IN THE SUPREME COURT OF THE STATE OF NEVADA

Erich M. Martin, Appellant, vs. Raina L. Martin, Respondent.	Case No. 81810 ***Consolidated with:*** Case No. 82517 Appeal from the Eighth Judicial District Court, the Honorable Rebecca L. Burton Presiding

APPELLANT'S OPENING BRIEF

Marquis Aurbach Coffing
Chad F. Clement, Esq.
Nevada Bar No. 12192
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
cclement@maclaw.com
kwilde@maclaw.com
Attorneys for Appellant, Erich M. Martin

MAC:16211-0014330956_1

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.

Appellant, Erich M. Martin ("Erich") is an individual.

Erich was previously represented in the District Court by Jason Naimi, Esq., of Standish Naimi Law Group; Randal Leonard, Esq., of the Law Office of Randal R. Leonard, Esq.; and John T. Kelleher, Esq., of Kelleher & Kelleher, LLC. He is currently represented in the District Court and this Court by Chad F. Clement, Esq. and Kathleen A. Wilde, Esq., of Marquis Aurbach Coffing.

Dated this 24th day of May, 2021.

MARQUIS AURBACH COFFING

By: Kathleen Wilde
Chad F. Clement, Esq.
Nevada Bar No. 12192
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellant, Erich M. Martin

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I. JURISDICTIONAL STATEMENT

In case number 81810, Erich challenges the August 11, 2020, post-decree Order Regarding Enforcement of Military Retirement Benefits in which the District Court addressed a change in facts and important changes of law. Erich timely filed his notice of appeal on September 9, 2020, and the matter is properly before the Court under NRAP 3A(b)(8) and *Burton v. Burton*, 99 Nev. 698, 700, 669 P.2d 703, 705 (1983).

Case number 82517 centers on an award of attorneys' fees pendente lite. Although Erich's counsel inadvertently listed a subsequent order in the otherwise timely notice of appeal,[1] this Court denied Raina Martin ("Raina")'s motion to dismiss because Erich's case appeal statement conveyed the subject of the appeal and Raina was not misled by the error. *See* Order Denying Motion to Dismiss, Granting Motions to Consolidate, and Granting Motions for Extension of Time dated April 23, 2021 (citing *Forman v. Eagle Thrifty Drugs & Markets, Inc.*, 89 Nev. 533, 536, 516 P.2d 1234, 1236 (1973)). This Court has jurisdiction to consider the appeal under NRAP 3A(b)(8).

[1] The notice of entry for the relevant order was served on January 28, 2021. Erich filed a notice of appeal on February 12, 2021, and an amended notice of appeal on March 5, 2021.

II. ROUTING STATEMENT

The Supreme Court of Nevada should retain these consolidated appeals because the lead case, 81810, centers on an issue of first impression that implicates preemption, the supremacy of federal law, and the jurisdiction of Nevada's family courts. *See* NRAP 17(a)(11).

The Supreme Court of Nevada should also retain this appeal because division of disabled veterans' benefits is an issue of statewide importance with significant public policy underpinnings. *See* NRAP 17(a)(12). As evidenced by Supreme Court of Nevada case number 81599, the Court's consideration is also warranted because Nevada district courts are divided as to the legal standards.

III. ISSUES ON APPEAL

1. Does federal law, including the Uniformed Services Former Spouse Protection Act (USFSPA), 10 U.S.C. 1408, and *Howell v. Howell*, 581 U.S. ___, 137 S. Ct. 1400 (2017), preempts state courts from ordering indemnification that is effectively a division of a veteran's disability benefits?

2. Did the District Court err by ignoring public policy that explicitly seeks to protect disabled veterans?

3. Did the support exception to *Howell* apply where Raina is in a registered domestic partnership, and the District Court discontinued spousal support in 2016?

4. Is indemnity warranted on contract grounds where Erich was forced to sign the Decree of Divorce and related QDRO despite his objections and inability to negotiate material terms?

5. Did the District Court err by granting indemnity on the alternative basis of preclusion given that neither party raised or briefed the issue?

6. Did the District Court abuse its discretion by awarding attorney fees pendente lite to Raina where both parties are financially well off, and the Court's order lacked any assessment of reasonableness or the *Brunzell* factors?

IV. STATEMENT OF THE CASE

The important purpose of veterans' disability benefits is to help disabled veterans live productive lives after service-related injuries. In the same way that personal injury judgments and social security disability are the separate property of the injured or disabled spouse, federal law prohibits state courts from dividing veterans' disability benefits in the course of divorce proceedings.

In *Howell v. Howell*, 581 U.S. ____, 137 S. Ct. 1400 (2017), the Supreme Court of the United States confirmed that attempts to circumvent federal preemption are improper. Although the Uniformed Services Former Spouse Protection Act and earlier Supreme Court precedents similarly conveyed that only a veteran's "disposable retired pay" is divisible, *Howell* rebuffed the use of indemnification and other semantics which obstruct "the accomplishment and execution of the full purposes and objectives of Congress." 581 U.S. at ___, 137 S. Ct. at 1402.

In this case, the Decree of Divorce granted to Raina "one-half (1/2) of the marital interest in the [sic] Erich's military retirement." After Erich retired, the

Department of Veterans Affairs rated Erich disabled and found him eligible for disabled retirement benefits. The CRSC Division of the Army also determined that Erich was eligible for Combat Related Special Compensation because of his serious, combat-related injuries. As required under federal law, Erich waived retirement pay in order to receive disability benefits.

Although disability benefits are not "disposable retired pay," the District Court ordered Erich to pay indemnification comparable to Raina's share of the waived retirement pay. In doing so, the District Court effectively awarded Raina a portion of the hard-earned disability benefits that federal law so vigorously protects. Then, when Erich initiated appellate proceedings, the District Court awarded Raina $5,000 for attorneys' fees pendente lite because "Erich should pay something."

Erich respectfully asks this Court to overturn both orders. Although the District Court's rulings are a disaster for Erich and an insult to his many sacrifices, the issues in this case are much greater than a single divorce. Accordingly, for the reasons detailed below, Erich hopes to correct the District Court's errors and vindicate veterans' interests in their hard-earned disability benefits.

V. RELEVANT FACTS AND PROCEDURAL HISTORY

A. THE PARTIES.

Erich served in the United States Army for twenty years. For most of his career, Erich worked in Special Forces, an elite subset of the Army which requires qualification. Erich completed missions in locations across the globe. Although many of the details regarding his missions are either classified or too difficult to discuss, Erich displayed valor and a multitude of proficiencies. Consistent with his many achievements, 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 and neurological disabilities. Erich also suffers with mental health challenges, as is all too common for veterans who survived horrific situations. *See*, *e.g.*, 4 AA 630 (listing some of Erich's undisputed disabilities).

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.[2]

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

The couples' relationship deteriorated for a number of ugly reasons. Although the divorce proceeding and post-decree proceeding have dragged on for over six years, both Raina and Erich have built new lives. Erich married his wife, Julie, and is a proud step-parent and step-grandparent. Raina is in a registered domestic partnership with Tony Bricker, and is a step-mother to his children. Despite a lot of drama related to Nathan[3] and years of court proceedings, both the Martin household and Martin / Bricker household enjoy financial stability and resources far greater than many people.

B. EARLY FAMILY COURT PROCEEDINGS.

On February 2, 2015, Erich filed a complaint for divorce. *See generally* 1 AA 1-6. A few weeks later, Raina filed an answer and counterclaim. 1 AA 7-14. In the early months of the divorce proceedings, the primary issue of contention was visitation and support for Nathan. *See generally* 1 AA 43-46 (Register of Action). Raina also sought temporary spousal support. *Id*. at 43 (entry dated February 25, 2015).

