 843 P.2d 807 (1992), dealt with just such a scenario. In *Siragusa,* the agreed decree of divorce required Husband to pay Wife five (5) years of alimony and a property settlement of $1.25 million, payable over time. Around the time that Wife's alimony was to terminate, Husband filed for bankruptcy and discharged his property settlement obligation.

Wife thereafter moved to modify alimony. Husband argued that the modification of alimony would deprive him of the protection of bankruptcy and was preempted by the Supremacy Clause of the United States Constitution. *Siragusa,* 108 Nev. at 994. The district court found that the parties' circumstances had significantly changed since the original divorce decree, due at least in part to the discharge of Husband's property settlement obligation in bankruptcy, and granted modification. The Nevada Supreme Court affirmed the determination of the lower

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court, noting that other state courts "have resolved the tension between federal and state objectives in favor of state interest in resolving domestic relations disputes", determining that federal bankruptcy protection, "did not preempt state procedures for modifying alimony to compensate wife for the discharged obligations." *Siragusa, supra,* 108 Nev. at 996, quoting *In re Marriage of Myers*, 54 Wash.App.233, 773 P.2d 118, 120 (1989).

In Nevada, the ability to modify alimony terminates at "the expiration of the period for which the original alimony award was decreed to run." *Siragusa*, 108 Nev. at 992-993. This language would appear to limit modification of alimony to those situations in which (1) an award is made that is expressly labeled as "alimony," and (2) that expressly-labeled award of "alimony" remains on-going. However, this Court has determined that a support award may exist even when not labeled as such. For example, in *Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992), Husband agreed to pay, and indemnify Wife from, several debts in exchange for a lower child support obligation. He then discharged the debts in bankruptcy, leaving Wife solely liable for them. The district court ordered Husband to reimburse Wife for all payments she had to make on the debts. The Supreme Court upheld the district court's order, stating that "[w]hen James breached his agreement to indemnify Judy, he unilaterally altered the amount of child support she received and left her inadequately supported as a result." *Martin,* 108 Nev. at 387.

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In both *Martin* and *Siragusa*, the Nevada Supreme Court concluded that federal law did not preempt a state court from issuing an order to enforce an agreed judgment, the purpose of which is consistent with the intent of the parties. The *Martin* court held, for example, that:

> [t]he critical issue in determining whether a debt is non-dischargeable in bankruptcy is the function the award was intended to serve. If the intent of the obligation is to award spousal or child support, then it is non-dischargeable. This intent should be clear from the provisions within the divorce decree or order for support. In *Holt,*[3] the Utah court determined that a "hold harmless" provision qualifies as maintenance or support "if without the debt assumption, the spouse would be inadequately supported."

Martin, 108 Nev. at 386-387 (internal citations omitted). Thus, it is clear under Nevada law that, where a judgment ambiguity exists, a Court may fashion a remedy that comports with the parties' intent to ensure that the payee spouse has sufficient support when obligations of the payor spouse have been discharged in bankruptcy. These same principles (in the context of military retirement and disability pay) apply in this case.

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[3] *Holt v. Holt,* 672 P.2d 738 (Utah 1983).

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A. The Court of Appeals' Misreading of *Howell* Creates a Judgment Ambiguity that Must Be Resolved so as to Implement the Intent of the Parties

When Raina stopped receiving her agreed-upon share of Erich's retirement pay, due to Erich's waiver of his retirement pay in order to receive disability benefits, she moved the district court to enforce the decree and order incident to divorce, seeking compensation for the lost retirement pay and seeking to enforce the indemnification provisions subsumed therein. The district court granted such relief, finding that Erich had voluntarily agreed to such terms and that *Howell* did not obviate parties' ability to freely contract.

The Court of Appeals, however, incorrectly concluded that *Howell* renders the district court's enforcement order invalid as pre-empted by the USFSPA. This conclusion reflects a misreading of *Howell*. As noted in Point I, above, the *Howell* court did not reach the question of whether the USFSPA pre-empts a state court's authority to enter or enforce an agreed order requiring indemnification and reimbursement (because that case did not involve such an order).

The matter before this Court, however, *does* involve an agreed-upon decree providing for indemnification, and *Howell* therefore does not preclude the result reached by the district court. The Court of Appeals decision misconstruing *Howell* has therefore created judgment ambiguity in this case, a conflict between the interpretation of the *agreed* judgment (*i.e.*, that its terms are disallowed by the

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holding in *Howell*) and the intent of the parties (*i.e.*, that Raina be made whole in the event of Erich's election to receive disability benefits). Nevada law requires that a state court effectuate remedies that implement that intent, an outcome that is not precluded by existing federal law or U.S. Supreme Court precedent.

