

# IN THE SUPREME COURT OF THE STATE OF NEVADA

## INDICATE FULL CAPTION:

Sarah Janeen Rose,  
Appellant,  
vs.  
David John Rose,  
Respondent.

No. 84295

Electronically Filed  
Mar 18 2022 12:22 p.m.

DOCKETING STATEMENT AT Brown  
CIVIL APPEAL of Supreme Court  
Clerk

## GENERAL INFORMATION

All appellants not in proper person must complete this docketing statement. NRAP 14(a). The purpose of the docketing statement is to assist the Supreme Court in screening jurisdiction, classifying cases for en banc, panel, or expedited treatment, compiling statistical information and identifying parties and their counsel.

## WARNING

This statement must be completed fully, accurately and on time. NRAP 14(c). The Supreme Court may impose sanctions on counsel or appellant if it appears that the information provided is incomplete or inaccurate. *Id.* Failure to fill out the statement completely or to file it in a timely manner constitutes grounds for the imposition of sanctions, including a fine and/or dismissal of the appeal.

A complete list of the documents that must be attached appears as Question 26 on this docketing statement. Failure to attach all required documents will result in the delay of your appeal and may result in the imposition of sanctions.

This court has noted that when attorneys do not take seriously their obligations under NRAP 14 to complete the docketing statement properly and conscientiously, they waste the valuable judicial resources of this court, making the imposition of sanctions appropriate. *See KDI Sylvan Pools v. Workman*, 107 Nev. 340, 344, 810 P.2d 1217, 1220 (1991). Please use tab dividers to separate any attached documents.

1. Judicial District Eighth Department I  
County Clark Judge C. Dianne Steel/S. Bailey/C. Moss  
District Ct. Case No. D547250

**2. Attorney filing this docketing statement:**

Attorney Racheal H. Mastel, Esq. Telephone 702-823-4900  
Firm Kainen Law Group, PLLC  
Address 3303 Novat Street, Suite 200  
Las Vegas, Nevada 89129

Client(s) Sarah Rose

If this is a joint statement by multiple appellants, add the names and addresses of other counsel and the names of their clients on an additional sheet accompanied by a certification that they concur in the filing of this statement.

**3. Attorney(s) representing respondents(s):**

Attorney Shelley Lubritz (District Court Counsel) Telephone 702-833-1300  
Firm Law Office of Shelley Lubritz, PLLC  
Address 375 E. Warm Springs Rd., Suite 104  
Las Vegas, Nevada 89119

Client(s) David Rose

Attorney \_\_\_\_\_ Telephone \_\_\_\_\_  
Firm \_\_\_\_\_  
Address \_\_\_\_\_

Client(s) \_\_\_\_\_

(List additional counsel on separate sheet if necessary)

**4. Nature of disposition below (check all that apply):**

- |                                                                       |                                                                                             |
|-----------------------------------------------------------------------|---------------------------------------------------------------------------------------------|
| <input checked="" type="checkbox"/> Judgment after bench trial        | <input type="checkbox"/> Dismissal:                                                         |
| <input type="checkbox"/> Judgment after jury verdict                  | <input type="checkbox"/> Lack of jurisdiction                                               |
| <input type="checkbox"/> Summary judgment                             | <input type="checkbox"/> Failure to state a claim                                           |
| <input type="checkbox"/> Default judgment                             | <input type="checkbox"/> Failure to prosecute                                               |
| <input checked="" type="checkbox"/> Grant/Denial of NRCP 60(b) relief | <input type="checkbox"/> Other (specify): _____                                             |
| <input type="checkbox"/> Grant/Denial of injunction                   | <input checked="" type="checkbox"/> Divorce Decree:                                         |
| <input type="checkbox"/> Grant/Denial of declaratory relief           | <input checked="" type="checkbox"/> Original <input type="checkbox"/> Modification          |
| <input type="checkbox"/> Review of agency determination               | <input checked="" type="checkbox"/> Other disposition (specify): <u>Denial of 52(c) Mtn</u> |

**5. Does this appeal raise issues concerning any of the following?**

- ☐ Child Custody
- ☐ Venue
- ☐ Termination of parental rights

**6. Pending and prior proceedings in this court.** List the case name and docket number of all appeals or original proceedings presently or previously pending before this court which are related to this appeal:

Sarah Janeen Rose v. David John Rose, case number 81859

**7. Pending and prior proceedings in other courts.** List the case name, number and court of all pending and prior proceedings in other courts which are related to this appeal (e.g., bankruptcy, consolidated or bifurcated proceedings) and their dates of disposition:

David Rose v. Regina McConnell, ESQ., McConnell Law Ltd., Shelly Booth Cooley, Esq., The Cooley Law Firm, Sarah Janeen Rose, Doe Individuals I through X and Roe Corporations XI through XX, A-20-815750-C, presently in litigation.

**8. Nature of the action.** Briefly describe the nature of the action and the result below:

The parties mediated a settlement of their divorce in March 2018. An MOU and a Decree were prepared and filed. The Decree addressed the division of David's PERS retirement survivor benefit options. The MOU did not. David filed a Motion Pursuant to NRCP 60(b) to set aside those provisions in the Decree. Senior Judge Kathy Hardcastle initially heard the Motion and granted the set aside. Sarah filed for Reconsideration and Judge Moss set aside Judge Hardcastle's Order and set a trial on the NRCP 60(b) Motion, as well as to determine the parties' intent with respect to the survivor benefit option, and how to address the same if the set aside was granted. The first day of trial was in front of Judge Moss. Due to Covid, Judge Moss did not complete the trial and the case was reassigned to Senior Judge Steel. A NRCP 52(c) Motion was filed, as David had rested after the first day of trial. That Motion was denied, and Judge Steel held a new trial. At the end of the trial, Judge Steel granted the Motion to Set Aside under contract law and determined that the survivor benefit option was not community property.

**9. Issues on appeal.** State concisely the principal issue(s) in this appeal (attach separate sheets as necessary):

- Whether the Court erred in Setting Aside the Survivorship Benefit Provision of the Decree
- Whether the Court erred in finding that contract law was applicable
- Whether the Court erred in finding that Sarah had a fiduciary duty to David to point out the survivor benefit language in the Decree
- Whether the Court erred in accepting Parol Evidence as to the survivorship benefit option
- Whether the Court erred in finding that the survivorship benefit option is not community property
- Whether the Court erred in denying the NRCP 52(c) Motion

**10. Pending proceedings in this court raising the same or similar issues.** If you are aware of any proceedings presently pending before this court which raises the same or similar issues raised in this appeal, list the case name and docket numbers and identify the same or similar issue raised:

N/A

**11. Constitutional issues.** If this appeal challenges the constitutionality of a statute, and the state, any state agency, or any officer or employee thereof is not a party to this appeal, have you notified the clerk of this court and the attorney general in accordance with NRAP 44 and NRS 30.130?

☒ N/A

☐ Yes

☐ No

If not, explain:

**12. Other issues.** Does this appeal involve any of the following issues?

☐ Reversal of well-settled Nevada precedent (identify the case(s))

☐ An issue arising under the United States and/or Nevada Constitutions

☐ A substantial issue of first impression

☒ An issue of public policy

☐ An issue where en banc consideration is necessary to maintain uniformity of this court's decisions

☐ A ballot question

If so, explain:

**13. Trial.** If this action proceeded to trial, how many days did the trial last? 3

Was it a bench or jury trial? Bench

**14. Judicial Disqualification.** Do you intend to file a motion to disqualify or have a justice recuse him/herself from participation in this appeal? If so, which Justice?

N/A

## TIMELINESS OF NOTICE OF APPEAL

**15. Date of entry of written judgment or order appealed from** 6/30/21 & 1/31/22

If no written judgment or order was filed in the district court, explain the basis for seeking appellate review:

**\*\*** The June 30, 2021 Notice of Entry was for the Order which denied the NRCP 52(c) Motion and set a new trial. Therefore it was not an appealable Order until entry of the Findings of Fact, Conclusions of Law and Order filed January 31, 2022.

**16. Date written notice of entry of judgment or order was served** Jan 31, 2022

Was service by:

☐ Delivery

☒ Mail/electronic/fax

**17. If the time for filing the notice of appeal was tolled by a post-judgment motion (NRCP 50(b), 52(b), or 59)**

(a) Specify the type of motion, the date and method of service of the motion, and the date of filing.

☐ NRCP 50(b)      Date of filing \_\_\_\_\_

☐ NRCP 52(b)      Date of filing \_\_\_\_\_

☐ NRCP 59      Date of filing \_\_\_\_\_

**NOTE: Motions made pursuant to NRCP 60 or motions for rehearing or reconsideration may toll the time for filing a notice of appeal. See AA Primo Builders v. Washington, 126 Nev. \_\_\_\_, 245 P.3d 1190 (2010).**

(b) Date of entry of written order resolving tolling motion \_\_\_\_\_

(c) Date written notice of entry of order resolving tolling motion was served \_\_\_\_\_

Was service by:

☐ Delivery

☐ Mail

**18. Date notice of appeal filed** Feb 15, 2022

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If more than one party has appealed from the judgment or order, list the date each notice of appeal was filed and identify by name the party filing the notice of appeal:

**19. Specify statute or rule governing the time limit for filing the notice of appeal, e.g., NRAP 4(a) or other**

NRAP 4(a)(1)

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**SUBSTANTIVE APPEALABILITY**

**20. Specify the statute or other authority granting this court jurisdiction to review the judgment or order appealed from:**

(a)

- |                                                   |                                       |
|---------------------------------------------------|---------------------------------------|
| <input checked="" type="checkbox"/> NRAP 3A(b)(1) | <input type="checkbox"/> NRS 38.205   |
| <input type="checkbox"/> NRAP 3A(b)(2)            | <input type="checkbox"/> NRS 233B.150 |
| <input type="checkbox"/> NRAP 3A(b)(3)            | <input type="checkbox"/> NRS 703.376  |
| <input type="checkbox"/> Other (specify) _____    |                                       |

(b) Explain how each authority provides a basis for appeal from the judgment or order:  
Sarah is appealing the Order after trial in this matter which adjudicated the terms of the Decree of Divorce.

**21. List all parties involved in the action or consolidated actions in the district court:**

(a) Parties:

Sarah Rose

David Rose

(b) If all parties in the district court are not parties to this appeal, explain in detail why those parties are not involved in this appeal, *e.g.*, formally dismissed, not served, or other:

N/A

**22. Give a brief description (3 to 5 words) of each party's separate claims, counterclaims, cross-claims, or third-party claims and the date of formal disposition of each claim.**

Appellant - Affirm the Decree as entered; disposition filed January 31, 2022

Respondent - Set aside survivor benefit option in Decree, Award total survivor benefit option to Respondent; disposition filed January 31, 22

**23. Did the judgment or order appealed from adjudicate ALL the claims alleged below and the rights and liabilities of ALL the parties to the action or consolidated actions below?**

☒ Yes

☐ No

**24. If you answered "No" to question 23, complete the following:**

(a) Specify the claims remaining pending below:

(b) Specify the parties remaining below:

(c) Did the district court certify the judgment or order appealed from as a final judgment pursuant to NRCP 54(b)?

☐ Yes

☐ No

(d) Did the district court make an express determination, pursuant to NRCP 54(b), that there is no just reason for delay and an express direction for the entry of judgment?

☐ Yes

☐ No

**25. If you answered "No" to any part of question 24, explain the basis for seeking appellate review (*e.g.*, order is independently appealable under NRAP 3A(b)):**

**26. Attach file-stamped copies of the following documents:**

- The latest-filed complaint, counterclaims, cross-claims, and third-party claims
- Any tolling motion(s) and order(s) resolving tolling motion(s)
- Orders of NRCP 41(a) dismissals formally resolving each claim, counterclaims, cross-claims and/or third-party claims asserted in the action or consolidated action below, even if not at issue on appeal
- Any other order challenged on appeal
- Notices of entry for each attached order

## VERIFICATION

I declare under penalty of perjury that I have read this docketing statement, that the information provided in this docketing statement is true and complete to the best of my knowledge, information and belief, and that I have attached all required documents to this docketing statement.