During a hearing in April 2015, the District Court noted that a separation agreement that the parties' prepared for themselves was not effective because it lacked a notary's stamp and date. 2 AA 160; *see also* 2 AA 119-34 (proposed

[3] Thankfully, the appeals before this Court do not involve any child support or custody issues.

agreement). The parties were then referred to the Family Mediation Center and Settlement Masters Program. 2 AA 161. It is unclear what, if anything, happened when the parties reported for mediation. However, one attorney appeared on June 2, 2015, to represent to the District Court that the parties had reached an agreement. 2 AA 164. The terms of the alleged agreement were not put on the record. 2 AA 166-69. From the short transcript, it appears that the Court also did not receive a written settlement agreement. *Id.*

On October 13, 2015, Erich's then-counsel filed a motion to withdraw based on Erich's refusal to sign a draft divorce decree. 2 AA 170-75. The motion implied that Erich and his counsel did not see eye-to-eye regarding settlement negotiations and a proposed decree. *Id*.

Two days later, Raina filed a motion to enforce settlement. 2 AA 176-82. After Erich failed to respond to the motion – an unsurprising omission given the tensions with legal counsel – Raina requested a summary disposition of the decree. 1 AA 46-47.

On October 28, 2015, the District Court held a hearing regarding pending matters. *See generally* 2 AA 215-27. During the hearing, Erich's counsel represented that the decree had not been signed because of issues that were unresolved after Settlement Masters. 2 AA 218. Counsel for both parties also discussed the issue of Erich's counsel attempting to withdraw and the "breakdown

of communications" that occurred. 2 AA 218-19. Erich then requested an opportunity to speak for himself. 2 AA 223. After expressing dissatisfaction with his counsel, Erich began to explain how the discussion at Settlement Masters "went completely the wrong way." *Id*. The Court and Raina's counsel cut Erich off. 2 AA 223-24. Although Raina's counsel acknowledged "it was our understanding he was not going to sign it [the agreement]," and Erich added "I never received anything," the Court moved on to granting counsel's motion to withdraw. 2 AA 223-25.

Rather than incurring more fees that he could not afford, Erich eventually signed off on the proposed decree. 2 AA 223, 247.

The Court entered the Decree of Divorce on November 5, 2015. 2 AA 230. Despite their withdrawal, *Erich's counsel* filed a notice of entry on November 10, 2015. 2 AA 228-29.

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. By contrast, Erich received an IRA account, a truck, and personal property that was in his possession and control. 2 AA 241

The decree also ordered "the parties shall use Marshall S. Willick, Esq. to prepare a qualified domestic relations order ("QDRO") to divide the pension." 2 AA 241. "Should Erich select to accept military disability payments," the Decree further provided 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.

Completion of the QDRO proved challenging. Throughout 2016, drama between the parties escalated to the point that civil conversations were rare. Unsurprisingly, drama spilled over into a flurry of court filings. *See generally* 1 AA 50-54 (Register of Action).

During return hearing in September 2016, the Court questioned why a QDRO had not been executed and why Erich had refused to sign the draft document. In response, Erich highlighted Raina's failure to be forthright regarding important issues, including her registered domestic partnership with Tony Bricker. Again, the District Court did not entertain Erich's concerns. Instead, the Court ordered: "It [the QDRO] needs to be completed. I want it postmarked in the mail no later than 5:00 p.m. Friday signed." *See also* 4 AA 641. Given the Court's directive, Erich complied and signed the proposed Order Incident to Decree of

Divorce. 4 AA 606 (showing notarization on September 23, 2016). The Court then entered the order on November 14, 2016.[4] 4 AA 608.

C. EVENTS 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 CRSC Division of the Army also determined that Erich was eligible for Combat Related Special Compensation because of his serious, combat-related injuries. As required under federal law, *see* Subsection VIII(A)(1), *infra*, Erich waived retirement pay in order to receive disability benefits from the Department of Veterans Affairs and Combat Related Special Compensation.

On May 1, 2020, Raina filed a Motion to Enforce in which she requested compensation for the loss of retirement pay. 3 AA 339-356. In the motion, Raina correctly recognized "*Howell* actually stands for the proposition that a Court can't order the division of a disability benefit, whether the disability occurs before or after the divorce. Doing so would be beyond the jurisdiction of the Court." 3 AA 346. However, based on the parties' alleged agreement, Raina argued that Erich

[4] Since the Order Incident to Decree of Divorce merely "clarified" the decree, 4 AA 599, it was not appealable under NRAP 3A(b)(8) and *Burton*, 99 Nev. at 700, 669 P.2d at 705.

was obligated to indemnify her for the loss. 3 AA 343-47. Raina then concluded the motion with a request for "[a]n order for ***permanent alimony*** in an amount equal to that which Raina should be receiving [$844.08[5]] plus any future cost of living increases should be entered by the Court." 3 AA 349 (emphasis added).

Erich vigorously opposed the motion. *See generally* 3 AA 367-79 (Response); 380-444 (Exhibits). Although Erich was self-represented, his response included an impressive discussion of federal preemption and the authorities which prohibit state courts from ordering any division of a veterans' disability benefits. 3 AA 368-72. In particular, Erich emphasized the *Howell* decision in which the Supreme Court ruled that courts may not use semantics or creative orders to "displace the federal rule and stand as an obstacle to the accomplishment and execution of the purposes and objectives of Congress." Erich also challenged Raina's contract-based arguments because he did not voluntarily assent to the terms of the alleged settlement or the QDRO. 3 AA 373.

After a hearing, 4 AA 530-583, the District Court issued an Order Regarding Enforcement of Military Retirement Benefits. *See generally* 4 AA 610-33. In the order, the Court acknowledged that federal law prohibits state courts from ordering

[5] The motion to enforce referenced previous payments in the amount of $844.08. It is unclear if this amount is correct under the Time Rule since the parties and Court were more focused on the legality of Raina's request.

the division of a veteran's disability benefits. 4 AA 613-18. The District Court also correctly noted that "*Howell* makes very clear that this court is without jurisdiction to order indemnification." 4 AA 630. However, after finding that Erich and Raina "voluntarily" agreed to the indemnification provisions in the decree, the District Court concluded that *Howell* had no impact on the parties' ability to "freely contract." 4 AA 624-25, 631. In so ruling, the District Court rejected Erich's arguments regarding the reasons he grudgingly and involuntarily signed the decree and QDRO. 4 AA 641. Though neither party raised or briefed the issue, the District Court held in the alternative that res judicata (claim preclusion) supported its decision. 4 AA 657-59.

In its conclusion, the District Court denied Raina's request for permanent alimony. 4 AA 661. However, the Court ordered Erich to personally pay Raina $845.43 plus applicable cost of living adjustments every month. 4 AA 661. The order includes no limit on duration. *Id*. The District Court also ordered Erich to pay $5,918.01 for arrears. *Id*.

After entry of the District Court's Order Regarding Enforcement of Military Retirement Benefits, Erich timely appealed. 4 AA 634-662.

D. ATTORNEYS' FEES PENDENTE LITE.

On September 30, 2020, Raina filed a Motion for Attorney's Fees and Costs Pendente Lite and Related Relief. 4 AA 675-85. In the motion, Raina argued for

$20,000 in attorney fees pursuant to NRS 125.040[6] for the fees that she would incur defending against Erich's then-forthcoming appeal. *Id*.

Erich filed a timely opposition in which he highlighted both parties' professional careers and Raina's ability to pay for legal counsel. 4 AA 686-700. Erich also argued that Raina's request for fees lacked adequate evidence to support the *Brunzell* / *Wright* factors. *Id*.