B. Recalculation of Alimony Is Another Remedy Through Which the Intent of the Parties Can Be Implemented

Even if the Court of Appeals was correct in its reading of *Howell*, this does not mean that Raina is without a remedy. An indemnification provision within the decree that is based upon a misunderstanding of the law (or on the fact that a change in the law invalidated the provision) would constitute a "mutual mistake." *See Anderson v. Sanchez*, 132 Nev. 357, 360, 373 P.3d 860, 863 (2016). As the court indicated in *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), such a "mutual mistake" would allow for reconsideration of the Decree pursuant to NRCP 60.

The agreed decree in this matter expressly made alimony modifiable. Near the end of its opinion, the *Howell* court gave a clear signal that a "calculation or recalculation of alimony" would be a valid means to protect non-military spouses from the harshness of the federal law that pre-empts state courts from issuing orders providing for indemnification or reimbursement in the event of a VA waiver. Consequently, such an outcome would have the implicit "blessing" of the U.S.

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Supreme Court. *See also Rose v. Rose*, 481 U.S. 619, 107 S.Ct. 2029 (1987) (holding that a statutory provision barring assignment of veterans' disability benefits did not preclude use of those benefits for child support).

The reimbursement language in this case operates much the same way as the assignment of debts in *Martin*. Without the total retirement benefit, the parties recognized that Raina would be "inadequately supported," as they accounted for that possibility in their agreement. Such a conclusion is supported by the finding of the Court of Appeals, in upholding the award of *pendente lite* counsel fees that Erich earns three times as much as Raina. (*See slip op* at 8). As *Martin, Siragusa*, and even *Howell,* suggest, a modification of alimony would be an appropriate alternative remedy in this matter.

III

OTHER STATES UPHOLD AGREEMENTS FOR REIMBURSEMENT OR INDEMNIFICATION MADE IN ANTICIPATION OF THE RETIREMENT PAY WAIVER EXERCISED HERE

Indemnity clauses and the doctrine of *res judicata* are routinely used by the states to uphold parties' agreements to divide military retirement pay even when the military member has reduced the retirement pay in favor of disability.[4] Brett R.

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[4] *E.g., In re Kaufman,* 485 P.3d 991 (Wash. App. 2021) (under the doctrine of *res judicata*, military member could not request that the trial court revisit the property settlement agreement); *Edwards v. Edwards*, 132 N.E.3d 391, 397 (Ind. App. 2019)

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Turner, the author of the three-volume series, *Equitable Distribution of Property* (the nationwide gold standard when it comes to issues of property division), has written about dividing military retirement benefits within the scope of the USFSPA under pure contract law.[5] Turner found that the majority of states agree that contractual provisions of property division are enforceable even if the asset divided constitutes separate property. Consequently, enforcement of an agreement dividing military benefits is outside the scope of USFSPA and does not violate the holdings in *Mansell* and *McCarty* because it does not treat the benefits as marital or community property but, rather, enforces an agreement of the parties. *Id.*

Turner contends that the argument for preemption of contract law is weaker than the argument for preemption of community property and equitable distribution law because the military member has, by definition, already agreed to the division of the benefits:

(holding that "the res judicata consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case"); *Hoskins v. Skojec*, 265 A.D.2d 706, 707 (N.Y. App. Div. 1999) ("parties are free to contractually determine the division of [military disability] benefits and a court may order a party to pay such moneys to give effect to such an agreement."); *In re Williams*, 2022 Wash. App. LEXIS 601, ¶ 15 (March 22, 2022) (the decision was a valid, unappealed final judgment on the merits, therefore, *res judicata* prevents collateral attack).

[5] Brett R. Turner, *Equitable Distribution of Property*, § 6:11, n.1 (4th ed. West 2021-2022)(hereafter, Turner __").