Sarah Rose  
Name of appellant

Racheal H. Mastel  
Name of counsel of record

3-18-22  
Date

  
Signature of counsel of record

Clark County Nevada  
State and county where signed

## CERTIFICATE OF SERVICE

I certify that on the 18<sup>TH</sup> day of MARCH, 2022, I served a copy of this completed docketing statement upon all counsel of record:

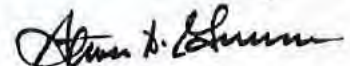
- ☐ By personally serving it upon him/her; or
- ☒ By mailing it by first class mail with sufficient postage prepaid to the following address(es): (NOTE: If all names and addresses cannot fit below, please list names below and attach a separate sheet with the addresses.)

DAVID ROSE  
C/O SHELLEY CUBRITZ, ESQ  
375 E. WARM SPRINGS ROAD, SUITE 104  
LAS VEGAS, NEVADA 89119

Dated this 18<sup>TH</sup> day of MARCH, 2022

\_\_\_\_\_  
Signature

**EXHIBIT “1”**

  
CLERK OF THE COURT

1 COMD  
2 REGINA M. McCONNELL, ESQ.  
3 Nevada State Bar No. 8029  
4 McCONNELL LAW, LTD.  
5 9017 S. Pecos Road, Suite 4445  
6 Henderson, Nevada 89074  
7 Telephone: (702) 487-3100  
8 Facsimile: (702) 487-3101  
9 E-mail: Regina@MLVegas.com  
10 Attorney for Plaintiff, David Rose

7 DISTRICT COURT, FAMILY DIVISION  
8 CLARK COUNTY, NEVADA

9 DAVID ROSE,  
10 Plaintiff,  
11 vs.  
12 SARAH ROSE,  
13 Defendant.

CASE NO: D- 17 - 547250 - D  
DEPT NO: I

14 COMPLAINT FOR DIVORCE

15 COMES NOW the Plaintiff, DAVID ROSE, by and through his attorney of record, REGINA M.  
16 McCONNELL, ESQ. of McCONNELL LAW, LTD., and for his cause of action against Defendant, complains  
17 and alleges as follows:

19 I.

20 For more than six (6) weeks immediately preceding the commencement of this action, Plaintiff  
21 has been and now is a bona fide and actual resident and domiciliary of the State of Nevada, County of  
22 Clark, and has been actually present in the State and County for more than six (6) weeks prior to the  
23 commencement of this action.

25 II.

26 Plaintiff and Defendant were married on June 17, 2006 in Las Vegas, Nevada, and ever since have  
27 been and now are husband and wife.

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III.

There are three (3) minor children born the issue of this marriage, to wit: DAVID ROSE, born April 12, 2007; CARSON ROSE, born April 12, 2007; and LILY ROSE, born May 24, 2011; there were no minor children born before the parties' marriage; there were no children adopted during the parties' marriage and to the best of Plaintiff's knowledge, Defendant is not now pregnant.

IV.

The parties are fit and property persons to be awarded joint legal custody with Plaintiff being awarded primary physical custody of the minor children.

V.

That Plaintiff shall maintain medical insurance for the minor children. The parties shall equally divide the cost of any and all out-of-pocket expenses, including but not limited to the monthly premiums, deductibles, co-pays and/or prescriptions incurred thereby, and any and all reasonable medical expenses incurred on behalf of the minor children not covered by insurance pursuant to the 30/30 rule.

VI.

That the child support shall be set pursuant to NRS 125B.070, and shall be set at twenty nine percent (29%) of the Defendant's gross monthly income, subject to the presumptive maximum amount. This obligation shall be for the support and maintenance of the minor children, and shall continue until the children attain the age of eighteen (18), or if still enrolled in high school, when the children graduate from high school, reach the age of 19, or otherwise become emancipated, whichever occurs first.

VII.

That the parties shall equally split any and all costs for education and extracurricular activities for the minor children.

VIII.

That the Plaintiff shall be entitled to claim the minor children for any and all tax purposes.

IX.

That the parties be put on notice, pursuant to NRS 125B.140(1)(a), if an order issued by a court provides for the payment of support of a child, that order is a judgment by operation of law and may not be retroactively modified or adjusted.

X.

That notice is hereby given, pursuant to NRS 125B.145, the parties, and each of them, are hereby placed on notice that an order for support will be reviewed by the court at least every three (3) years to determine whether the order should be modified. The review will be conducted upon the filing of a request by (1) a parent or legal guardian of the child; or (2) the Nevada State Welfare Division or the District Attorney's Office, if the Division or the District Attorney has jurisdiction over the case.

XI.

That notice is hereby given that pursuant to NRS 125.007, the parties, and each of them, are hereby placed on notice that the wages and commissions of the parent responsible for paying support will be subject to assignment or withholding for the purpose of payment of the obligation of support as provided in NRS 31A.025 through 31A.240, inclusive, unless the parties demonstrate or the court finds good cause to postpone the withholding or assignment.

XII.

That pursuant to NRS 125C.0045(7), both parties are subject to the terms imposed by the HAGUE CONVENTION of October 25, 1980, adopted by the 14th Session of the Hague Conference on Private International Law, which apply if a parent abducts or wrongfully retains a child in a foreign country. The minor child's habitual residence is located in the United States of America, in accordance with NRS 125C.0045(8).

///

///

**XIII.**

That there is community property belonging to the parties to be adjudicated by the Court, the exact amounts and descriptions of which are unknown to Plaintiff at this time. Plaintiff prays leave of this Court to amend this Complaint to insert the same when they have become known to Plaintiff or at the time of trial.

**XIV.**

That there are community debts of the parties to be adjudicated by the Court, the exact amounts and descriptions of which are unknown to Plaintiff at this time. Plaintiff prays leave of this Court to amend this Complaint to insert the same when they have become known to Plaintiff or at the time of trial.

**XV.**

That both parties are able bodied and capable of providing for their own support and maintenance and neither party should be required to pay support to the other.

**XVI.**

Defendant shall be entitled to maintain her married name if she wishes, to wit: "ROSE."

**XVII.**

The parties shall be jointly restrained from incurring additional community debt or encumbering community property, in accordance with the terms of the Joint Preliminary Injunction issued herewith.

**XVIII.**

Each party shall be responsible for their own attorney's fees and costs.

**XIX.**

The tastes, mental dispositions, views and likes and dislikes of Plaintiff and Defendant have become so widely separated and divergent that the parties are incompatible to such an extent that it is impossible for them to live together as husband and wife; the incompatibility between Plaintiff and Defendant is so great that there is no possibility of reconciliation between them.

WHEREFORE, Plaintiff prays as judgment:

1. That the contract of marriage now and heretofore existing between Plaintiff and Defendant be dissolved and that Plaintiff be granted an absolute Decree of Divorce;

2. That the parties be awarded joint legal custody with Plaintiff being awarded primary physical custody of their minor children;

3. That the parties receive notice of the applicability of the above-referenced statutes relating to the custody and support and maintenance of the minor children;

4. That child support be set according to statute;

5. That the Plaintiff continue to maintain health insurance for the minor children so long as it is available from his employer with the parties equally splitting any and all uncovered expenses pursuant to the 30/30 rule;

6. That the Court make an equitable division of the community assets;

7. That the Court make an equitable division of community obligations;

8. That neither party be awarded spousal support;

9. That this Court issue its Joint Preliminary Injunction enjoining the parties pursuant to the terms stated therein;

10. That each party be responsible for their own attorney's fees and costs; and

11. That Plaintiff be awarded such other and further relief as the Court may deem just and proper in the premises.

DATED this 22<sup>nd</sup> day of February, 2017.

McCONNELL LAW, LTD.

LMM Council

REGINA M. McCONNELL, ESQ.  
Nevada State Bar No. 8029  
9017 S. Pecos Road, Suite 4445  
Henderson, Nevada 89074  
Telephone: (702) 487-3100  
*Attorney for Plaintiff*

VERIFICATION

I, DAVID ROSE, swear under penalty of perjury that the following statements are true and correct:

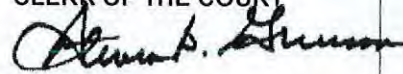
That I am the Plaintiff in the above-entitled action; that I have read the above and foregoing COMPLAINT FOR DIVORCE and know the contents thereof and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters, I believe them to be true.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 22 day of February, 2017

  
\_\_\_\_\_  
DAVID ROSE

**EXHIBIT “2”**



**THE COOLEY LAW FIRM**  
Shelly Booth Cooley  
Nevada State Bar No. 8992  
10161 Park Run Drive, Suite 150  
Las Vegas, Nevada 89145  
Telephone Number: (702) 265-4505  
Facsimile Number: (702) 645-9924  
E-mail: scooley@cooleylawlv.com  
Attorney for Defendant,  
SARAH ROSE

**DISTRICT COURT  
FAMILY DIVISION  
CLARK COUNTY, NEVADA**

DAVID ROSE,

Case No. D-17-547250-D  
Dept No. I

Plaintiff/Counterdefendant,

vs.

SARAH ROSE,

Defendant/Counterclaimant.

**ANSWER AND COUNTERCLAIM FOR DIVORCE**

Defendant/Counterclaimant, SARAH ROSE, by and through her attorney of record, Shelly Booth Cooley, and The Cooley Law Firm, hereby files her Answer and Counterclaim for Divorce as follows:

**ANSWER**

1. SARAH ROSE has made an effort to respond to each and every allegation. However, to the extent any allegation was not responded to, SARAH ROSE denies said allegations.

1           2.     SARAH ROSE admits the allegations contained in Paragraphs 1, 2, 3,  
2  
3     5, 13, 14, 16, 17, and 19 of the Complaint.

4           3.     SARAH ROSE denies the allegations contained in Paragraphs 6, 7, 8,  
5     15, and 18 of the Complaint.

6  
7           4.     In answering paragraph 4 of the Complaint, SARAH ROSE admits that  
8     the parties are fit and proper to be awarded joint legal custody of the minor children.  
9     As to the remaining allegations set forth in said paragraph, SARAH ROSE denies the  
10    same.

11  
12          5.     In answering paragraphs 9, 10, 11, and 12 of the Complaint, the  
13    allegations are statements of law; therefore, no answer is necessary. In the event that  
14    an answer is required, SARAH ROSE neither admits nor denies the allegations.

15  
16                   **COUNTERCLAIM FOR DIVORCE**

17  
18          SARAH ROSE, as and for a Counterclaim for Divorce against DAVID ROSE,  
19    alleges as follows:

20  
21                   **I.**

22          That SARAH ROSE, for a period of more than six (6) weeks immediately  
23    preceding the filing of this action, has been and now is an actual, bona fide resident  
24    of the State of Nevada, County of Clark, and has been actually physically present and  
25    domiciled in Nevada for more than six (6) weeks prior to the filing of this action.

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II.

That SARAH ROSE and DAVID ROSE were married on or about the 17<sup>th</sup> day of June, 2006, in the City of Las Vegas, County of Clark, State of Nevada, and ever since have been husband and wife.

III.

That there are three (3) minor children of this marriage: DAVID JAMES ROSE, date of birth: 04/12/2007; CARSON DAVID ROSE, date of birth: 04/12/2007; and, LILY PAIGE ROSE, date of birth: 05/24/2011. There are no minor children adopted by the parties, SARAH ROSE is not now pregnant, and the parties are not now Intended Parents.

IV.

The children's state of habitual residence is Nevada.

V.

That the parties should be awarded joint legal custody of the minor children.

VI.

That the parties should be awarded joint physical custody of the minor children.

VII.

That the Court should establish Orders for the support of the minor children pursuant NRS 125B.070, NRS 125B.080, Wright v. Osborn, 114 Nev. 1367 (1998), and Wesley v. Foster, 119 Nev. 110 (2003).

...

**VIII.**

That the minor children are entitled to the provision of medical insurance by DAVID ROSE, including psychological, psychiatric, dental and optical insurance, as well as hospitalization insurance; and SARAH ROSE and DAVID ROSE should equally bear all unreimbursed medical expenses, including vision, dental and orthodontic expenses, which are not covered by said insurance.