After a hearing, *see generally* 5 AA 755-779, the District Court entered a written order which consisted of quotes from the hearing transcript. 5 AA 780-92. In the order – as in the Court's verbal remarks – the Court recognized that both Raina and Erich are professionals "who make very nice incomes and [that] neither party is destitute by any means." 5 AA 787. The Court also acknowledged that "Raina's expenses are reduced by her domestic partner and his very large income," so, "[w]hen you balance out the household incomes, they are fairly equivalent." 5 AA 787-88. Yet, after correctly finding that both Erich and Raina are fortunate compared to most and correctly finding no disparity in income, the District Court then backtracked by finding that Erich should "contribute something toward Raina's attorney's fees because this is all, at the end of the day, going to effect

[6] This statute provides, in relevant part, "In any suit for divorce the court may . . . require either party to pay moneys necessary to assist the other party in accomplishing one or more of the following: . . . (c) To enable the other party to carry on or defend such suit."

[sic] her greater financially." 5 AA 788. Without any further explanation, the District Court then concluded, "The Court is not inclined to grant all of the attorney fees. The Court does not want anybody being destitute by this, but Erich should pay something so he will contribute $5,000 to her attorney's fees." *Id*.

Erich filed another notice of appeal. 5 AA 793-03; 804-46 (amended notice). After this Court denied Raina's motion to dismiss the appeal, both matters were consolidated. *See* order dated April 23, 2021.

VI. STANDARDS OF REVIEW

This matter centers on important issues of law that are reviewed de novo including federal preemption concerns, interpretation of case law, and resolution of a novel issue of statewide importance. *See, e.g., Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n*, 134 Nev. 270, 271, 417 P.3d 363, 366 (2018); *Double Diamond v. Second Jud. Dist. Ct*., 131 Nev. 557, 561, 354 P.3d 641, 644 (2015); *LVMPD v. Blackjack Bonding*, 131 Nev. 80, 85, 343 P.3d 608, 612 (2015).

An award of attorneys' fees in a divorce proceeding is reviewed for an abuse of discretion. *See, e.g., Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006); *Ellett v. Ellett*, 94 Nev. 34, 40, 573 P.2d 1179, 1182 (1978).

VII. SUMMARY OF THE ARGUMENT.

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 typically have significant authority over family law, 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). Given the importance of the Armed Forces to national security and the very freedoms that Americans enjoy, it is unsurprising that Congress chose to legislate in this area. When a veteran has endured permanent disabilities as a result of his or her service, Congress' desire to protect their hard-earned benefits is all the more legitimate.

In this case, Erich dedicated twenty years of his life to serving in the Army's Special Forces. Multiple tours of duty, dangerous missions, and physically intensive labor took a serious toll on Erich's body. After witnessing countless horrors, surviving near-death experiences, and losing too many brothers-in-arms, Erich's service also took a toll on Erich's mind. Although few would argue being a military spouse is easy, Raina made no such sacrifices while living comfortably in the United States. Raina also does not have to live with the challenges and expenses that come with permanent disabilities.

In the guise of indemnification, the District Court effectively awarded Raina a portion of Erich's hard-earned disability benefits. In doing so, the District Court failed to give due consideration for preemption and the many ways in which federal law protects disabled veterans. In addition to advancing bad public policy, the District Court's decision also incorrectly relied upon contract and preclusion principles that are not applicable in this matter.

In addition to its erroneous order regarding Erich's military benefits, the District Court also abused its discretion by awarding Raina $5,000 for attorneys' fee pendente lite. Although the Court correctly found that both parties are financially well off, it simply felt "Erich should pay something." So, without assessing the *Brunzell* factors or the rationale behind NRS 125.040, the District Court ordered Erich to contribute $5,000 to Raina's attorneys' fees.

Thus, for the reasons explained in more detail below, this Court should overturn the Order Regarding Enforcement of Military Retirement Benefits. Further, this Court should reverse or vacate the portion of the Order from the November 3, 2020, Hearing in which the District Court granted attorneys' fees pendente lite.

VIII. LEGAL ARGUMENT

A. FEDERAL LAW PROTECTS DISABLED VETERANS' BENEFITS.

1. Background Regarding Military Benefits.

Throughout the history of the United States, the federal government has provided a variety of benefits to veterans who serve our great country.[7] In times of (relative) peace, the widespread benefits of serving in the military incentivize enlistment. In times of conflict, veterans' benefits are compensation for the many sacrifices that come with service. And, overall, military benefits promote national security because a vigorous, dedicated military force is essential to the common defense and protection of the United States.

The rationale for veterans' benefits is widely understood and largely uncontroversial. Unfortunately, the difficulty of navigating the bureaucratic labyrinth needed to collect military benefits is also widely known. While a comprehensive treatise is unnecessary (and would exceed the word limit), some background on military retirement and disability benefits is useful to the issues in these appeals.

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[7] Such benefits date back to the Revolutionary War. Marjorie Dick Rombauer, *Marital Status and Eligibility for Federal Statutory Income Benefits: A Historical Survey*, 52 WASH. L. REV. 227, 228 (1977) ("One of the early resolutions of the first Congress in 1776 provided for monthly payments of up to half pay to officers, soldiers, and seaman disabled in the line of duty").

Under federal law, there are two basic forms of military retirement for non-reserve members of the military – (1) non-disability retirement and (2) disability retirement. *McCarty v. McCarty*, 453 U.S. 210, 213, 101 S. Ct. 2728, 2731(1981). Non-disability retirement pay is generally available to members of the armed forces who serve for a specific period of time, typically at least twenty years. *Howell*, 581 U.S. at ___, 137 S. Ct. at 1403 (citing 10 U.S.C. § 3911 et seq. (1982 ed. and Supp. V) (Army); § 6321 et seq. (1982 ed. and Supp. V) (Navy and Marine Corps); § 8911 et seq. (1982 ed. and Supp. V) (Air Force)). Non-disability retirement pay is based primarily on the number of years of service and the highest rank that a veteran achieved. *Mansell*, 490 U.S. at 583, 109 S. Ct. at 2025 ((citing §§ 3926 and 3991 (Army); §§ 6325–6327 (Navy and Marine Corps); § 8929 (Air Force)).

Veterans who become disabled as a result of military service can be found eligible for retirement benefits on the basis of a disability rating. Disability pay is then calculated according to the severity of a veteran's disability or combined disabilities. *Mansell* 490 U.S. at 583, 109 S. Ct. at 2026 (citing 38 U.S.C. § 310 (wartime disability); § 331 (peacetime disability); §§ 314 and 355 (calculation factors)).

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.

In addition to disability retirement, some veterans may qualify for Combat Related Special Compensation (CRSC) from the Department of the Defense. Although CRSC payments are not retirement pay, 10 U.S.C. § 1413(a), the federal government still prohibits double-dipping. So, if a disabled veteran elects to receive CRSC pay, such compensation is made in lieu of retirement payments up to the amount that would be waived to receive VA disability benefits.

So, to summarize, veterans qualify for longevity / retirement pay through their years of service. Disability retirement is available if the VA rates a veteran sufficiently disabled. In some cases, disabled veterans may receive CRSC in addition to or in lieu of disability retirement.

2. Federal Law Protects Disabled Veterans.

In 1981, the Supreme Court ruled on the first of several cases involving division of veterans' military benefits during divorce. *See generally McCarty*, 453 U.S. 210, 101 S. Ct. 2728. There, the Court concluded that state courts could not consider any of a veteran's non-disabled retirement pay to be form of community property divisible at divorce. *Id*. at 224, 101 S. Ct. at 2737. In so ruling, the Court noted the legislative history in which Congress referred to military retirement pay as "a personal entitlement." *Id*.

The following year, Congress responded to the *McCarty* decision by passing the Uniformed Services Former Spouses' Protection Act. *See* 10 U.S.C. § 1408. Although division of military benefits remained a matter of federal law, the Act carved out a limited grant of authority to states for certain benefits. *See, e.g*., *Mansell*, 490 U.S. at 588-89, 109 S. Ct. at 2028-29. Specifically, the Act provides that state courts may treat veterans' "disposable retired pay," as community property divisible upon divorce. 10 U.S.C. §1408(c)(1). In defining "disposable retired pay," the Act expressly excluded retirement pay that is waived, as required by law, in order to receive disability benefits. 10 U.S.C. §1408(a)(4)(B). By excluding disability pay from the definition of "disposable" pay, the Act is consistent with federal regulations which provide that disability benefits are generally non-assignable. Cf. 38 U.S.C. § 5301(a)(1).