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> It is one thing to hold that military recruitment and retention would suffer if state courts could divide the service benefits of service members against their wishes, but it is another step entirely to hold that military recruitment and retention requires that service members be permitted to breach contracts with their former spouses. There are not many areas, if indeed any at all, in which members of the military are given free license to break private contracts. *Id.*

Recently, the Alaska Supreme Court addressed the issue of the enforceability of indemnification clauses contained in settlement agreements. The matter of *Jones v. Jones*, 505 P.3d 224 (Alaska 2022), involved a property settlement agreement requiring Husband to pay Wife $1,200 per month from the non-disability portion of the Husband's military retirement (defined in the agreement as "all amounts of retired pay HUSBAND 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. . ."). *Jones,* 505 P.3d at 227. The agreement also contained a provision requiring Husband to indemnify Wife and pay her directly "an amount sufficient to neutralize [ ] the effects of the action taken by Husband" so that Wife "will not suffer a reduction in her share of the retired pay as a result of any post-divorce actions." *Id.*

Nearly a year after the divorce, Wife filed a motion to enforce the property settlement agreement and related orders, as she was no longer receiving the monthly payments from Husband's retirement as outlined in the decree because of the Husband's VA waiver. The court issued a "partial ruling" recognizing that federal

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law prevented it from enforcing Wife's right to receive these monthly payments because the money would come from Husband's disability payments. However, the court indicated that if Wife had entered the settlement agreement on the assumption that she would receive $1,200 per month, she "may be entitled to a reevaluation and a re-jiggering, if you will, of the overall settlement that [she] entered into" and would treat Wife's motion "as a request for Rule 60(b)[6] relief, and a reconfiguration of the original property settlement." *Id.* Unable to reach an agreement on this issue with Husband, Wife moved to set aside the property division. *Id.*

The superior court ruled that it was unnecessary to set aside the agreement under Alaska Civil Rule 60(b) because it could be enforced. The court held that

> [t]he terms of the parties' agreement contemplate[] the eventuality that has transpired (i.e., the elimination of [Husband]'s non-disability retirement) and requires him to indemnify [Wife]. Therefore, the issue is not one of 60(b) relief but rather of enforcement. The undisputed facts establish [Wife]'s right to indemnity in an amount of $1,200 per month from [Husband] *Id.* at 228.

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[6] The court invoked the decision in *Guerrero v. Guerrero*, 362 P.3d 432 (Alaska 2015), where the court used Rule 60(b) to grant Wife relief from a judgment where all of Husband's retirement pay was converted to disability pay. The court reasoned that because the retirement pay division was a fundamental underlying assumption of the dissolution, and since the assumption had been destroyed, the court was authorized to correct or amend the judgment pursuant to Rule 60(b). *Id.* at 436.

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Husband's motion for reconsideration was denied, and he appealed. On appeal, as relevant here, Husband argued that by enforcing the indemnity provision, the superior court violated federal law by requiring him to pay the exact same amount in the settlement agreement even though his only source of income was disability payments *Id.* at 229.

The Court acknowledged the decision in *Howell*,[7] but determined that *Howell* "does not hold that a state court cannot enforce a property division by ordering a service member who unilaterally stops making payments the service member was legally obligated to make to resume those payments and pay arrearages" *Jones*, *supra*, at 230, quoting *Gross v. Wilson,* 424 P.3d 390, 401 (Alaska 2018).

The Alaska Supreme Court found that the superior court did not divide Husband's disability pay, but simply required him to keep his promise to indemnify Wife in the event that he took some action which led to her receiving less than she had bargained for (*Id.*), finding that "[t]he total conversion of [Husband]'s retirement benefits to disability benefits is precisely the type of situation the provision was designed to protect against." *Id.* at 229. The Court ruled that neither federal nor Alaska law prevented the superior court from enforcing the contract term, and that

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[7] 137 S.Ct. 1400, 197 L.Ed.2nd 781 (2017).

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enforcing the indemnity provision was necessary to correct "'a clear error constituting a manifest injustice.'" *Id.* at 231. Internal citations omitted.

Another method of addressing this issue—this time, in the absence of an agreement—was used by a Washington court in *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999). At the conclusion of trial in that case, the Court awarded Wife 50% of Husband's gross military retirement benefits. *Id.* at 1248. The Department of Veteran Affairs later reassessed Husband and increased his disability rating, resulting in Wife's monthly payments of $813.50 being decreased to $136 per month. *Id.* at 1251. Wife filed an application requesting that the court either (1) vacate the decree of dissolution due to the extraordinary circumstances; (2) modify the decree and direct maintenance payments to her equal to one-half of Husband's disability payments for as long as he receives them; or (3) clarify the decree to require Husband to pay her no less than $813 per month. *Id.*

At the conclusion of the hearing, the trial court vacated the decree insofar as the division of Husband's retirement and awarded Wife non-modifiable compensatory spousal maintenance in the amount of $876 per month which included the survivor benefit monthly premium that was originally ordered to come out of Husband's retirement pay. Husband appealed, and the court of appeals reversed and remanded the case for reinstatement of the original decree, finding that Wife had not demonstrated extraordinary circumstances since she only presented evidence of one asset awarded to her that had declined in value.