**IX.**

That there is community property to be adjudicated by the Court, the exact amounts and descriptions of which are presently unknown to SARAH ROSE. SARAH ROSE will seek leave of this Court to amend this Complaint for Divorce to provide this information when it becomes known to her or at the time of trial.

**X.**

That there is community debt to be adjudicated by the Court, the exact amount and description of which is presently unknown to SARAH ROSE. SARAH ROSE asks permission of this Court to amend this Complaint for Divorce to insert this information when it becomes known to her or at the time of trial.

**XI.**

That pursuant to NRS 125.150(1), Putterman v. Putterman, 113 Nev. 606, 939 P.2d 1047 (1997), and Lofgren v. Lofgren, 112 Nev. 1282, 926 P.2d 296 (1996), compelling circumstances exist which may support an unequal division of the community and jointly owned property and community debts of the parties. Such

1 compelling circumstances include, but are not limited to DAVID ROSE's  
2 waste/dissipation of community and jointly owned property and DAVID ROSE's  
3 incurring community debts for non-legitimate purposes.  
4

5 **XII.**

6  
7 That SARAH ROSE should be awarded spousal support.

8 **XIII.**

9 It has been necessary for SARAH ROSE to retain the services of attorneys to  
10 represent her in this divorce action and DAVID ROSE should be ordered to pay  
11 SARAH ROSE's attorneys' fees and costs incurred in this matter pursuant to Sargent  
12 v. Sargent, 88 Nev. 223, 495 P2d 6128 (1972).  
13  
14

15 **XIV.**

16 That SARAH ROSE should be permitted to either restore her maiden name:  
17 SARAH JANEEN WOODALL, and/or retain her married name: SARAH JANEEN  
18 ROSE.  
19

20 **XV.**

21 That since said marriage, the parties have become and are incompatible.  
22

23 WHEREFORE, SARAH ROSE prays for a Judgment as follows:  
24

- 25 1. That DAVID ROSE take nothing by virtue of his Complaint.
- 26 2. That the bonds of matrimony now and heretofore existing between the  
27 parties be dissolved, that SARAH ROSE be granted an absolute Decree  
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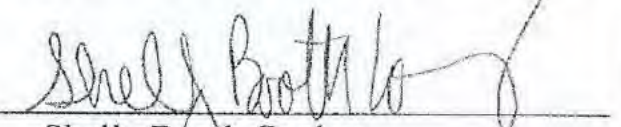
1 of Divorce, and that the parties hereto be released from all the  
2 obligations thereof and restored to the status of single persons;  
3

4 3. That the Court grant the relief requested in this Answer and  
5 Counterclaim; and  
6

7 4. For such other relief as the Court finds to be just and proper.

8 Dated this 8 day of September, 2017.  
9

10 THE COOLEY LAW FIRM

11  
12 By: 

13 Shelly Booth Cooley  
14 Nevada State Bar No. 8992  
15 10161 Park Run Drive, Suite 150  
16 Las Vegas, Nevada 89145  
17 Attorney for Defendant,  
18 SARAH ROSE  
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VERIFICATION

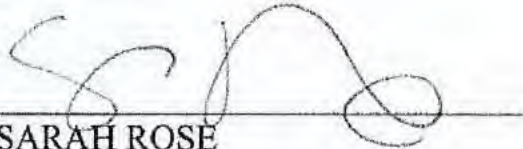
STATE OF NEVADA    )  
                                  ) ss:  
COUNTY OF CLARK    )

SARAH ROSE, being first duly sworn, deposes and says:

That she is the Defendant in the above-entitled action; that she has read the foregoing COMPLAINT FOR DIVORCE and knows the contents thereof; that the same is true of her own knowledge, except for those matters therein stated on information and belief and, as to those matters, she believes them to be true.

I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045) that the foregoing is true and correct.

Executed this 31 day of August, 2017.

  
SARAH ROSE

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\_\_\_\_ **BY MAIL:** Pursuant to EDCR 7.26(a)(1), by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid to the last known address of each of the parties, at Las Vegas, Nevada.

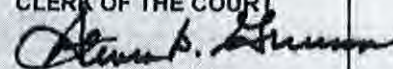
X **BY ELECTRONIC SERVICE:** Pursuant to EDCR 7.26(a)(4), via electronic transmission through the Court's electronic filing system.

**BY MAIL AND ELECTRONIC MEANS:** Pursuant to NRCP 5(b), by depositing a copy of the same in a sealed envelope in the United States Mail, Postage Pre-Paid to the last known address of each of the parties, at Las Vegas, Nevada and via electronic mail.

Regina M. McConnell  
McConnell Law Group  
9017 S. Pecos Road, Suite 4445  
Henderson, Nevada 89074  
Attorney for Plaintiff,  
DAVID ROSE

/s/ Shelly Booth Cooley  
An Employee of The Cooley Law Firm

**EXHIBIT “3”**



1 MOT

2 REGINA M. McCONNELL, ESQ.  
3 Nevada State Bar No. 8029  
4 McCONNELL LAW, LTD.  
5 9017 S. Pecos Road, Suite 4445  
6 Henderson, Nevada 89074  
7 Telephone: (702) 487-3100  
8 E-mail: Regina@MLVegas.com  
9 Attorney for Plaintiff, David Rose

10 DISTRICT COURT, FAMILY DIVISION  
11 CLARK COUNTY, NEVADA

12 DAVID ROSE,

13 Plaintiff,

14 vs.

15 SARAH ROSE,

16 Defendant.

CASE NO: D-17-547250-D

DEPT NO: I

Date of Hearing: 07/23/2018

Time of Hearing: 10:30 am

ORAL ARGUMENT REQUESTED: YES

17 MOTION TO SET ASIDE THE PARAGRAPH REGARDING SURVIVOR BENEFITS IN THE  
18 DECREE OF DIVORCE BASED UPON MISTAKE

19 NOTICE: YOU ARE REQUIRED TO FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE  
20 CLERK OF THE COURT AND TO PROVIDE THE UNDERSIGNED WITH A COPY OF YOUR RESPONSE  
21 WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN  
22 RESPONSE WITH THE CLERK OF THE COURT WITHIN TEN (10) DAYS OF YOUR RECEIPT OF THIS  
23 MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT  
24 HEARING PRIOR TO THE SCHEDULED HEARING DATE.

25 COMES NOW, Plaintiff, DAVID ROSE, by and through his attorney of record, REGINA M.  
26 McCONNELL, ESQ., of McCONNELL LAW, LTD., and hereby files this Motion to Set Aside the  
27 Paragraph Regarding Survivor Benefits in the Decree of Divorce Based Upon Mistake. Plaintiff seeks  
28 the following relief: 1) that the Court grants Plaintiff's motion in its entirety and order the survivor  
beneficiary language be removed from the Decree of Divorce based upon mistake; 2) that Plaintiff be  
awarded attorney's fees; and 3) any and all additional relief the Court deems necessary.

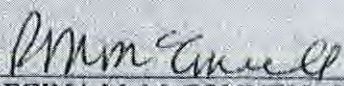
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1 This Motion is based on all pleadings, exhibits, points, and authorities, Affidavit of DAVID  
2 ROSE and any arguments at the time of said hearing.

3 DATED this 25<sup>th</sup> day of April, 2018.

4 McCONNELL LAW, LTD.

5  
6   
7 REGINA M. McCONNELL, ESQ.  
8 Nevada Bar No. 8029  
9 9017 S. Pecos Road, Suite 4445  
10 Henderson, Nevada 89074  
11 Attorneys for Plaintiff

12 NOTICE OF MOTION

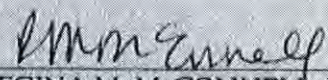
13 TO: SARAH ROSE, Defendant; and

14 TO: SHELLY BOOTH COOLEY, ESQ., her Attorney.

15 YOU WILL PLEASE TAKE NOTICE that the undersigned will bring the above and foregoing  
16 Motion on for hearing on the 23 day of July, 2018, at the hour of 10:30 o'clock a m. in  
17 Dept. I of the Family Court Division of District Court, which is located at 601 N. Pecos Road, Las  
18 Vegas, Nevada or as soon thereafter as Counsel may be heard.

19 DATED this 25<sup>th</sup> day of April, 2018.

20 McCONNELL LAW, LTD.

21   
22 REGINA M. McCONNELL, ESQ.  
23 Nevada Bar No. 8029  
24 9017 S. Pecos Road, Suite 4445  
25 Henderson, Nevada 89074  
26 Attorneys for Plaintiff  
27  
28

## MEMORANDUM OF POINTS AND AUTHORITIES

### I. STATEMENT OF FACTS

Plaintiff ("David") and Defendant ("Sarah") were ordered to attend mediation with an attorney settlement master on November 1, 2017 at the Case Management Conference. As a result, the parties attended mediation with Rhonda K. Forsberg on March 23, 2018 and the parties reached an agreement. At the outset of the mediation, when all parties were sitting together, Ms. Forsberg discussed how the process would work and the issues that would be addressed to try to get the case settled. The parties both actively participated in the mediation and it and the parties agreed that David's Nevada PERS pension would be divided per Gemma, that David would pay Sarah a lump sum payment from his share of the house proceeds as taxable alimony and they agreed upon child support arrears. Defendant's counsel began working on a Decree during the mediation but unfortunately, her computer ran out of battery. As such, a Memorandum of Understanding ("Memorandum") was drafted setting forth the full terms of the agreement. (See Memorandum of Understanding, Exhibit 1, attached to Plaintiff's Appendix of Exhibits.) The Memorandum, which was attached to the Decree, did not specify that Sarah would receive any survivor benefits from David's pension because David did not agree to any such term. Further, there was no agreement that David would be solely responsible for the children's healthcare premiums. After leaving the mediation, Sarah's counsel was able to get to a computer locally (near the mediator's office) so as to get the Decree finalized and signed. Unfortunately, upon a later reading of the Decree, it came to undersigned counsel's attention that Sarah had included an award of the PERS survivor benefit option, even though it was never agreed upon. To this end, the Decree has indicated that David will be responsible for providing insurance for the children, without giving him the benefit of the cost, which was not in the Memorandum. Further, the Decree states that David is awarded one-half of the community portion of his LVMPD pension pursuant to Gemma v Gemma and Fondi v Fondi and

1 based upon a selection of Option 2 being made at the time of retirement so as to name Sarah as the  
2 irrevocable survivor beneficiary. This was not included in the Memorandum because it was not  
3 agreed upon by the parties at the time of the mediation. Therefore, David requests that this  
4 paragraph be set aside as it was not agreed upon and it was mistakenly included and not noticed  
5 upon signing.

## 6 7 II. LEGAL ARGUMENT

### 8 A. THE DECREE MUST BE SET ASIDE BASED UPON MISTAKE BECAUSE THE PARTIES 9 DID NOT AGREE

10 As discussed above, the agreements that were made at the mediation were reflected in a fully  
11 signed and notarized Memorandum but were not correctly reflected in the Decree of Divorce. The  
12 Decree was signed by mistake according to NRCP 60 (b) which states in pertinent part as follows:

13 NRCP 60 (b) Mistakes; Inadvertence; Excusable Neglect; Newly  
14 Discovered Evidence; Fraud, Etc. On motion and upon such terms as are  
15 just, the court may relieve a party or a party's legal representative from a  
16 final judgment order, or proceeding for the following reasons: (1)  
17 mistake, inadvertence, surprise, or excusable neglect; (2) newly  
18 discovered evidence which by due diligence could not have been  
19 discovered in time to move for a new trial under Rule 59(b); (3) fraud  
20 (whether, heretofore denominated intrinsic or extrinsic),  
21 misrepresentation or other misconduct of an adverse party; (4) the  
22 judgment is void; or, (5) the judgment has been satisfied, released, or  
23 discharged, or a prior judgment upon which it is based has been reversed  
24 or otherwise vacated, or it is no longer equitable that an injunction should  
25 have prospective application. The motion shall be made within a  
26 reasonable time, and for reasons (1), (2), and (3) not more than 6 months  
27 after the proceeding was taken or the date that written notice of entry of  
28 the judgment or order was served. A motion under this subdivision (b)  
does not affect finality of a judgment or suspend its operation. This rule  
does not limit the power of a court to entertain an independent action to  
relieve a party from a judgment, order, or proceeding, or to set aside a  
judgement for fraud upon the court. Writs of coram nobis, coram vobis,  
audita querela, and bills of review and bills in the nature of a bill of  
review, are abolished, and the procedure for obtaining any relief from a  
judgment shall be by motion as prescribed in these rules or by an  
independent action. (Emphasis added).