Based on the plain language of the Uniformed Services Former Spouses' Protection Act, the Supreme Court later confirmed that the Act "does not grant state courts the power to treat as property divisible upon divorce military retirement pay that has been waived to receive veterans' disability benefits." *Mansell v. Mansell*, 490 U.S. 581, 581, 109 S. Ct. 2023, 2025 (1989).

After *Mansell*, cunning lawyers and courts still attempted to circumvent the prohibition on dividing a veterans' disability benefits during or after a divorce. In

Howell v. Howell, the Supreme Court confirmed that such efforts are improper. *See generally* 581 U.S. ___, 137 S. Ct. 1400.

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*.

3. ***Howell*** **Applies Retroactively.**

The Supreme Court decided *Howell* in 2017. Since *Howell* is a fairly recent decision, some courts and scholars questioned whether the decision applies retroactively. Although such discussions are intellectually interesting, there is little question that the rule of law clarified in *Howell* is entitled to full retroactive effect.

For one, retroactivity is not an issue when a decision merely clarifies an existing rule. *See, e.g., Gier v. District Court*, 106 Nev. 208, 213, 789 P.2d 1245, 1248 (1990). Since *Howell* built upon *Mansell* and the plain language of the Uniformed Services Former Spouses' Protection Act, *Howell* clarified law that was already in existence. *See Howell*, 581 U.S. at ___, 137 S. Ct. at 1405 ("This Court's decision in *Mansell* determines the outcome here."); *see also Foster v. Foster*, 949 N.W.2d 102, 112 n.12 (Mich. 2020) ("It is important to note that *Howell* is merely a clarification of *Mansell*.").

Yet, even if *Howell* announced a new rule, it is well-established that the Supreme Court's rulings in civil matters apply retroactively. *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 97, 113 S. Ct. 2510, 2517-18 (1993). And, because of the Supremacy Clause, federal retroactivity doctrine controls when the ruling in question centers on an interpretation of federal law. *Id* at 100, 113 S. Ct. at 2519.

Thus, state courts must apply the rule announced / clarified in *Howell* even if the case in question arose prior to 2017. *See, e.g.*, *Russ v. Russ*, ___, P.3d ___, 2021 WL 1220719 (N.M. Apr. 1, 2021).

4. Persuasive Authorities Recognize and Apply the Rule Stated in *Howell*

When deciding an issue of first impression, this Court regularly turns to other jurisdictions for guidance. *See, e.g.*, *Rubio v. State*, 124 Nev. 1032, 1041, 194 P.3d 1224, 1230 (2008); *Whitemaine v. Aniskovich*, 124 Nev. 302, 311, 183 P.3d 137, 143 (2008).

Before and after *Howell*, multiple state courts recognized that veterans' disability benefits are personal to the veteran and not divisible in divorce proceedings. *See, e.g.*, *Donald v. Donald*, 892 N.W.2d 100, 107 (Neb. 2017) ("[F]ederal law precludes a state court, in a dissolution proceeding, from exercising subject matter jurisdiction over VA disability benefits. In the same way, a state court cannot include the amount of military retirement pay that a veteran waives in order to receive such benefits as divisible marital property."); *Hagen v. Hagen*, 282 S.W.3d 899, 903 (Tex. 2009) (addressing established Circuit and state law which held that VA disability benefits are gratuity based upon service-connected disability rather than an earned property right); *Morgan v. Morgan*, 249 S.W.3d 226, 231–32 (Mo. Ct. App. 2008) ("Total retired pay amounts that do not fit into

the category of disposable retired pay cannot be divided in a dissolution judgment. This includes both disability benefits and amounts waived to receive disability benefits."); *Halstead v. Halstead*, 596 S.E.2d 353, 357–58 (N.C.Ct.App. 2004) (holding that held that a trial court "could not substitute its own definition of military retired pay in lieu of the definition of disposable retirement pay as defined by the Congress"); *Ex parte Billeck*, 777 So. 2d 105, 108 (Ala. 2000) ("The *Mansell* decision and § 1408 clearly manifest the intent of the federal law that a retiree's veteran's disability benefits be protected from division or assignment"); *Davis v. Davis*, 777 S.W.2d 230, 232 (Ky.1989) ("[W]e recognize the potential for inequity to the former spouse, but conclude that the wording of [the USFSPA] evidences an intention on the part of Congress to make these [disability] payments solely for the use of the disabled veteran.").

In doing so, many courts also correctly recognized that parties may not attempt to circumvent federal law by using contract, "equitable division," or indemnity theories. For example, in *Phillips v. Phillips*, the Georgia Court of Appeals overturned an order which held,

> [I]f [Husband] waives, ... all or any portion of his entitlement to his military retirement pay for any reason ... and this results in any diminution of the payments due to [Wife], [Husband] shall fully indemnify and hold harmless for any loss resulting from the reduction of regular monthly retired pay and shall pay directly to [Wife] any payments or portions of payments which [Wife] does not directly

> receive from the retirement center as a result of the reduction in the allotment.
>
> 820 S.E.2d 158, 163 (2018).

Interestingly, the *Phillips* court reasoned that the lower court's order was impermissible under both *Howell* and the earlier decision in *Mansell*. *Id*. at 164 n.6.

Recently, in *Jordan v. Jordan*, the Supreme Court of Alaska rejected a "dollar for dollar offset." 480 P.3d 626, 636 (2021). Although *Howell* did not prohibit courts from considering disability benefits when addressing other forms of support, the *Jordan* Court correctly recognized, "[w]hether the disability pay is received concurrently or through waiver, *Howell* preempts dividing military disability pay in either form or effect, particularly with a 'dollar for dollar' offset." *Id*.

In *Mallard v. Burkart*, the parties reached a settlement agreement which was incorporated into the decree of divorce. 95 So. 3d 1264, 1272 (Miss. 2012). After the husband converted retirement pay into disability benefits, the wife challenged the reduction in retirement pay as a breach of the parties' agreement. *Id*. at 1267. On appeal, the Mississippi Supreme Court rejected the attempted use of "creative solutions" to circumvent federal law. *Id*. at 1272. Although the Court understood the potential for harsh outcomes, it reasoned: "[w]hatever the equities may be, state

law is preempted by federal law, and thus, state courts are precluded from ordering distribution of military disability benefits contrary to federal law." *Id*. at 1272.

After *Howell*, the Minnesota Court of Appeals similarly recognized "[f]ederal law preempts state courts from dividing a veteran's military disability compensation as marital property, even where, as here, the parties agreed to the division." *Mattson v. Mattson*, 903 N.W.2d 233, 235 (Minn. Ct. App. 2017). Although the *Mattson* Court acknowledged the general rule that parties are free to bind themselves to contractual agreement, the Court emphasized the limits on the states' jurisdiction and the Supreme Court's explicitly warning against attempting to circumvent the protections that Congress intended. *Id.* at 241. In so ruling, the Court rejected the former-wife's creative argument that "once the disability-compensation funds reach Mattson's pocket, they have become his property and are no longer subject to federal protection." *Id.* Noting the importance of treading lightly in matters of preemption, the Court concluded that "arguments rooted in semantics" are not enough to circumvent federal law. *Id.*

Like the *Mattson* Court, the Michigan Supreme Court similarly concluded that a consent judgment following a settlement is unenforceable to the extent a state court's order requires reimbursement based on a veteran's election to waive retirement benefits in exchange for disability benefits. *Foster*, 949 N.W.2d at 104. Although *Foster* addressed a waiver of retirement pay for the receipt of CRSC, the

Court found *Howell* informative because neither CRSC nor VA disability payment are "disposable retired pay" under the Uniformed Services Former Spouses' Protection Act. *Id*. at 108-09 (citing *Merrill v. Merrill*, 581 U.S. ___, 137 S. Ct. 2156; *Cassinelli v. Cassinelli*, 538 U.S. ___138 S. Ct. 69 (2017)). Based on the clear ruling in *Howell*, the Supreme Court of Michigan held that federal law "preclude[s] any provision" which requires payment to a non-veteran former spouse "in an amount equal to what he or she would have received if the veteran former spouse had not waived his or her retirement pay in order to obtain CRSC." *Id*. at 111. Because consideration for a contract cannot be premised on something impermissible, the Court then concluded "[our] analysis is not undone by plaintiff's insistence that this case is distinguishable from *Howell* because the parties consented." *Id*. at 112.