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Wife sought review by the Supreme Court of Washington, which found that the trial court had issued an order equitably distributing community property and, when the Department of Veteran Affairs authorized the change in Husband's status, it had a significant effect on Wife's monthly payments. *Jennings*, 980 P.2d at 1253. The Court found that there were "extraordinary circumstances in this case which justified remedial action by the trial court to overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree." *Id.* at 1254. Since neither the parties nor the court contemplated the drastic change in the status and amount Husband was receiving, it was reasonable for the court to expect that payments to Wife would continue for the remainder of Husband's life. *Id.* at 1255. Therefore, the trial court was authorized to devise a formula which would equitably divide the community property without requiring the monthly payment to Wife to be paid directly from Husband's retirement. *Id.* at 1256.

The present matter can be analogized to *Jones* and *Jennings*. This is a case in which Husband agreed to share his retirement pay with Wife, and to make her whole should his actions defeat that division—which they did. Though *Jones* and *Jennings* utilized different methods of arriving at their result, the effect was the same. Should this Court hold that Raina is not entitled to the bargained-for agreement, as a result of Erich unilaterally modifying that agreement by accepting military disability in lieu of retirement benefits, it would be a manifest injustice.

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IV.

NEVADA LAW ESTABLISHES A COMPELLING PUBLIC POLICY IN FAVOR OF THE FAMILY COURT'S AUTHORITY TO ENFORCE MARITAL SETTLEMENT AGREEMENTS AND DIVORCE JUDGMENTS ENTERED BY THE COURT

A triangulation of the centuries-old abstention doctrine rooted in federalism and the authority of the states concerning family law,[8] the United States Supreme Court decisions discussed above, such as *Howell* and *Mansell*, establishes the fundamental proposition of law and policy: Nevada state courts retain exclusive jurisdiction in a divorce to enforce equitable and legal rights to property and support conferred by the Nevada Legislature.

These centuries-old doctrines, implicating constitutionally rooted notions of federalism, are not the discretionary grant of a federal government deigning to recognize state autonomy over its citizens in a divorce.[9] To the contrary, preemption

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[8] The law review literature in this area is vast but emphasizes that the domestic relations exception is well-settled. *See* Travis Grant, *The Domestic Relations Exception to Diversity Jurisdiction: Spousal Support Enforcement in the Federal Courts*, 14 J. CONTEMP. LEGAL ISSUES 15, 19 (2004) ("As both the Ankenbrandt majority and Justice Blackmun point out, the federal system lacks the elaborate legal infrastructure, the expertise, and the means of enforcement to intervene in matters of divorce, alimony, and child custody and support. Congress seems to have recognized as much in limiting its domestic-relations legislation to enforcement measures that would promote cooperation and uniformity among the states.").

[9] The case on appeal does not implicate constitutional issues related to marriage or divorce but is purely a matter of equitable distribution and support. *See* Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL

and abstention are intentionally designed policies, grounded in comity and core constitutional structures.

In this case, the parties, represented by counsel, negotiated and settled their divorce. A judge approved that settlement as an order by a court with lawful jurisdiction. The settlement agreement itself contained mutual promises grounded in economic disclosures under oath at that time, presumptively in good faith, and consistent with Nevada divorce law. *See, e.g., Bluestein v. Bluestein,* 131 Nev. 106, 345 P.3d 1044 (2015), confirming that family law does not wholly ignore contract law, and contractual language will generally be enforced in a divorce, custody, or support settlement if the agreement is not contrary to public policy; *Rivero, supra; Mizrachi, supra; Aseltine, supra.*[10] In that same vein, decades of state law preclude

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RTS. J. 381, 432-33 (2007) ("At the same time, the Court supported the general authority of states to act on other family controversies that came before their courts. By distinguishing between the jurisdictional requirements for a divorce decree and the requirements for litigating financial and custodial questions, the Court treated marital status as a matter of personhood, a question of individual right, an aspect of citizenship worthy of protection by the Court and weighty enough to prevail over important state interests in marriage. By treating financial and custody matters as distinct from matters of status, the Court supported state efforts to develop public policies to protect dependent spouses and children. In the process of this transition, the Supreme Court set family law on a new course.").