1 As this court is aware, the Nevada Supreme Court in *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d  
2 380 (1992); which noted that the purpose of Rule 60 (b) was to redress any injustices that may have  
3 resulted because of excusable neglect or the wrongs of an opposing party, and should be liberally  
4 construed to do so, citing to *Nevada Indus. Dev. v. Benedetti*, 103 Nev. 360, 741 P.2d 802 (1987). *Lesley v.*  
5 *Lesley*, 113 Nev. 727, 941 P.2d 451 (1997), the Nevada court reiterated that under NRCP 60(b), the  
6 district court has "wide discretion in deciding whether to grant or deny a motion to set aside a  
7 judgment," but added that "this legal discretion cannot be sustained where there is no competent  
8 evidence to justify the court's action." The factors to be applied by the court in an NRCP 60(b)(1)  
9 motion are "whether the movant: (1) promptly applied to remove the judgment; (2) lacked intent to  
10 delay the proceedings; (3) demonstrated good faith; (4) lacked knowledge of procedural  
11 requirements; and (5) tendered a meritorious defense to the claim for relief." *Id.* at 732, citing to  
12 *Bauwens v. Evans*, 109 Nev. 537, 853 P.2d 121 (1993).

13  
14  
15 The Court announced that when it reviewed district court decisions on NRCP 60(b) motions, it  
16 also examined whether the case "should be tried on the merits for policy reasons," *Id.* at 734 citing to  
17 *Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992). The Court expanded on that holding, stating that:  
18 "This court has held that Nevada has a basic underlying policy that cases should be decided on the  
19 merits. . . .Our policy is heightened in cases involving domestic relations matters," *Id.* at 734 to citing  
20 *Hotel Last Frontier Corp. v. Frontier Properties, Inc.*, 79 Nev. 150, 380 P.2d 293 (1963), and *Price v. Dunn*,  
21 106 Nev. 100, 787 (1990).

22  
23 The Decree of Divorce that was entered by this Court warrants a set aside only as it relates to  
24 the particular portion regarding the award of David's survivor benefit to Sarah. As stated above, the  
25 terms of the parties' agreement at mediation were put in writing in the Memorandum and signed by  
26 the parties. Sarah knew that the parties did not agree that she was to receive his survivor benefits and  
27 she is only basing it on the fact that he had indicated that he wanted his children taken care of in the  
28

1 future - this does not translate into giving her any survivor benefits. In total disregard of what was  
2 agreed upon and set forth in the Memorandum, the Decree awarded Sarah David's survivor benefits.

3       Unfortunately, when reviewing the Decree, counsel inadvertently did not see that the option  
4 for survivor benefits was listed and awarded to Sarah. Further, David believed, and had no reason  
5 not to believe, that the Decree was going to mirror the Memorandum, since that is what the parties  
6 agreed to at the mediation. He would not have signed the Decree, had he realized the survivor  
7 benefits were now being awarded to Sarah. This is a "bait and switch" because the intent as set forth  
8 in the Memorandum was that there was no award of survivor benefits. However, that was stripped  
9 away during the drafting of the Decree; which sadly, and by mistake, David had missed. In Nevada,  
10 unless the parties specifically agree to an award of survivor benefits, it is not considered a part of the  
11 pension. In the case at hand, David did not specifically agree to the award of survivor benefits and it  
12 was mistakenly placed in the Decree in complete disregard to the terms agreed upon and set forth in  
13 the Memorandum.  
14

15  
16       David's request is certainly timely made to this court. David believed that the parties were still  
17 under the considerations of mediation, again, under the intent of waiving the survivor benefit option.  
18 It seems rather questionable that Defendant's attorney would disregard the agreements made, then  
19 enter into an agreement with the decisions dismissed.  
20

21 **B.     DAVID SHOULD BE AWARDED ATTORNEY'S FEES FOR HAVING TO BRING THIS**  
22 **MOTION**

23       David respectfully requests an award of attorney's fees for having to bring this motion. To  
24 this end, NRS 18.010 states in pertinent part:

25               2. In addition to the cases where an allowance is authorized by specific statute,  
26 the court may make an allowance of attorney's fees to a prevailing party:

27                     (a) When he has not recovered more than \$20,000; or  
28

1 (b) Without regard to the recovery sought, when the court find that the  
2 claim, counterclaim, cross-claim or third party complaint or defense of the  
3 opposing party was brought without reasonable ground or to harass the  
4 prevailing party.

5 Further, in *Halbrook v Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1998), the Nevada Supreme  
6 Court held that the power of the court to award attorney fees in divorce actions remain parts of the  
7 continuing jurisdiction of the court in appropriate post-judgment motions relating to support and  
8 child custody. Moreover, in *Love v Love*, 114 Nev. 572, 959 P.2d 523 (1998), the court reaffirmed NRS  
9 18.010(2)(b) and NRS 125.150(3), holding that the district court can award fees in a post-judgment  
10 motion in a divorce case, citing with approval *Leeming v Leeming*, 87 Nev. 530, 490 P.2d 342 (1971);  
11 *Korbel v Korbel*, 101 Nev. 140, 696 P.2d 993 (1985); *Fletcher v Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973).

12 Finally, David respectfully requests the Court award him attorney's fees and costs incurred in  
13 having to file this motion. Sarah knows that David did not agree to give her any survivor benefits to  
14 his pension and it was not included in the Memorandum, but she refused to agree to make the  
15 change. Under *Brunzell v Golden Gate National Bank*, 85 Nev. 345 (1969), the Court should take into  
16 consideration the following factors when determining an award of attorney's fees: (1) the qualities of  
17 the advocate, (2) the character and difficulty of the work performed; (3) the work actually performed  
18 by the attorney; and (4) the result obtained. The undersigned has been practicing law over fifteen  
19 years, with approximately 95% of her practice dedicated to all aspects of family law for over ten years.  
20 The character and difficulty of the work performed in this matter is moderate, with the main issues  
21 being Sarah's actions in including language in the Decree awarding her survivor benefits to David's  
22 pension when it was not agreed upon nor included in the Memorandum because it was not agreed  
23 upon between the parties. To date, the work performed on this matter includes researching the issue  
24 of survivor benefits when not agreed upon, trying to resolve the issue, reviewing e-mails, drafting the  
25 Motion and conversations with the client regarding the motion. Counsel will provide an Affidavit of  
26 Fees upon request by the Court, following the hearing.  
27  
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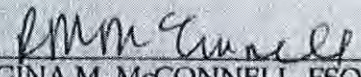
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III. CONCLUSION

WHEREFORE, based upon the foregoing, David requests that this Court grant his Motion in its entirety and order that the paragraph awarding Sarah any survivor benefits to David's pension be removed and that she not be awarded any benefits from his pension. Finally, David requests that he be awarded his attorney's fees in having to file this Motion.

DATED this 25<sup>th</sup> day of April, 2018.

McCONNELL LAW, LTD.

  
REGINA M. McCONNELL, ESQ.  
Nevada Bar No. 8029  
9017 S. Pecos Road, Suite 4445  
Henderson, Nevada 89074  
E-mail: Regina@MLVegas.com  
*Attorneys for Plaintiff*

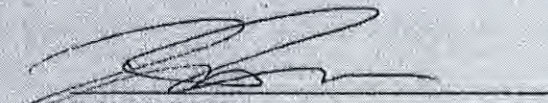
DECLARATION OF DAVID ROSE

I, DAVID ROSE, declare under penalty of perjury that the following statements are true and correct:

1. That I am the Plaintiff in the above-entitled matter.
2. That I have read the above and foregoing Motion and know the contents thereof and that the same is true of my own knowledge, except as to those matters therein stated on information and belief, and as to those matters, I believe them to be true.
3. That I attended mediation and the agreed upon terms were set forth in a Memorandum of Understanding.
4. That I never agreed to give Sarah any portion of my survivor benefits from my pension.

Pursuant to NRS 53.045, I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 25 day of April, 2018.

  
DAVID ROSE

MOFI

DISTRICT COURT  
FAMILY DIVISION  
CLARK COUNTY, NEVADA

DAVID ROSE  
Plaintiff/Petitioner

vs.

SARAH ROSE  
Defendant/Respondent

Case No. D-17-547250-D

Dept. I

**MOTION/OPPOSITION  
FEE INFORMATION SHEET**

**Notice:** Motions and Oppositions filed after entry of a final order issued pursuant to NRS 125, 125B or 125C are subject to the reopen filing fee of \$25, unless specifically excluded by NRS 19.0312. Additionally, Motions and Oppositions filed in cases initiated by joint petition may be subject to an additional filing fee of \$129 or \$57 in accordance with Senate Bill 388 of the 2015 Legislative Session.

**Step 1.** Select either the \$25 or \$0 filing fee in the box below.

- ☐ **\$25** The Motion/Opposition being filed with this form is subject to the \$25 reopen fee.  
-OR-  
☒ **\$0** The Motion/Opposition being filed with this form is not subject to the \$25 reopen fee because:  
☐ The Motion/Opposition is being filed before a Divorce/Custody Decree has been entered.  
☐ The Motion/Opposition is being filed solely to adjust the amount of child support established in a final order.  
☒ The Motion/Opposition is for reconsideration or for a new trial, and is being filed within 10 days after a final judgment or decree was entered. The final order was entered on 4/11/2018.  
☐ Other Excluded Motion (must specify) \_\_\_\_\_.

**Step 2.** Select the \$0, \$129 or \$57 filing fee in the box below.

- ☒ **\$0** The Motion/Opposition being filed with this form is not subject to the \$129 or the \$57 fee because:  
☒ The Motion/Opposition is being filed in a case that was not initiated by joint petition.  
☐ The party filing the Motion/Opposition previously paid a fee of \$129 or \$57.  
-OR-  
☐ **\$129** The Motion being filed with this form is subject to the \$129 fee because it is a motion to modify, adjust or enforce a final order.  
-OR-  
☐ **\$57** The Motion/Opposition being filed with this form is subject to the \$57 fee because it is an opposition to a motion to modify, adjust or enforce a final order, or it is a motion and the opposing party has already paid a fee of \$129.

**Step 3.** Add the filing fees from Step 1 and Step 2.

The total filing fee for the motion/opposition I am filing with this form is:

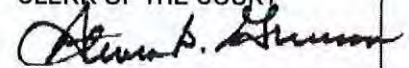
☒ **\$0** ☐ **\$25** ☐ **\$57** ☐ **\$82** ☐ **\$129** ☐ **\$154**

Party filing Motion/Opposition: Plaintiff Date April 25, 2018

Signature of Party or Preparer

mmcneel

**EXHIBIT “4”**



**MOT**  
RACHEAL H. MASTEL, ESQ.  
Nevada Bar No. 11646  
KAINEN LAW GROUP, PLLC  
3303 Novat Street, Suite 200  
Las Vegas, Nevada 89129  
(702) 823-4900  
(702) 823-4488 (Fax)  
Service@KainenLawGroup.com  
Attorneys for Defendant  
*in conjunction with the Legal Aid Center of Southern Nevada*

DISTRICT COURT  
CLARK COUNTY, NEVADA

DAVID ROSE,

Plaintiff,

vs.

SARAH ROSE,

Defendant.

CASE NO.  
DEPT NO.