Thus, to summarize, many courts have correctly recognized that veterans' benefits are divisible in divorce proceedings only to the extent allowed by federal law. Consistent with *Howell*'s condemnation of efforts to circumvent federal law, a growing number of courts correctly recognized that any attempt to divide a veterans' disability benefits via alternatives like indemnification or a settlement agreement is still improper.

B. THE DISTRICT COURT ERRED BY ORDERING INDEMNIFICATION THAT IS EFFECTIVELY A DIVISION OF ERICH'S DISABILITY BENEFITS

Regardless of the labels used, 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. As explained below, this Court should overturn the District Court's decision because: (1) the District Court ignored the supremacy of federal law; (2) the limited exception for spousal support is inapplicable; and (3) the District Court's order advances bad public policy. To the extent this Court needs to revisit *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003), while correcting the District Court's error, it is proper to do so because: (4) stare decisis is not a straight jacket which requires adherence to outdated or poorly reasoned decisions.

1. The District Court Ignored the Supremacy of Federal Law.

"The Supremacy Clause of the United States Constitution proclaims federal law to be 'the supreme Law of the Land.' Art. VI, cl. 2. Consequently, federal law can preempt state law whenever Congress explicitly states that it is preempting state law or implicitly preempts state law by occupying an entire field of regulation or passing laws that conflict with state law." *Mich. Canners & Freezers Ass'n v. Agric. Mktg. & Bargaining Bd.*, 467 U.S. 461, 469, 104 S. Ct. 2518, 2523 (1984).

Although state law typically controls in familial and divorce matters, *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808 (1979), 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 (citing H.R.Conf.Rep. No. 97–749, p. 165 (1982); S.Rep. No. 97–502, pp. 1–3, 16 (1982), U.S.Code Cong. & Admin.News 1982, p. 1555). In doing so, Congress relied upon its military powers under Article 1, Section 8 of the Constitution.

Although the Uniformed Services Former Spouses' Protection Act carved out a "precise" and "limited" grant of authority for states, the Act did not alter the general rule that federal law occupies the field. *Mansell*, 490 U.S. at 588, 109 S. Ct. at 2028; *Foster*, 949 N.W.2d at 108 ("*Mansell* concluded that *McCarty* had not been abrogated by the USFSPA, leaving in place the general rule that state-court authority over veterans' benefits is preempted by federal law").

As noted above, the Act carved out "disposable retired pay" as a property interest that may be divisible upon divorce. 10 U.S.C. §1408(c)(1). Neither CRSC payments nor disability retirement benefits are "disposable retired pay." And, as the Supreme Court confirmed in *Howell*, it does not matter if the court's order is fashioned as division of community property, enforcement of an agreement or indemnity. State courts simply cannot obstruct "the accomplishment and execution

of the full purposes and objectives of Congress." *Howell*, 581 U.S. at ___, 137 S. Ct. at 1402.

Thus, state courts "must tread with caution" when a case involves veterans' disability benefits, "lest they disrupt the federal scheme." *McCarty*, 453 U.S. at 224 n.16, 101 S. Ct. at 2737 n.16.

2. The Limited Exception for Spousal Support is Inapplicable.

Although Congress directly and specifically occupied the field with respect to division of veterans' disability benefits, neither the USFSPA nor Supreme Court precedent prohibits awards of spousal support in appropriate cases. In fact, *Howell* confirmed that family courts may account for "reductions in value" when calculating the need for spousal support. *Howell*, 137 S. Ct. at 1406.

In this case, Raina requested permanent spousal support in her motion to enforce. 3 AA 349. The District Court explicitly denied spousal support in the Order from the November 3, 2020, Hearing. 4 AA 661. Unsurprisingly, its order did not address the factors listed in NRS 125.150 or the equity of awarding spousal support for the rest of the parties' lives. *See generally* 4 AA 608--33. As such, the indemnity payments that the District Court ordered cannot properly be construed as spousal support.

Nevertheless, even if Raina advocates for spousal support, such a request would be improper in light of her registered domestic partnership. See

NRS 125.150(6). After all, Nevada law recognizes that registered domestic partners are legally the equivalent of a spouse. *See* NRS 122A.200. So, for the same reason that the District Court discontinued spousal support and ordered reimbursement of sums paid after Raina and Tony registered with the Secretary of State, *see* 2 AA 300-314; 2 AA 315-21, ordering spousal support as an alternative to indemnification would be unjust and improper.

3. The District Court's Order Advances Bad Public Policy.

Equity and fairness are essential to domestic relations matters. Indeed, family law is unique compared to other areas of law because the court is charged with making decisions regarding interpersonal and interfamilial issues.

In this case, the order granting Raina a lifetime of indemnity payments is unnecessary and wholly unfair to Erich. Both Raina and Erich are professionals "who make very nice incomes." After the divorce, both Raina and Erich began new lives with new partners,[8] step-children, and lovely homes. Yet, while both parties have the opportunity to move on from the nasty circumstances that led to their divorce, the lifetime of indemnity payments and drama relating to the same

[8] Erich's wife and Raina's registered domestic partner are also employed. 3 AA 395-396; 3 AA 449. So, both the Martin household and the Martin / Bricker household enjoy annual incomes in excess of $175,000.

ensures that Raina and Erich's lives will be intertwined for the next thirty-plus years.

On an individual level, the facts of this case are troubling. But, on a greater scale, the District Court's decision has terrible implications for other veterans who are similarly situated.[9] Typically, when an individual endures injuries and/or permanent disability[ies], any compensation related to his or her condition is personal, separate property. For example, Nevada law recognizes that damages recovered in a personal injury suit are separate property not subject to division in divorce. NRS 123.130; *Fredrickson & Watson Const. Co. v. Boyd*, 60 Nev. 117, 102 P.2d 627, 629 (1940) ("[A] cause of action for a personal injury is based on the violation of a separate right, namely the right to personal security, than which no right is more intensely personal and separate. This right is so intensely personal and separate that it can not be held by another as trustee nor in common with another."). Likewise, social security disability and other forms of disability income are typically categorized as separate property. *See, e.g.*, *Powers v. Powers*, 105 Nev. 514, 517, 779 P.2d 91, 93 (1989); *Flowers v. Flowers*, 578 P.2d 1006, 1008 (Ariz. Ct. App. 1978) ("Pain, suffering, disfigurement or the loss of a limb, as

[9] Granted, the Second Judicial District Court ruled in favor of a veteran under similar circumstances in *Dalton v. Dalton*. *See* Supreme Court of Nevada case number 81599.

here, is the peculiar anguish of the person who suffers it, it can never be wholly shared even by a loving spouse and surely not after the dissolution of a marriage by a departed one. Disability pay, consequently, compares to compensation for personal injury rather than to retirement pay.").

This approach makes sense because pain, suffering, and disability are deeply personal issues. Moreover, because injuries and disabilities can limit employment prospects and reduce quality of life while often necessitating costly treatment, both fairness and compassion support the protection that comes with classifying such benefits as separate property. In the same way, Congress' desire for disability benefits to actually reach disabled veterans is a warranted recognition of the sacrifices and challenges that disabled veterans endure. *Hisquierdo*, 439 U.S., at 584, 99 S. Ct., at 809; *McCarty*, 453 U.S. 210, 228, 101 S. Ct. 2728, 2739. It thus follows that veterans should fully retain their disability benefits as separate property.