[10] Other state courts have commented on this point as well. *See e.g. Black v. Black,* 2004 ME 21, ¶ 13, 842 A.2d 1280 ("The strong public policy favoring the finality of property distributions and nonmodifiable waivers of spousal support is not furthered here by the denial of enforcement. David's election of disability pay in lieu of retirement pay usurped the allocation of property ordered in the judgment, and it

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a party from agreeing to one position and then changing that position later for unilateral gain that vitiates a court-approved agreement. *See Kaur v. Singh*, 477 P.3d 358, 363 (Nev. 2020) ("Judicial estoppel prevents a party from stating a position in one proceeding that is contrary to his or her position in a previous proceeding" setting forth the five-part test).[11]

In the related context of *res judicata*, the Michigan Supreme Court recently held in *Foster v. Foster*, No. 161892, at p. 10 (Mich. April 5, 2022), "[a]pplying these principles, the provision of the parties' consent judgment of divorce that divides defendant's military retirement and disability benefits is generally enforceable under the doctrine of *res judicata* even though it is preempted by federal law." These same policies are grounded in decades of Nevada case law regarding the enforceability of settlement agreements approved by the state court:

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promoted the exact instability that the policy favoring the finality of judgments seeks to avoid. Because an adjustment to the mechanism by which Lorraine receives her property award is warranted, the court may enforce the judgment by requiring David to pay directly to Lorraine the amounts she would have received but for his actions.").

[11] *See id.* at 363-64 ("Well-established caselaw sets forth a five-factor test for courts to consider when determining whether judicial estoppel applies: whether '(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.'") Internal citations omitted.

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> Generally, a judgment entered by the court on consent of the parties after settlement or by stipulation of the parties is as valid and binding a judgment between the parties as if the matter had been fully tried, and bars a later action on the same claim or cause of action as the initial suit. See Sheldon R. Shapiro, Annotation, Modern Views of State Courts as to Whether Consent Judgment is Entitled to Res Judicata or Collateral Estoppel Effect, 91 A.L.R.3d 1170, 1173, 1176 (1979) (citing dozens of state court decisions for the proposition that "a valid consent judgment is entitled to res judicata effect, so as to preclude relitigation of the same claim or cause of action as was covered by such judgment") (emphasis added); see also Fleming James, Jr., Consent Judgments as Collateral Estoppel, 108 U.Penn.L.Rev. 173, 173-74 & n. 3 (1959).

Willerton v. Bassham, by Welfare Div., State, Dept. of Human Resources, 889 P.2d 823, 826-27, 111 Nev. 10 (1995).

As a matter of policy and practice, *federal* law may preclude equitable division of a *federal* military disability pension. But nothing in federal law preempts the authority of a state court to enforce a final divorce judgment entered by agreement of a military spouse. As ancient law has held, any right granted under the law has a concomitant right to a remedy. The Nevada family courts have the authority to enforce their own state judgments as a matter of law and policy.

CONCLUSION

There is a significant benefit to the courts, and to parties, from enforcing settlement agreements. Such an outcome permits parties to resolve disputes upon their own terms, and preserves court resources that would otherwise be required to

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determine the parties' respective rights and obligations. This is particularly true in domestic relations matters, which involve the most personal of decisions.

Domestic relations matter reside within the purview of state law. Nonetheless, there are instances—such as in the matter before this Court—in which issues involving federal law arise, and in those instances the question of federal preemption arises, raising the specter of whether an action taken by a state court (or by parties under the jurisdiction of a state court) can stand in light of the federal interests involved.

One such issue is the waiver by a former spouse of military retirement pay in favor of military disability benefits. It is not uncommon for spouses to provide, in settlement agreements, for the reimbursement or indemnification of the non-military spouse who would lose out on his or her share of the military spouse's retirement pay due to such a waiver. The question in such cases is whether such provision can be enforced under existing federal law. Miliary and non-military spouses across the

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nation have a vested interest in the answer to that question, now before this Court. We urge this Court to respond in the affirmative, and to ensure that Raina Martin is made whole for her loss of retirement pay due to Erich's post-decree election.

DATED this 2 day of May, 2022.

Respectfully submitted,

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1. I hereby certify that this appellate brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this appellate brief has been prepared in a proportionally spaced typeface using Microsoft Word 365 in 14-point Times New Roman style;

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of May, 2022, I caused to be served the ***American Academy Of Matrimonial Lawyers Amicus Curiae In Support Of Reversal Of The Court Of Appeals Decision*** to all interested parties as follows:

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