D-17-547250-D  
I / Senior Judge  
Cynthia Diane Steele

Date of Hearing:  
Time of Hearing:

ORAL ARGUMENT REQUESTED?  
YES XX NO       

**NOTICE: PURSUANT TO EDCR 5.502(a) YOU MAY FILE A WRITTEN RESPONSE TO THIS MOTION WITH THE CLERK OF THE COURT AND PROVIDE THE UNDER-SIGNED WITH A COPY OF YOUR RESPONSE WITHIN FOURTEEN (14) DAYS OF YOUR RECEIPT OF THIS MOTION. FAILURE TO FILE A WRITTEN RESPONSE WITH THE CLERK OF THE COURT WITHIN FOURTEEN (14) DAYS OF YOUR RECEIPT OF THIS MOTION MAY RESULT IN THE REQUESTED RELIEF BEING GRANTED BY THE COURT WITHOUT HEARING PRIOR TO THE SCHEDULED HEARING DATE.**

**DEFENDANT'S MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c)**  
**OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

COMES NOW, Defendant, SARAH ROSE, by and through her attorney, RACHEAL H. MASTEL, ESQ., of the KAINEN LAW GROUP, PLLC, and moves this Honorable Court for a Judgment pursuant to NRCP 52(c) on Plaintiff's Motion to Set Aside the Decree and for attorney's fees related to this matter.

...

KAINEN LAW GROUP, PLLC  
3303 Novat Street, Suite 200  
Las Vegas, Nevada 89129  
702.823.4900 • Fax 702.823.4488  
www.KainenLawGroup.com

1 This *Motion* is made and based upon the Points and Authorities submitted  
2 herewith, the Affidavit of counsel submitted herewith and oral argument of counsel at the  
3 time of the hearing of this matter.

4 DATED this 12 day of February, 2021.

5 KAINEN LAW GROUP, PLLC

6 By: 

7 RACHEAL H. MASTEL, ESQ.

8 Nevada Bar No. 11646

9 3303 Novat Street, Suite 200

10 Las Vegas, Nevada 89129

11 Attorney for Defendant

12 I.

13 POINTS AND AUTHORITIES AND ARGUMENT

14 A. Procedural Background

15 Defendant, SARAH ROSE (hereinafter "Sarah"), and Plaintiff, DAVID  
16 ROSE (hereinafter "David"), were divorced by a Stipulated Decree of Divorce filed on  
17 April 11, 2018. Shortly thereafter, on April 25, 2018, David filed a Motion to Set Aside  
18 the Decree of Divorce, as it related to the survivor benefit option awarded to Sarah, on  
19 the basis of "mistake." David claimed that neither he nor his counsel at the time (Regina  
20 McConnell, Esq.) actually read the Decree before signing it and did not realize that the  
21 survivor benefit option had been included. A hearing was held on August 28, 2018, with  
22 Judge Kathy Hardcastle sitting for Judge Moss in Department I. Judge Hardcastle did not  
23 address the merits of David's Motion. Rather, Judge Hardcastle decided that she was  
24 unfamiliar with any law that allowed parties to dictate survivor benefits in a Decree prior  
25 to a party retiring and Ordered the provision struck on that basis. *See Order filed*  
26 *September 25, 2018.*

27 Sarah thereafter hired undersigned counsel who filed a Motion to Alter and  
28 Amend, as Judge Hardcastle's decision was based on a misunderstanding of the law.  
David opposed the Motion, and Judge Moss heard argument regarding the same on  
November 6, 2018. Sarah's request to have Judge Hardcastle's Order set aside was

1 **granted.** Sarah also alleged that David's Motion failed as a matter of law, because his  
2 choice not to read the Decree (if that was indeed the case) did not constitute a "mistake"  
3 pursuant to NRCP 60(b). The Court set an evidentiary hearing to determine the intent of  
4 the parties, why the survivorship option was included, and whether or not the same was  
5 void as a matter of law. **See Order filed January 16, 2019.**

6 Prior to any trial on this matter, David fired Ms. McConnell and retained  
7 Shelley Lubritz, Esq., to represent him. After retaining Ms. Lubritz, David filed a second  
8 Motion (on May 8, 2019), arguing that the Memorandum of Understanding (MOU),  
9 which was prepared *prior* to the Decree, was the only proper contract and that the Court  
10 should enforce that in lieu of the Decree itself.<sup>1</sup> Sarah opposed the same and the Court  
11 held a hearing on June 18, 2019, acknowledging that the new Motion raised the question  
12 as to whether there was a merger of the MOU into the Decree, or whether the Decree  
13 were a second contract, and what impact either of those would have on David's request  
14 to have the survivor benefit provision removed at the time of trial.

15 The first day of trial occurred on October 23, 2019. *See Transcript Re: All*  
16 *Pending Motions Volume I and II, filed concurrently herewith.* David put on his case in  
17 chief and rested (*Transcript Re: All Pending Motions*, VII: Pg 238 lines 11-12), but due  
18 to Ms. Lubritz renewing her Motion in Limine with regard to Sarah's first witness  
19 (Marshal Willick, Esq.) the Court recessed before Sarah was able to put on her case. The  
20 Court then conducted multiple settlement conferences. Because of those conferences and  
21 issues related to the pandemic (as well as the Administrative Orders of the Court related  
22 to the same), the second day of trial has not yet occurred.

23 **B. Facts**

24 The parties engaged in mediation with Judge Rhonda Forsberg in 2018 (prior  
25 to her appointment to the bench). At the time, Sarah was represented by Shelly Cooley,  
26 Esq. At the end of the mediation, the parties signed a MOU reflecting the general terms  
27

---

28 <sup>1</sup> The MOU does not mention survivor benefits.

1 of their agreement. The MOU specifically stated:

2 The memorandum addresses the material terms of the  
3 agreement, and is intended to bind the parties to those terms.  
4 *The parties agree, however, that counsel for Sarah shall draft  
a final formal agreement incorporating the terms herein.*

5 See "Exhibit "1."

6 Immediately after signing the MOU, Ms. Cooley attempted to draft the  
7 Decree, while the parties were still in the same room.<sup>2</sup> Unfortunately, Ms. Cooley's laptop  
8 battery died. As a result, the parties relocated to Bruce Shapiro, Esq.'s office to finish  
9 drafting the Decree.<sup>3</sup> All of the parties were present during the drafting process.<sup>4</sup> Once  
10 the Decree was drafted, a copy was printed for each party to review.<sup>5</sup>

11 It was David's testimony at trial that Ms. McConnell told him to sign it  
12 without reading it, and that she would review it after and make any changes necessary  
13 once it was signed. *Transcript Re: All Pending Motions*, VII: Page 185 lines 9 -20. Ms.  
14 McConnell's testimony did not concur. Specifically, Ms. McConnell testified:

15 Q: Did David have an opportunity to review [the Decree].

16 A: There was a copy for everyone at the end.

17 Q: Okay. And David signed it?

18 A: Yes.

19  
20 <sup>2</sup> The reason for the MOU (despite the fact that the parties intended to draft the Decree immediately)  
was due to the fact that Judge Forsberg needed to leave.

21 <sup>3</sup> **Testimony of Ms. McConnell** *Transcript Re: All Pending Motions*, VI: Pg 141 lines13-17, Pg 150  
22 line 17 - Pg 151 line 5, Page 154 lines 13-19;

**Testimony of Sarah** *Transcript Re: All Pending Motions*, VI: Pg 113 line 10 - Pg 114 line 19;

23 **Testimony of David** *Transcript Re: All Pending Motions*, VI: Pg 133 lines 3-13.

24 <sup>4</sup> **Testimony of Ms. McConnell** *Transcript Re: All Pending Motions*, VI: Pg 156 line 3 - Page 157 line  
25 4;

**Testimony of Sarah** *Transcript Re: All Pending Motions*, VI: Pg 117 line 1 - Pg 118 line 14, Pg 123  
26 line 18 - Pg 125 line 22;

**Testimony of David** *Transcript Re: All Pending Motions*, VII: Pg 181 lines 9 -23, Pg 183 line 16 - 21.

27 <sup>5</sup> **Testimony of Ms. McConnell** *Transcript Re: All Pending Motions*, VI: Pg 157 lines 5-9;

28 **Testimony of David** *Transcript Re: All Pending Motions*, VII: Pg 185 lines 7-10.

1 Q: You signed it?

2 A: Yes.

3 Q: You wouldn't have signed the decree unless you knew that David had read  
4 it and fully understood it, would you?

5 A: It -- I have all my clients review it, if they have any questions they ask me.  
6 So --

7 Q: Okay. And so to the best of your understanding, but you would not have  
8 signed it if you thought he hadn't reviewed it and understood it?

9 A: Well, I can really know if someone understands something.

10 Q: If he had told you he didn't understand something, would you have signed  
11 it?

12 *Transcript Re: All Pending Motions, VI, Pg 157 lines 8 - 24.*

13 Ms. McConnell's testimony is more credible. For one, she has an ethical  
14 obligation of Candor to the Court and is unlikely to risk her licence for a single client by  
15 perjuring herself. For another, Ms. McConnell is not a "greenhorn." She is well aware  
16 that signing a document means accepting the terms therein. It is inconceivable that she  
17 would direct a client to sign a document that they have not reviewed, or represent to them  
18 that the proper procedure would be to request changes *after* signing a document. In  
19 contrast, however, it is conceivable that a party would have buyer's remorse and change  
20 their mind after signing an agreement. That said, "buyer's remorse" is not a basis for  
21 setting aside a Decree. Nothing in David's case in chief credibly sets forth a mistake,  
22 inadvertence, surprise or excusable neglect.

23 With regard to a "mistake," there are two kinds of mistakes which may result  
24 in setting aside a Decree - unilateral or mutual. A unilateral mistake may be utilized to  
25 set aside a Decree:

26 Where a mistake of one party at the time a contract was made  
27 as to a basic assumption on which he made the contract has a  
28 material effect on the agreed exchange of performances that is  
adverse to him, the contract is voidable by him if he does not  
bear the risk of the mistake under the rule stated in § 154, and

1                   \* \* \*  
2                   \* \* \*

3                   (b) the other party had reason to know of the mistake or  
4                   his fault caused the mistake.

5                   *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-359,  
6                   741 P.2d 1355, 1356-1357 (1987), quoting *Restatement*  
7                   *(Second) of Contracts*, ss 153 (1981).

8                   Here, any mistake by David was clearly his risk. He was present and able to  
9                   be involved with the drafting of the Decree. In fact, he was standing in the doorway of  
10                  the office in which Ms. Cooley was drafting the Decree, while Ms. McConnell was  
11                  present with her, and able to also review the Decree. He was provided a copy and given  
12                  an opportunity to review the Decree. He created and bore the risk of a mistake by  
13                  choosing not to read the Decree before signing (if that is even true, rather than a  
14                  convenient excuse for his “buyer’s remorse”). Sarah, who was reviewing the Decree in  
15                  a separate room, had no reason to know that David would choose not to read, and she has  
16                  no fault in his choice. It is clear that David’s alleged “unilateral” mistake is not a basis  
17                  for setting aside the Decree.

18                  Further, there is no mutual mistake. A mutual mistake “occurs when both  
19                  parties, at the time of contracting, share a misconception about a vital fact upon which  
20                  they based their bargain.” *Anderson v. Sanchez*, 131 Nev. Ad. Op 51, 355 P.3d 16, 23  
21                  (2015). Sarah reviewed the Decree. Sarah was aware that the parties had negotiated after  
22                  mediation to include the survivor benefits, and Sarah was aware of the inclusion in the  
23                  Decree.<sup>6</sup> She was under no misconception of any vital fact. It is clear that there was no  
24                  mutual mistake.

25                  To set a Decree aside for inadvertence or neglect, the same must be  
26                  excusable. *Bryant v. Gibbs*, 69 Nev. 167, 243 P.2d 1050, 1051 (1952). Further, the  
27                  purpose of NRCP 60(b) “is to redress any injustices that may have resulted because of  
28                  excusable neglect or the wrongs of an opposing party.” *Nev. Indus. Development, Inc.*,

---

<sup>6</sup> It is still Sarah’s position that David was also aware, but for the purpose of this Motion, her point is that even if David were telling the truth, there is still no basis to set aside the Decree.

1 v. *Benedetti*, 103 Nev. 360, 741 P.2d 802, 805 (1987). There is no injustice where a  
2 party's choices are what resulted in the Decree.