So, while there are plenty of legal reasons to overturn the District Court's decision, the public policy implications of the order also warrant serious consideration. After all, Erich served his country with honor. For the rest of his life, he will struggle with the physical, neurological, and mental disabilities that came from his service. Yet, by ordering Erich to indemnify Raina, the District

Court denied Erich the full benefits that he earned. And, at the same time, the District Court granted Raina yet another windfall that she did not earn.

4. There are Weighty Reasons to Overturn *Shelton.*

"[S]tare decisis plays a critical role in [this Court's] jurisprudence." *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013); *see also Grotts v. Zahner*, 115 Nev. 339, 342, 989 P.2d 415, 417 (1999) (Rose, C.J., dissenting) ("The rule of stare decisis is founded upon sound principles in the administration of justice") (internal quotation marks and citation omitted). That being said, "[t]he doctrine of stare decisis must not be so narrowly pursued that the ... law is forever encased in a straight jacket." *Rupert v. Stienne*, 90 Nev. 397, 400, 528 P.2d 1013, 1015 (1974); *see also Matter of Est. of Sarge*, 134 Nev. 866, 870, 432 P.3d 718, 722 (2018) (quoting *Rupert* with favor). So, where this Court's precedents prove to be 'unworkable or are badly reasoned,' they should be overruled." *Egan*, 129 Nev. at 243, 299 P.3d at 367 (quoting *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S. Ct. 2597, 2600 (1991)).

In its order, the District Court cited to *Shelton v. Shelton*, 119 Nev. 492, 496, 78 P.3d 507, 510 (2003). In *Shelton*, the parties jointly petitioned the District Court for a summary decree of divorce. In the joint filing, the parties designated the husband's military retirement and military disability pay as community property, though they agreed that husband was entitled to all of his disability pay.

Id. at 494, 78 P.3d at 508. Years later, the husband was rated 100% disabled. *Id*. He then waived retirement pay to receive great disability pay. *Id*. Because the waiver effectively nullified the wife's share of the husband's retirement pay, the wife filed a motion to enforce in which she requested compensation or alimony equivalent to the loss in retirement pay. *Id*. at 494-95, 78 P.3d at 508.

On appeal, the Supreme Court of Nevada ruled in favor of the wife. "Based on the cases decided after *Mansell I*," the Court disagreed with the veteran's preemption arguments. *Shelton*, 119 Nev. at 496, 78 P.3d at 509.[10] In particular, the Court found persuasive a South Dakota Supreme Court decision which reasoned "the source of the payments need not come from his exempt disability pay; the husband is free to satisfy his obligations to his former wife by using other available assets." *Id*. at 496-97; 78 P.3d at 510 (quoting *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D.1996)). Without much discussion, the *Shelton* Court also concluded "states are not precluded from applying state contract law, even when disability benefits are involved." 119 Nev. at 498, 78 P.3d at 511.

[10] The Supreme Court of Nevada referred to the Supreme Court's decision as "*Mansell I*" and the partially-published California Court of Appeal's decision on remand as "*Mansell II*."

Shelton is distinguishable from the instant case because the Court issued its decision before *Howell*. Regardless, at least three weighty reasons also warrant overturning *Shelton*.

First, "[i]n dealing with questions of this federal character we are, of course, bound by the holdings of the United States Supreme Court." *State ex rel. Texas Co. v. Koontz*, 69 Nev. 25, 32, 240 P.2d 525, 528 (1952). Because *Howell* explicitly holds that division of veterans' disability benefits is improper, regardless of semantics, 581 U.S. at ___ 137 S. Ct. at 1406, this Court cannot properly rule otherwise.

Second, the *Shelton* Court's reasoning regarding other payment sources is incompatible with federal law and the weight of persuasive authority. In limiting states' ability to interfere with veterans' benefits, Congress plainly conveyed its desire to compensate and protect the men and woman who serve in the Armed Forces. Understandably, Congress is particularly protective of veterans' whose sacrifices resulted in permanent disabilities. If state courts could circumvent these important objectives by requiring payment from another source, states would effectively – and improperly – obstruct Congress' power to enact laws in the interest of national security.

Third, *Shelton*'s discussion of contract law lacked nuance. While it is true that Congress did not occupy the field of contract law, states still must tread lightly

when preemption and matters of federal concern are involved. After all, Nevada courts do not enforce contracts which are illegal or contrary to public policy. *Clark v. Columbia/HCA Info. Servs., Inc*., 117 Nev. 468, 480, 25 P.3d 215, 224 (2001) ("[T]his court will not enforce contracts that violate public policy"). Yet, in *Shelton*, the Court failed to consider the greater context of the parties' disagreement, namely, that enforcement of the decree in question would result in an improper dollar-for-dollar indemnification.

Thus, while this Court is understandably reluctant to depart from stare decisis, the *Shelton* decision does not salvage the District Court's erroneous decision. Instead, to the extent *Shelton* even survived *Howell*, the decision should be overruled as outdated and unworkable.

C. THE DISTRICT COURT ERRED BY APPLYING CONTRACT PRINCIPLES TO THE DECREE ERICH WAS FORCED TO SIGN.

Courts lack authority to "force upon parties contractual obligations, terms or conditions which they have not voluntarily assumed." *McCall v. Carlson*, 63 Nev. 390, 424, 172 P.2d 171, 187 (1946). Accordingly, voluntary agreement and a meeting of the minds are essential to form a valid contract. *See, e.g*., *Certified Fire Prot. Inc. v. Precision Constr*., 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).

Where the contract in question is a settlement agreement, written voluntary assent is all the more necessary. *See Lehrer McGovern Bovis, Inc. v. Bullock*

Insulation, Inc., 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008) ("To be valid, a stipulation requires mutual assent to its terms and either a signed writing by the party against whom the stipulation is offered or an entry into the court minutes in the form of an order."). The extra cautions applicable to settlement agreements are logical since settlements are typically reached against the backdrop of litigation which too often involves half-truths, convenient omissions, and tensions between the parties and their counsel. At the same time, giving up the rights and process that come with litigation is such a serious matter that actual assent is crucial.

In this case, Erich and Raina attempted to privately negotiate a separation agreement. In the agreement, Erich agreed to a division of retirement pay, but not any terms related to disability. 2 AA 119-34. After counsel endeavored to negotiate a new settlement, the terms changed.

Erich informed the District Court of his concerns with legal counsel and the proceedings during which a settlement was purportedly reached. Former counsel's motion to withdraw further validated Erich's concerns since counsel's sole reason for wanting to withdraw centered on a difference of opinion as to the proposed decree. Since clients have exclusive authority when it comes to settlement issues, *see* Nevada Rule of Professional Conduct 1.2(a), counsels' apparent disagreement had troubling implications.

Instead of addressing Erich's concerns, the District Court pushed the settlement forward. Given counsels' withdrawal and the thinly veiled threat of paying fees to Raina as sanction, Erich simply acquiesced. Thereafter, there was no marital settlement agreement, no property settlement agreement" and "no other contract that independently survive[d] the decree." 2 AA 306-07.

Erich endured a similar experience with the QDRO. After Erich noted concerns with Raina's dishonesty and certain child-related issues that he wanted to discuss during mediation, the District Court halted the discussion. The District Court then instructed Erich to sign and mail the QDRO by the end of the week. Erich understandably did not feel free to disregard the order. So, he acquiesced. Thus, under the circumstances, Erich did not freely or voluntarily agree to either document. Although Erich was not able to fully articulate his issues with the decree and QDRO, his comments also conveyed the absence of a meeting of the minds. As such, the District Court erred by enforcing a contract to which Erich had not agreed.