3         There is no excusable inadvertence or neglect where a party chooses not to  
4 read a contract before signing the same, unless there has been a misrepresentation by the  
5 opposing party. *See Yee v. Weiss*, 110 Nev. 657, 877 P.2d 510, 513 (1994). Sarah made  
6 no representations to David as to what was in the Decree. It is obvious that the same  
7 would have necessarily included language which was not in the MOU because a one page  
8 MOU clearly does not set forth all of the minutiae of a Decree. Further, all of the  
9 testimony supported that David and Ms. McConnell were present during the drafting of  
10 the Decree - it was not handed to them without their prior input. There was no  
11 inadvertence or excusable neglect; nor can David claim surprise where he was present  
12 during the drafting and *chose* not to read the Decree before signing.

13         Although David did not specifically reference a claim of fraud in his initial  
14 Motion, he has made the allegation in other ways throughout the case, including filing a  
15 civil case for Conspiracy and fraud against Sarah, Ms. Cooley and Ms. McConnell. **See**  
16 **Exhibit "2."** David is not entitled to Set Aside the Decree for fraud, either.

17         The elements of fraud, which a Plaintiff must prove are: 1) a false  
18 representation made by the Defendant; 2) Defendant's knowledge or belief that the  
19 representation is false (or insufficient basis for making the representation); 3) Defendant's  
20 intention to induce the Plaintiff to act or to refrain from acting in reliance upon the  
21 misrepresentation; 4) Plaintiff's justifiable reliance upon the misrepresentation; and 5)  
22 Damage to the plaintiff resulting from such reliance. *Bulbman, Inc. v. Nevada Bell*, 108  
23 Nev. 105, 111, 825 P.2d 588, 592 (1992), quoting *Lubbe v. Barba*, 91 Nev. 596, 540 P.2d  
24 115 (1975).

25         Again, Sarah made no representations to David as to the contents of the  
26 Decree, true or false. Nor was David expected to rely on any representations. He was  
27 given a copy of the Decree *for his review*. He *chose* to sign the same, apparently without  
28 reviewing it. Sarah clearly had no intention of David "relying" on any misrepresentation.

1 Nor was any reliance by David justifiable when he failed to review the Decree when  
2 offered. The simple fact is that *David's* failure to read a document before he signed it  
3 constitutes neither valid mistake nor fraud on Sarah's part.

4 David is also making the argument that the Decree must be invalidated  
5 because it does not match the MOU, and the MOU is the only valid contract. David's  
6 contention relies on a fundamental misunderstanding of the law. Nevada Law is long  
7 standing and clear - in order to have the MOU survive as an independent contract, *both*  
8 the Decree and the MOU must direct survival. *Day v. Day*, 80 Nev. 386, 395 P.2d 321  
9 (1964), is exactly on point. Therein, the Court stated: "In the case before us, only the  
10 agreement directs survival; the decree does not. We now ... hold that the survival  
11 provision of an agreement is ineffective unless the court decree specifically directs  
12 survival." *Day v. Day*, 80 Nev. 386, 389, 395 P.2d 321, 322-323 (Nev. 1964).

13 This matter is exactly the same. The language of the MOU stated, "[t]hat  
14 agreement shall be ratified by the Court, but shall not merge and shall retain its separate  
15 nature as a contract."<sup>7</sup> **See Exhibit "1."** In contrast however, the Decree states the  
16 following:

17  
18 The Court FINDS that the parties' have resolved all other issues, including  
19 but no limited to, child support, division of assets and debts, marital waste  
20 claims, alimony and attorney's fees and costs as is memorialized by the  
Memorandum of Understanding, a copy of which is attached hereto as  
**Exhibit "B."**

21 *Stipulated Decree of Divorce, filed April 11, 2018, page 4, line 27 - page 5, line 4.*

22 There is no language directing the survival of the MOU. The MOU therefore  
23 *cannot* survive as an independent contract under Nevada Law, and cannot be held to be  
24 the enforceable agreement between the parties.

25 ...

26 \_\_\_\_\_  
27 <sup>7</sup> It seems clear, in the context of the paragraph that the surviving contract was intended to be the final  
28 formal agreement rather than the MOU, but ultimately the parties chose to make the Decree itself that  
final formal agreement.

1 That said, even if the Court were to find that the MOU is an independent  
2 contract not merged into the Decree, the same is still not enforceable over the Decree  
3 itself. Should the MOU and the Decree remain separate agreements they are at best  
4 preceding and superceding contracts.<sup>8</sup> Although the MOU is attached and referenced in  
5 the Decree, the Decree itself contains all of the provisions set forth in the MOU, *and*  
6 several specific provisions (not including those related to custody) which are *not* included  
7 in the MOU.

8 Parties are free to modify contracts and enter into new agreements. Where  
9 an existing contract is replaced by a subsequent agreement, the same operates as a  
10 novation and prior obligations are extinguished as a result. *See Williams v. Crusader*  
11 *Discount Corp.*, 75 Nev. 67, 334 P.2d 843 (1959).

12 For a novation to exist, there must have been an existing valid contract, the  
13 parties must agree to the new contract, the new contract extinguishes the old, and the new  
14 contract must be valid. *United Fire Ins. Co., v. McClelland*, 105 Nev. 504, 508, 780 P.2d  
15 193, 195 (1989). Whether a novation occurred is only a question of law “when the  
16 agreement and consent of the parties are unequivocal.” *Id.* It is “a question of fact if the  
17 evidence is such that reasonable persons can draw more than one conclusion. *Id.*

18 A settlement agreement is a contract. *May v. Anderson*, 121 Nev. 668, 672,  
19 119 P.3d 1254, 1257 (2005). The “contract” does not need to incorporate all of the terms,  
20 so long as reasonable certainty exists as to the underlying contract; it can be a formal or  
21 informal agreement, but the same must be signed. *Wiley v. Cook*, 94 Nev. 558, 563, 583  
22 P.2d 1076, 1079 (1978). There is no question, nor do the parties disagree, that the MOU  
23 was a contract. *However*, thereafter, the parties went to a different location and drafted  
24 a new contract. The new contract contained *all of the terms* included in the MOU, not just  
25 by reference, but by specific written inclusion in the Decree. The new contract *also*  
26

---

27 <sup>8</sup> See Restatement (Second) of Contracts ss 213(1) (1981), “A binding integrated agreement discharges  
28 prior agreements to the extent that it is inconsistent with them.”

1 included additional terms, not previously addressed by either the parenting agreement or  
2 the MOU. *See Stipulated Decree of Divorce, filed April 11, 2018; C.f. Exhibit "1."*

3 By virtue of incorporating the terms of the MOU into the Decree (as well as  
4 the language that a final formal agreement would be prepared and it would be that  
5 agreement which survived), it is apparent that the intention of the new agreement was to  
6 replace the old agreement.

7 Although specifically dealing with a loan, the *Williams* case provides clear  
8 guidance about the replacement of a contract. In that case, a husband and wife guaranteed  
9 a loan taken out by a company called Jamboree from the Defendant "Crusader." When  
10 the terms of the loan were unmet, Jamboree agreed to a second loan with Crusader,  
11 reducing the total amount owed, and extending the time for payment. The husband, but  
12 not the wife, signed a second guaranty. The second guaranty referenced the first. Despite  
13 that fact, the Court found that the second loan operated as a novation of the first, because  
14 it was between the same parties and it was clear from the terms that it was intended as a  
15 substitution. *Williams*, 75 Nev. at 68-70.

16 It is apparent from the terms in this matter, given the incorporation of all  
17 terms of the MOU and the inclusion of *several* additional terms, that it was the intention  
18 that the Decree would replace, or subsume the MOU. Further evidence is the language  
19 included in the Decree at Page 38 line 21 - Page 39 line 2 of the Stipulated Decree, which  
20 is a clear merger clause.<sup>9</sup> It is also worth noting, that there is no other agreement which  
21 mentions the survivorship benefits.<sup>10</sup>

22 \_\_\_\_\_  
23 <sup>9</sup> "IT IS STIPULATED AND THEREFORE ORDERED, ADJUDGED AND DECREED...DAVID  
24 JOHN ROSE and SARAH JANEEN ROSE further expressly agree that this Decree of Divorce contains  
25 the entire agreement of the parties on these matters, superseding any previous agreement between them.  
26 No other agreement, statement, or promise made on or before the effective date of this Decree by or to  
either party or his or her agent or representative will be binding on the parties unless (a) made in writing  
and signed by both parties, or (b) contained in an order of a Court of competent jurisdiction.

27 <sup>10</sup> *Testimony of Ms. McConnell Transcript Re: All Pending Motions*, VI: Pg 140 line 22 - Pg 141 line  
2, Pg 165 line 8 - Pg 166 line 23;

28 *Testimony of Sarah Transcript Re: All Pending Motions*, VI: Pg 112 lines 8 - 11;



1 under Nevada law to find that there is either a (1) valid mistake, inadvertence, surprise  
2 or excusable neglect; or (2) fraud.

3 Therefore, Sarah requests that this court grant her Motion for a judgment  
4 pursuant to NRCP 52(c), or alternatively grant summary judgment on the matter, denying  
5 David's Motion *in toto* and affirming the Decree of Divorce. Sarah also requests  
6 permission from this Court to file a Motion pursuant to NRCP 54.

7 DATED this 12 day of February, 2021.

8 KAINEN LAW GROUP, PLLC

9  
10 By: 

11 RACHEAL H. MASTEL, ESQ.  
12 Nevada Bar No. 11646  
13 3303 Novat Street, Suite 200  
14 Las Vegas, Nevada 89129  
15 Attorney for Defendant  
16  
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**AFFIDAVIT OF RACHEAL MASTEL, ESQ., IN SUPPORT DEFENDANT'S  
MOTION FOR JUDGMENT PURSUANT TO NRCP 52(c)  
OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

STATE OF NEVADA }  
COUNTY OF CLARK } ss:

RACHEAL MASTEL, ESQ., being first duly sworn, deposes and states that  
I am an attorney duly licensed to practice law in the State of Nevada, and in that capacity,  
I represent the Defendant, Sarah Rose, in the above-entitled action.

That I have read through the foregoing Motion and the facts contained  
therein are true to the best of my knowledge except as to those matters stated upon  
information and belief and as to those matters, I believe them to be true.

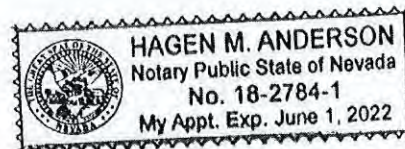
FURTHER AFFIANT SAYETH NAUGHT.

  
RACHEAL MASTEL, ESQ.

SUBSCRIBED and SWORN to before me  
by Racheal Mastel, Esq., this 12 day  
of February, 2021.



NOTARY PUBLIC in and for said  
County and State



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12 day of February, 2021, I caused to be served the *Defendant's Motion for Judgment Pursuant to NRCP 52(c) or in the Alternative for Summary Judgment* to all interested parties as follows:

\_\_\_ BY MAIL: Pursuant to NRCP 5(b), I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed as follows:

\_\_\_ BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S. Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully paid thereon, addressed as follows:

\_\_\_ BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to be transmitted, via facsimile, to the following number(s):

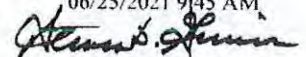
X BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I caused a true copy thereof to be served via electronic mail, via Wiznet, to the following e-mail address(es):

Shelley@lubritzlawoffice.com  
Daverose08@gmail.com



\_\_\_\_\_  
An Employee of  
KAINEN LAW GROUP, PLLC

**EXHIBIT “5”**

  
CLERK OF THE COURT

**ORDR**

CLARK COUNTY DISTRICT COURT, FAMILY DIVISION  
CLARK COUNTY, NEVADA

DAVID JOHN ROSE,

Plaintiff,

vs.

SARAH JANEEN ROSE,

Defendant

Case No.: D-17-547250-D  
Dept. No.: I

Date of Hearing: April 9, 2021  
Time of Hearing: 8:30 a.m.