Moreover, even though Erich's counsel agreed to the documents on Erich's behalf, the District Court still should not have enforced the unconscionable violation of public policy. *See, e.g.*, *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 226 (2009). Instead, given federal law, the importance of supporting disabled veterans, and the widespread recognition that payments related to permanent

disabilities are personal, separate property, the District Court should have denied Raina's motion. Therefore, because contract principles do not support the lifetime of indemnity payments that the District Court ordered, this Court should reverse.

D. THE DISTRICT COURT'S RELIANCE ON RES JUDICATA WAS MISPLACED.

In her Motion to Enforce, Raina argued that indemnification and/or permanent spousal support should be ordered as compensation for the loss of Erich's retirement pay. Unsurprisingly, Raina's motion, Erich's opposition, and the entire discussion that followed then centered on federal preemption and the scope of the *Howell* decision. To a lesser degree, the parties also argued regarding contract principles and the settlement that was purportedly incorporated into the decree.

Although Erich and Raina rarely agree about anything, both seemingly agreed that neither claim preclusion nor issue preclusion was relevant. Yet, after receiving no briefing or argument regarding the matter, the District Court ordered indemnification on the basis of res judicata.

In its order, the District Court alternated between res judicata (claim preclusion) and collateral estoppel (issue preclusion). 4 AA 657-59. Indeed, while the Court repeatedly used the term "res judicata," its analysis centered on the four factors which apply to issue preclusion. *Id.* At the same time, the District Court

cited authorities which granted indemnification on the basis of res judicata. 4 AA 657.

The District Court's confusion in this regard is somewhat understandable since the terms and factors related to preclusion were hazy for some time. However, after the excellent decision in *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), the relevant standards became markedly clearer.

To the extent that the District Court relied on res judicata, *i.e.*, claim preclusion, its decision was plainly mistaken. As evidenced by the word "claim," claim preclusion may be applicable when a party asserts a claim that was or could have brought in a previous case that was reduced to a valid final judgment. *Five Star*, 124 Nev. at 1054, 194 P.3d at 713 (citing *Executive Mgmt. v. Ticor Title Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465, 473 (1998)). Here, claim preclusion is inapplicable given the absence of a previous case or a valid final judgment.

Issue preclusion is also a poor fit because the central issue in Raina's motion to dismiss – whether indemnification based on a veterans' disability benefits is permissible under *Howell* – was not actually and necessarily litigated in the alleged settlement agreement or decree. The District Court also did not make an earlier ruling on the merits. In fact, the District Court could not have done so given that the decree was entered in 2015 and *Howell* was not decided until 2017.

In addition to the substantive problems with the District Court's reasoning, its alternative ruling was also improper for procedural reasons. For one, the District Court improperly grasped for a way to circumvent federal law.

More importantly, the District Court's alternative ruling also deprived the parties of a meaningful opportunity to address what was apparently an issue of importance. As the District Court's ruling deprived Erich of significant property, namely a lifetime of payments that will likely exceed $300,000, the decision has serious due process implications. Indeed, even if the District Court ultimately rejected Erich's arguments, its decision was all the harder to accept because Erich was not afforded an opportunity to be heard regarding res judicata. *See, e.g.*, *Gordon v. Geiger*, 133 Nev. 542, 546, 402 P.3d 671, 674 (2017) (reversing where appellant was "not afforded the opportunity to be heard and rebut the evidence upon which the district court [sua sponte] relied"); *Rivero*, 125 Nev. at 446, 216 P.3d at 238 (Pickering, J., concurring in part and dissenting in part) (rejecting an argument where "the family court could not consider it since this basis was not raised"); *see also Acosta v. Artuz*, 221 F.3d 117, 122 (2d Cir. 2000) ("Generally, courts should not raise sua sponte nonjurisdictional defenses not raised by the parties.").

Thus, while there are many important grounds upon which this Court can – and should – overturn the District Court's order, its mistaken, sua sponte reasoning regarding res judicata is also grounds for reversal.

E. THE DISTRICT COURT ERRED BY AWARDING FEES PENDENTE LITE.

1. Legal Standard.

Nevada has long followed the "American Rule" which provides that parties generally bear their own attorneys' fees. *See, e.g., Thomas v. City of N. Las Vegas*, 122 Nev. 82, 85, 127 P.3d 1057, 1060 (2006); *Consumers League of Nev. v. Sw. Gas Corp.*, 94 Nev. 153, 156, 576 P.2d 737, 739 (1978). Accordingly, attorney's fees are not recoverable unless allowed by express or implied agreement or when authorized by statute or rule." *Schouweiler v. Yancey Co.*, 101 Nev. 827, 830, 712 P.2d 786, 788 (1985). The party who seeks fees bears the burden of proving his or her entitled to attorneys' fees. *E.g., Miller v. Wilfong*, 121 Nev. 619, 623, 119 P.3d 727, 730 (2005).

Where fees are recoverable, the controlling standard is reasonableness. Although Nevada courts may use a variety of tools to calculate a reasonable amount of fees, it is well-established that courts – including the family court – must analyze the four factors enumerated in *Brunzell v. Golden Gate National*

Bank.[11] *See, e.g*., *Shuette v. Beazer Homes Holdings Corp*., 121 Nev. 837, 864–65, 124 P.3d 530, 549 (2005); *Miller*, 121 Nev. at 623, 119 P.3d at 730 ("We take this opportunity to clarify our jurisprudence in family law cases to require trial courts to evaluate the *Brunzell* factors when deciding attorney fee awards"). While talismanic language is not required, the court must provide sufficient reasoning and findings in support of its decision. *Logan v. Abe*, 131 Nev. 260, 267, 350 P.3d 1139, 1143 (2015); *Shuette*, 121 Nev. at 865, 124 P.3d at 549.

2. <u>NRS 125.040 does not Allow for an Attorney Fee Free-for-all</u>

In this case, Erich acknowledges that family courts are empowered to order support and costs of suit during the pendency of a divorce action. *See* NRS 125.040; *Leeming v. Leeming*, 87 Nev. 530, 532, 490 P.2d 342, 343 (1971). That being said, NRS 125.040 does not allow for a fee awarding free-for-all. Instead, the plain language of the statute conveys that fee awards must be need-based:

[11] *See* 85 Nev. 345, 455 P.2d 31 (1969) (listing the relevant factors as "(1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to the work; (4) the result: whether the attorney was successful and what benefits were derived.").

NRS 125.040 Orders for support and cost of suit during pendency of action.

1. In any suit for divorce the court may, in its discretion, upon application by either party and notice to the other party, require either party to pay moneys ***necessary*** to ***assist*** the other party in accomplishing one or more of the following:

(a) To provide temporary maintenance for the other party;

(b) To provide temporary support for children of the parties; or

(c) To ***enable*** the other party to carry on or defend such suit.

(emphasis added)

The word "necessary" means "needed, unavoidable, that cannot be done without." WEBSTER'S CONCISE ENGLISH DICTIONARY 99 (2004). "Assist" also conveys an inability to accomplish some end on one's own. *Id*. at 15 (defining "assist" as "to help" and "assistance" as "help, aid"). Together, the first part of NRS 125.040(1) allows for support if one party needs financial assistance.

In turn, the second portion of NRS 125.040(1) enumerates only three expenses for which assistance may be properly ordered. Under NRS 125.040(1)(c), legal expenses may be awarded if needed to enable participation in litigation. That is, the monies in question should "give the power or means to do something." WEBSTER'S CONCISE ENGLISH DICTIONARY, *supra*, 51; *see also* BLACK'S LAW DICTIONARY 567 (8th ed. 2004) (defining "enable" as "[t]o give power to do something; to make able."). Thus, if both parts of NRS 125.040(1) are

read together, the family court may order payment if necessary, to assist or enable the other parties' participation in litigation.