**ORDER AFTER HEARING**  
**(APRIL 9, 2021)**

THIS MATTER having come on for hearing this 9<sup>th</sup> day of April, 2021, before the Honorable Sr. Judge Cynthia Dianne Steel, *Defendant's Motion for Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary Judgment and Countermotion for Attorney's Fees and Costs*; Plaintiff, David John Rose, present and represented by and through his attorney, Shelley Lubritz, Esq., of the Law Office of Shelley Lubritz, PLLC; Defendant, Sarah Janeen Rose, present and represented by and through her attorney, Racheal H. Mastel, Esq. of the Kainen Law Group, PLLC, and the Court having heard oral argument, having read the pleadings and papers on file herein, being fully advised in the premises and good cause appearing, makes the following Findings and Orders:

### RELEVANT PROCEDURAL HISTORY

02/22/17 Plaintiff files Complaint for Divorce

09/26/17 Defendant files Answer and Counterclaim

12/15/17 Plaintiff files Reply to Counterclaim

03/23/18 The parties met with their counsel and mediated a MEMORANDUM OF UNDERSTANDING granting each their "interest in his Nevada PERS pursuant to *Gemma v. Gemma*"; drafted and signed a Decree of Divorce; and submitted the proposed Decree of Divorce to the Court.

03/23/18 Plaintiff files Affidavit in Support of and Request for Summary Disposition of Decree of Divorce, wherein he states: "14. That the parties have entered into and executed an equitable agreement settling all issues regarding spousal support."

04/11/18 Stipulated Decree of Divorce and the Notice of Entry Decree filed. Page 21, lines 8-22 award Defendant ½ of Plaintiff's pension with LVMPD based on a selection of Option 2 reserving to Defendant the position of irrevocable survivor beneficiary of Plaintiff's pension benefits upon death. The MOU was attached as Exhibit to the Decree of Divorce.

1 04/25/18 Plaintiff files Motion to Set Aside the Paragraph Regarding Survivor  
2 Benefits in the Decree of Divorce Based upon Mistake. Plaintiff  
3  
4 claims:

- 5 1. His indication that "he wanted his children taken care of in  
6 the future" does not translate into giving Defendant any  
7 survivor benefits.
- 8 2. His attorney did not see that the option for survivor benefits  
9 was listed and awarded to Defendant during her review prior  
10 to signing the Decree.
- 11 3. David had reason to believe the Decree would Mirror the  
12 MOU.
- 13 4. Indicates it is Nevada law that parties must specifically  
14 agree to award survivor benefits, or it is not considered a  
15 part of the pension. (no citation given)

14 05/10/18 Defendant files Opposition to Motion to Set Aside the Paragraph  
15 Regarding Survivor Benefits in the Decree Based on Mistake...  
16  
17 Defendant Argues:

- 18 1. The Agreement complies with Rule 7.50 as it was signed by  
19 all parties and their respective counsel at the close of the  
20 mediated settlement.
- 21 2. The Decree provides that the Decree will supersede any  
22 prior agreement made between the parties. [Including the  
23 MOU].
- 24 3. The parties amply addressed the contingencies for an  
25 omitted asset from this Decree.
- 26 4. The Decree is a valid binding Contract enforceable by Court.
- 27 5. Plaintiff's counsel was actively participating in the drafting  
28 of the Decree, suggesting terms and wording.
6. Both counsel reviewed the drafted Decree prior to printing.

1 7. Plaintiff's counsel reviewed the Decree with Plaintiff prior  
2 to all parties and counsel signing the final draft of the  
3 Proposed Decree of Divorce.

4 08/28/18 Senior Judge Kathy Hardcastle, sitting for Judge Moss, entertained all  
5 pending motions and ordered the parties to REMOVE the Survivor  
6 Benefits language from the Decree of Divorce and submit the QDRO  
7 to PERS.  
8

9 09/25/18 Judge Hardcastle's Order to remove the survivor benefit language  
10 filed. Court found:  
11

- 12 1. The Decree granted the Benefits of the Pension be divided  
13 pursuant to Option 2
- 14 2. That the Survivor benefits are usually not provided when  
15 dividing a pension pursuant to QDRO
- 16 3. That PERS will tell parties what benefits Defendant is  
17 entitled to receive based on the time rule
- 18 4. The survivor benefits must be removed from the Decree
- 19 5. The parties should submit the QDRO to PERS for their  
20 determination of the benefits Defendant is entitled to.
- 21 6. The survivor benefits option is not selected until the person  
22 entitled to the PERS benefit retires.
- 23 7. There has never been a case that the Court is aware of where  
24 the court has forced a person to agree that years down the  
25 road that person is going to select the option dictated in the  
26 divorce decree filed years earlier.
- 27 8. That Defendant is entitled to a certain portion of Plaintiff's  
28 benefit under the time rule.

10/09/18 Motion to Alter and Amend the Findings and Judgement regarding the  
9/25/18 Order filed by Defendant or for the Court to set a trial on the

1 matter of survivor benefits awarded in the Decree of Divorce.

2  
3 Defendant argues:

- 4 1. Plaintiff admitted he and his attorney did not actually  
5 review the Decree  
6 2. That Judge Hardcastle, in her 9/25/18 Order, did not address  
7 the claim of Mistake claimed by Plaintiff.  
8 3. The survivor benefits are a community asset.  
9 4. The Court erred under the law by setting aside the Order that  
10 Husband select Option 2 upon divorce and grant wife the  
11 survivor benefits.  
12 5. Defendant is entitled to a new trial unless parties can agree  
13 to an award of survivor benefits. If Court determines that  
14 there was no mutual agreement or intent to include the  
15 survivor benefits in the Decree, then the Survivor benefits  
16 becomes an omitted asset.  
17 6. Plaintiff's Motion to Set Aside the Stipulated Decree of  
18 Divorce should have been denied by Judge Hardcastle. The  
19 Plaintiff cannot claim mistake where he failed to engage in  
20 his duty to read the Decree in full before signing the Decree.

21 10/24/18 Plaintiff's Opposition to Defendant's Motion to Alter or Amend  
22 Judgment or in the Alternative for New Trial Pursuant to 59(a)(7),  
23 argues:

- 24 1. The MOU did not specify that Defendant would receive any  
25 survivor benefits from Plaintiff's pension "because the  
26 parties did not agree to any such term."  
27 2. That the Order of Amendment does not comport with the  
28 evidence.  
3. NRS 125.155(3) permits but does not require the court to  
order division of the retirement benefit.  
4. Defendant has not set forth valid reason to grant a new trial  
where there was no initial trial before the court. Failure to

1 include an item in the decree that was not agreed to by both  
2 parties is not an omitted asset; it is an item that remains in  
3 the control of the Plaintiff.

4 10/30/18 Defendant's Reply argues that:

- 5 1. Plaintiff had a duty to read the Decree before filing.
- 6 2. Plaintiff has not asked to set aside the order that he alone be  
7 responsible for health insurance which was also absent from  
8 the MOU.
- 9 3. Plaintiff is experiencing buyer's remorse.
- 10 4. Judge Hardcastle made no findings or orders regarding  
11 Plaintiff's claim of mistake or whether or not the set aside is  
12 appropriate under any portion of NRCP 60(b).

13 11/6/18 Hearing regarding pending motions to amend Judge Hardcastle's  
14 Order removing the language regarding survivor benefits from the  
15 decree of divorce.

16 06/16/19 Order filed from 11/6/18 hearing where Judge Moss:

- 17 1. Found that Judge Hardcastle's Order is insufficient and  
18 ordered that it be set aside;
- 19 2. Found that an Evidentiary Hearing is necessary and ordered  
20 that the request be granted;
- 21 3. Orders that the scope of the Evidentiary Hearing shall be:
  - 22 a. the intent of the parties,
  - 23 b. why the survivorship provision was included, and
  - 24 c. whether it would be void as a matter of law;
- 25 4. Plaintiff's original motion will be reheard and is pending as  
26 are the post-decree pleadings file by Defendant; and
- 27 5. That Defendant shall retain Marshal Willick, Esq. as her  
28 expert on the PERS matter, permitting Defendant to retain  
his own expert for rebuttal.

1 01/22/19 Defendant files Expert report in essence stating that the survivor  
2 benefit is a community asset. [Said Report stricken from the record,  
3 but not removed from the register of action by the clerk's office.]  
4  
5 05/08/19 Plaintiff's Motion to enforce the MOU filed. Since it was not merged  
6 it is not modifiable by the court and is binding on the parties. The  
7 Decree should be amended to reflect the agreement of the parties  
8  
9 05/22/19 Defendant's Opposition to Plaintiff's Motion to Enforce MOU filed.  
10 Defendant notes that Plaintiff's motion argues that only the terms in  
11 the MOU should have been included in the Decree. Were that so,  
12 several required items for a decree would have been absent from the  
13 Decree and the Decree would not have been approved and signed by  
14 the court.  
15  
16 06/02/19 Plaintiff's Reply to Opposition filed. Plaintiff notes that Defendant's  
17 Opposition contained no citation to case law or other legal authority  
18 therefore, the Court should rule in Plaintiff's favor. Plaintiff made  
19 repeat arguments found in other pleadings as well.  
20  
21 10/23/19 Evidentiary Hearing (Moss) Day One.  
22  
23 01/27/20 Evidentiary Hearing (Moss) Day Two.  
24  
25 03/10/20 Settlement Conference (Moss) Day One.  
26  
27  
28

1 03/27/20 Settlement Conference (Moss) Day Two.

2 08/13/20 Evidentiary Hearing (Moss) Day Three. [Vacated.]  
3  
4

5 **Questions pending:**  
6

7 **1. Whether the procedural peculiarities should be overlooked by the**  
8 **undersigned Senior Judge, where a previous Senior Judge made a decision**  
9 **which was reversed by the assigned District Court Judge, followed by the**  
10 **initiation of a trial hearing. The trial was not completed by the assigned**  
11 **District Judge prior to her retirement from the bench due in part to covid19**  
12 **restrictions. This case has languished in the system far too long. As a**  
13 **discretionary call, the undersigned will proceed to questions still pending in order**  
14 **to bring finality to the parties.**  
15  
16  
17

18 **2. Whether there was an agreement between the parties regarding the**  
19 **survivor benefits. Judge Moss granted a trial to make this determination. It has**  
20 **not yet been tried for a preponderance of the evidence to bring the answer to light**  
21

22 **3. Whether Nevada PERS Irrevocable survivor benefits are the property**  
23 **right of both spouses. Neither party has brought forth definitive statute or case**  
24 **law on this specific right. The analysis tends toward something of value, gained**  
25  
26  
27  
28

1 during the marriage which makes it community property. There has been no  
2 affidavit from the agency to determine the PERS position on the claim.  
3

4 **4. Whether these matters can be determined on a summary judgement**  
5 **motion once the trial is initiated, or in the alternative grant a new trial.** The  
6 current procedure pursuant to orders of the court is that a trial would be necessary  
7 to determine the intent of the parties. The trial commenced, there were  
8 continuances and covid19 interruptions. To invoke summary judgement prior to  
9 the court's decision on the merits of the parties' intent would not comply with the  
10 law of the case.  
11  
12

13  
14 **5. Whether the Court would enter a directed verdict on the information**  
15 **produced in the trial transcript.** The court expressed concern to make a decision  
16 on a transcript of a prior judge's unfinished trial. The undersigned did review the  
17 transcript provided on the record and determined it was not comfortable rendering  
18 a decision based solely on that transcript.  
19  
20

21 **6. Whether the MOU is a contract that survives the Decree of Divorce as**  
22 **it was not merged into the Decree of Divorce.** Under most circumstances the  
23 MOU will control where the Decree is silent on an issue. In this case, the Decree  
24 restated the terms in the MOU along with additional terms not addressed in the  
25 MOU. One term in the Decree stated that the Decree supersedes any other  
26  
27  
28

1 agreement of the parties. The MOU was an agreement that was signed prior to the  
2 stipulated Divorce Decree.  
3

4 **7. Whether the 3/23/18, MOU memorialize the parties' agreement as to**  
5 **a division of all community property assets and debts?** There appears to be at  
6 least two issues that were not mentioned in the MOU that were included in the  
7 Decree. One was the party responsible to pay the children's health insurance and  
8 the property designation of the irrevocable survivor benefit rights. The MOU did  
9 not list the survivor benefit asset as Plaintiff's separate property.  
10

11 **8. Whether the MOU binds the parties to its terms.** Under strict  
12 compliance regarding the formation, agreement, and signing of the MOU it is a  
13 binding contract. Attaching it to the Decree must also avoid any conflicting  
14 terminology in the subsequently signed agreement.  
15  
16  
17