The plain meaning of the statute speaks for itself. *See, e.g.*, *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012); *Miller*, 121 Nev. at 624, 119 P.3d at 731 ("When a statute has a definite and ordinary meaning, this court will not look beyond the statute's plain language."). So, in the same way that "[a] woman is not entitled to alimony just because she has been [a man's] wife," *Fausone v. Fausone*, 75 Nev. 222, 224, 338 P.2d 68, 69 (1959), a party to a divorce case is not entitled to fees just because he or she incurred some litigation expense.

Nevertheless, the Supreme Court of Nevada has also confirmed that financial need is highly relevant to NRS 125.040. In *Griffith v. Gonzales-Alpizar*, for example, the Court noted that the public policy rational behind NRS 125.040, namely, "ensuring that underprivileged parties have access to justice in Nevada courts." 132 Nev. 392, 394-95, 373 P.3d 86, 88 (2016). In so ruling, the *Griffith* Court relied upon the earlier decision in *Sargeant v. Sargeant*, where the Court held that parties to a divorce action should "be afforded [their] day in court without destroying [their] financial position." 88 Nev. 223, 227, 495 P.2d 618, 621 (1972). And, while "strictly necessitous circumstances" are not required, *Sargeant*, 88

Nev. at 226-27, 495 P.2d at 620-21, a disparity in the parties' wealth is still an important factor in assessing an award of attorneys' fees under NRS 125.040.

The case law regarding NRS 125.040 is wholly consistent with the Supreme Court of Nevada's decision in *Wright v. Osburn*, 114 Nev. 1367, 970 P.2d 1071 (1998). There, the Court opined that family courts must consider the disparity in income of the parties when assessing attorneys' fees. *Id*. at 1370, 970 P.2d at 1073. A few years later, in *Miller*, the Court again emphasized that all requests for attorney fees must be supported by affidavits or other evidence sufficient to satisfy both the *Brunzell* factors and the disparity of income inquiry noted in *Wright*. *See* 121 Nev. at 623-24, 119 P.3d at 730.

3. The District Court Abused its Discretion by Awarding Attorney Fees Pendente Lite

Here, the District Court awarded Raina $5,000 for attorney fees pendente lite. In its written order, the Court recognized that both Raina and Erich are professionals "who make very nice incomes and [that] neither party is destitute by any means." 5 AA 787. Although the Court noted that Erich individually makes "three times" as much as Raina,[12] the Court acknowledged that "Raina's expenses

[12] It is unclear how the Court came to the conclusion that Erich makes three times as much as Raina. In the financial disclosures that were before the District Court in November 2020, Raina listed her annual income as $71,344, 4 AA 664, whereas Erich listed his income as $138,049. 3 AA 446. A year earlier, Raina listed her annual income as $101,920. 3 AA 323.

are reduced by her domestic partner and his very large income." 5 AA 787-88. So, "[w]hen you balance out the household incomes, they are fairly equivalent." 5 AA 788.

After correctly finding that both Erich and Raina are fortunate compared to most and correctly finding no overall disparity in income, the District Court then backtracked. Without any meaningful explanation, it concluded, "The Court is not inclined to grant all of the attorney fees. The Court does not want anybody being destitute by this, but Erich should pay something so he will contribute $5,000 to her attorney's fees." 5 AA 788.

In so ruling, the Court ignored the other "somethings" that Erich already paid and continued to pay to Raina. The ruling was also contradictory, at best, with regard to disparity of income or lack thereof. At the very least, the District Court overlooked the plain language and purpose of NRS 125.040. After all, the District Court did not find that payment of fees pendente lite was *necessary* to *enable* Raina's ability to meaningfully participate in the appellate proceedings. Given the $19,800 that Raina had already paid to her current counsel,[13] 4 AA 670, the District Court could not reasonably make such a determination. So, the Court simply found that Erich "should" pay something."

[13] In addition, Raina paid at least $5,000 to Mr. Ramir Hernandez, 2 AA 96, and $7,500 to Ford and Friedman. 3 AA 328.

The bigger problem with the District Court's ruling is its complete failure to address reasonableness or the *Brunzell* factors. Indeed, the District Court's order does not address the quality of Raina's counsel as advocates or the reasonableness of their hourly rates. The District Court also did not address the character or difficulty of the work to be completed or the importance of the work for which Raina sought fees pendente lite. While the result of these appeals remains to be seen, the District Court also failed to assess whether $5,000 is generally reasonable in the context of this case. Instead, the Court chose $5,000 out of thin air because Erich "should pay something."

The District Court's failure to make appropriate findings hinders meaningful appellate review. After all, "it is not the function of this court to search the record and analyze the evidence in order to supply findings which the trial court failed to make." *LaGrange Const. Inc. v. Del E. Webb Corp*., 83 Nev. 524, 529, 435 P.2d 515, 518 (1967). Nevertheless, even if the Court is inclined to scour the record, substantial evidence does not support the District Court's ruling. The parties' respective financial disclosure forms convey that both Raina and Erich are financially secure. Although Raina omitted her registered domestic partners' contribution to household expenses, the District Court correctly recalled that Tony makes more a "very large income" around $150,000. At the same time, Erich's household expenses are far greater than Raina's. With respect to the actual fees

requested, Raina submitted only verifications attesting to the accuracy of her pleadings. Although her motion argued that the cost of briefing an appeal is at least $20,000 and often "six figures," there is no indication what counsel actually charged Raina or the type of fee agreement that was in place. Thus, the fee award was improper because it is not supported by substantial evidence. *See*, *e.g.*, *Logan*, 131 Nev. at 267, 350 P.3d at 1143; *Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 830, 192 P.3d 730, 737 (2008).

In summation, the award of fees pendente lite in this matter is inconsistent with the public policy rational behind NRS 125.040 and the plain meaning of the statute. The District Court also abused its discretion by failing to consider the *Brunzell* and *Wright* factors and by failing to make adequate findings. As such, this Court should reverse the award of fees pendente lite.

IX. CONCLUSION

Erich served our great county for over twenty years. As a result of his service, Erich will be disabled for the rest of his life. Although Erich is thankful to be alive and proud of his military career, he certainly earned the benefits that are available to disabled veterans.

Under the District Court's order, Erich will have to pay Raina at least $845 every month for all time. Although Raina already received significant property

and monetary payments as a result of the divorce, the indemnification payments will likely exceed $300,000 if the parties live another thirty years.

In so ruling, the District Court effectively stood as an obstacle to federal law which vigorously protects disabled veterans like Erich. Regardless of semantics, the District Court lacked authority to order indemnification comparable to a division of disability benefits. Yet, in grasping for theories that were unsupported under the facts of this case, the District Court went out of its way to award Raina benefits that only Erich earned through his sacrifice. Then, to make matters worse, the Court also ordered Erich to pay Raina's attorneys' fees simply because he "should pay something."

Accordingly, for the foregoing reasons, Erich respectfully asks this Court to overturn the Order Regarding Enforcement of Military Retirement Benefits. Further, this Court should reverse the portion of the Order from the November 3, 2020, Hearing in which the District Court granted attorneys' fees pendente lite.

Dated this 24th day of May, 2021.

MARQUIS AURBACH COFFING

By: *Kathleen Wilde*
Chad F. Clement, Esq.
Nevada Bar No. 12192
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellant, Erich M. Martin

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

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:

☒ proportionally spaced, has a typeface of 14 points or more and contains 11,516 words; or

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3. Finally, I hereby certify that I have read this 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 24th day of May, 2021.

MARQUIS AURBACH COFFING

By: Kathleen Wilde
Chad F. Clement, Esq.
Nevada Bar No. 12192
Kathleen A. Wilde, Esq.
Nevada Bar No. 12522
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Appellant, Erich M. Martin

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **APPELLANT'S OPENING BRIEF** was filed electronically with the Supreme Court of Nevada on the 24th day of May, 2021. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Marshal S. Willick, Esq.
Willick Law Group
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110
Willicklawgroup.com
Attorney for Respondent

/s/ Kathleen Wilde
Kathleen Wilde, Esq., an employee of
Marquis Aurbach Coffing