18 **9. Whether Nevada Law allows (or requires) this Court to make a**  
19 **ruling on a dispute concerning the election of survivor benefits under the**  
20 **PERS retirement system: What is the proper ruling in this case.** The family  
21 bench must address all matters in dispute between divorcing spouses dealing with  
22 community property, and separate property. As the Plaintiff is asserting his  
23 separate property right to the survivor benefit, there is a property of value, earned  
24 during the marriage which has not been adjudicated, unless the court finds after  
25  
26  
27  
28

1 trial that the parties intended for the Plaintiff to maintain the survivor benefit as a  
2 trade-off for the lump sum, sum certain alimony. The court is allowed and even  
3 required to resolve the dispute. The proper ruling would naturally be determined at  
4 the close of the trial.  
5

6  
7 **10. If the provision related to survivor benefits contained in the 4/11/18**  
8 **Decree in this case is set aside, is Doan v. Wilkerson, 130 Nev. 449 (2014)**  
9 **applicable?** In the Doan case, the court found that all parties were aware of the  
10 Survivor Benefit pursuant to the evidence and pleadings on file at the time the  
11 parties entered into the decree and therefore denied the request to divide the asset  
12 several years later as an omitted asset. In the case at bar, the asset is addressed in  
13 the Decree, and the Plaintiff is requesting that the asset be removed from the  
14 Decree, having found the entry and motioned for its removal within the 6 months  
15 to request a review of the property and asset division.  
16

17  
18  
19 **THE COURT HEREBY NOTES** that the Defendant was awarded her  
20 community property interest in the Plaintiff's PERS pursuant to the timeline rule  
21 by the Stipulated Decree of Divorce as defined within Gemma v. Gemma, 105 Nev.  
22 458 (1989) and Fondi v. Fondi, 106 Nev. 856 (1990).  
23

24  
25 **THE COURT FURTHER NOTES** that the Defendant was also awarded a  
26 sum certain, lump-sum alimony award in the Stipulated Decree of Divorce.  
27

1       **THE COURT FURTHER NOTES** that the Stipulated Decree of Divorce  
2 also included the "Option 2" language, which granted the defendant the irrevocable  
3 survivor benefit of the Plaintiff's Nevada PERS.  
4

5       **THE COURT FURTHER NOTES** that all litigants have (6) six months to  
6 seek relief pursuant to NRCP 16(b) from a Decree of Divorce regarding property  
7 rights.  
8

9       **THE COURT FURTHER NOTES** that the Stipulated Decree of Divorce  
10 was filed on April 11, 2018 and was challenged by the Plaintiff (14) fourteen days  
11 later, on or about April 25, 2018, declaring grounds of mistake because he had not  
12 read the Stipulated Decree thoroughly.  
13  
14

15       **THE COURT FURTHER NOTES** that on or about 08/28/18, Senior Judge  
16 Kathy Hardcastle, covering the cases for Department I, made a ruling that the  
17 irrevocable Survivor Benefits, found within the terms of the Stipulated Decree of  
18 Divorce for the parties herein, to a Nevada PERS pension are not community  
19 property. Her decision granting Plaintiff's motion to set aside was filed on or  
20 about 09/25/18, making findings that were not presented or briefed on the nature of  
21 Survival Benefits as community or separate property. Her order did not address  
22 the grounds for the Plaintiff's request to set aside the Order, (Plaintiff's failure to  
23  
24  
25  
26  
27  
28

1 thoroughly read the Stipulated Decree prior to signing same rising to the level of a  
2 mistake).

3  
4 **THE COURT FURTHER NOTES** that the decision was not remanded to  
5 Sr. Judge Hardcastle for reconsideration or clarification, but rather the Defendant's  
6 Motion to Alter or Amend, or in the Alternative New Trial pursuant to NRCP 59  
7 (a)(7) and for Attorney Fees and Costs (Motion to Amend) filed on or about  
8 October 9, 2018, was heard by the assigned District Court Judge, Judge Cheryl  
9 Moss. This placed Judge Moss in the untenable position of sitting as an appellate  
10 court to affirm or reverse the decision made by Sr. Judge Hardcastle.  
11

12  
13 **THE COURT FURTHER NOTES** that at the hearing on November 16,  
14 2018, Judge Moss set the matter for evidentiary Non-Jury Trial. Pursuant to  
15 several delays and stipulations to continue the trial, the trial motions in limine  
16 began on or about October 23, 2019, regarding the intention of the parties  
17 regarding the Survivor Benefit, why Option 2 was included in the Stipulated  
18 Decree and whether the matter would be void as a matter of law. Judge Moss also  
19 set aside Judge Hardcastle's judgment.  
20  
21

22  
23 **THE COURT HEREBY FINDS** that in the March 23, 2018 Memorandum  
24 of Understanding, [hereinafter "MOU"] was declared to be its own independent  
25  
26  
27  
28

1 document, the parties settled on lump sum, sum certain alimony. There was no  
2 mention of or provision for additional alimony in the MOU.  
3

4 **THE COURT HEREBY FINDS** that there was no mention in the MOU of  
5 any discussion or controversy regarding the irrevocable survivor benefit.  
6

7 **THE COURT FURTHER FINDS** that Plaintiff has alleged factors for  
8 NRCP 60b to satisfy the requirements for the court to consider his request for relief,  
9 including:  
10

- 11 1. Prompt application to remove the judgment;
- 12 2. Lack of intent to delay the proceedings; and
- 13 3. A meritorious defense to the claim of relief.

14 **THE COURT FURTHER FINDS** that no documentation was submitted to  
15 the Court that the parties, or their counsel, renegotiated the terms of the MOU  
16 giving Defendant lump sum alimony and the irrevocable survivor benefits to  
17 Plaintiff's Nevada PERS [*aka* "Option 2"] between signing the MOU and signing  
18 the Decree of Divorce.  
19

20 **THE UNDERSIGNED COURT NOTES** that it was not provided with the  
21 benefit of a transcript or any video record evidencing that the parties made  
22 additional agreements other than those set forth in the MOU. The Court had no  
23 records or notes that show:  
24  
25

- 26 1. The discussion for inclusion or exclusion of Option 2 rights for  
27 irrevocable survivor benefit rights,

2. The agreement for the inclusion or exclusion of Option 2 rights for irrevocable survivor benefits, or
3. Any agreement that the lump sum, sum certain alimony would be supplemented by the PERS irrevocable survivor benefits in the future.

**THE COURT FURTHER FINDS** that in a Settlement Conference procedure, parties have an expectation that only agreed upon terms will be set forth in the final Decree of Divorce, along with statutorily required language such as residency, cause for the divorce, declaration of divorce, etc..

**THE COURT FURTHER FINDS** that these parties have a fiduciary duty to point out the inclusion or exclusion of material changes to the MOU in a stipulated decree of divorce.

**THE COURT FURTHER FINDS** that, according to the pleadings, the Stipulated Decree of Divorce could have been negotiated, prepared, signed and submitted to the Court all on the same day. It possible that the Option 2 language was mistakenly included in the Decree prepared by Defendant's counsel ["boiler plate" comes to mind] and/or overlooked by Plaintiff and Plaintiff's counsel, or both.

**THE COURT FURTHER FINDS** that according to the MOU, "David shall receive \$5,000 from the approximate \$54,868.45 in proceeds of the marital home and Sahara shall receive remainder. Of the remainder of the sale proceeds

1 \$22,434.22 shall be as and for lump-sum non-modifiable alimony. The parties  
2 agree that the alimony amount shall be tax deductible to David and taxed as  
3 income to Sarah.”  
4

5 **THE COURT FURTHER FINDS** that in this particular case, to grant the  
6 defendant the irrevocable survivor benefit from the Plaintiff's PERS could award  
7 additional spousal support as to the half of the reduction to the Defendant by way  
8 of decreasing future pension payments to the plaintiff during his lifetime on top of  
9 the lump sum, sum certain alimony bargained for in the MOU and, thereafter,  
10 included in the Stipulated Decree of Divorce.  
11  
12

13 **THE COURT FURTHER FINDS** that the rights for irrevocable survivor  
14 benefits to a Nevada PERS pension is an issue that needs to be decided as a matter  
15 of statute and case law.  
16  
17

18 **THE COURT FURTHER FINDS** that 100% of the Plaintiff's pension and  
19 benefits were obtained during the marriage of nearly 12 years.  
20

21 **THE COURT FURTHER FINDS** that the issue is muddled by the lack of  
22 evidence that the parties knew and intended that the rights be awarded to the  
23 Defendant in addition to the lump sum, sum certain alimony negotiated by the  
24 parties or, in the alternative, that the lump sum alimony included her community  
25 property right to the benefit.  
26  
27  
28

1       **THE COURT FURTHER FINDS** that if the Court's findings are amended  
2 to grant the Set Aside of survivor benefits from the decree, the district court must  
3 then address the benefit as an omitted asset. Either the parties negotiated a  
4 determination on the survivor benefit, or the Court must make one.  
5

6       **THE COURT FURTHER FINDS** that, procedurally, the district court  
7 ordered a trial to determine the intent of the parties, the summary judgement  
8 motion is not available to the Defendant as there is a question of fact which needs  
9 to be determined, and that the Court is under a duty to follow the order of the  
10 previous Court to proceed to trial.  
11

12       **THE COURT FURTHER FINDS** that the Court is not denying the  
13 Defendants' right to proceed to trial when it permits certification of this order.  
14

15       **THE COURT FURTHER FINDS** merit in Defendant's argument that the  
16 Survivor Benefit is community property, having been acquired during the marriage.  
17

18       **THE COURT FURTHER FINDS** that the failure to address the survivor  
19 benefit, now that it has been ordered removed from the Decree of Divorce by  
20 Judge Hardcastle, said order being set aside by Judge Moss, the asset must be  
21 considered an omitted asset, unless Plaintiff can show the Parties addressed the  
22 asset and intended the asset to be exchanged for lump sum, sum certain alimony  
23 through mutual agreement.  
24  
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**THE COURT FURTHER FINDS** that should this case proceed to trial, the prior testimony and evidence provided in previous trial days would be stricken and the trial would be heard *de novo*.

**THE COURT FURTHER FINDS** that the court is bound to comply with NRS 125.150(3) mandating equal division of Community Property, unless it finds a compelling reason to dispense with the property by other means. The compelling reason must be set forth in writing.

Therefore, good cause appearing,

**IT IS HEREBY ORDERED** that Defendant's Motion for Judgment pursuant to NRCF 52(C) or in the Alternative, Motion for Summary Judgment is hereby denied as there is a question of fact to be addressed.

**IT IS FURTHER ORDERED** that Option 2 Survivor Benefits should not have been entertained in the Decree absent the affirmative consent of both parties;

IT IS FURTHER ORDERED that once the April 9, 2021 order has been filed, the Court will certify this Order as a final Order if requested by either party.

**IT IS FURTHER ORDERED** that if this Order is Certified to the Supreme Court, the Court will stay any further proceedings or decisions regarding the issue of the irrevocable survivor benefits until further request by the parties and Order of the Court, or direction by the Supreme Court.

**IT IS FURTHER ORDERED** that failure to file and action with the Supreme Court within 21 days of the filing of this order will constitute grounds for a hearing to re-set the trial date. The matter will be set on Chambers calendar for review 21 days after the filing of a request to certify this order and the Order granting certification.

**IT IS FURTHER ORDERED** that at trial, if warranted, the court will determine:

1. Whether or not the Survivor Benefit has been determined in the Memorandum of Understanding to be the separate property of the plaintiff;
2. Whether the Survivor Benefit should be divided as community property as an omitted asset; and
3. If the Survivor Benefit is determined to be community property, whether the court will divide it by awarding the asset to the Defendant as the sole beneficiary, by denying the defendant an interest in the survivor benefit, or to order some alternative form of equitable relief.

**IT IS FURTHER ORDERED** that attorney's fees will be deferred.

DATED this       day of June, 2021.

Dated this 25th day of June, 2021

*Janet Bailey*  
DISTRICT COURT JUDGE  
FOR SENIOR JUDGE DIANNE STEEL

**A38 A75 BE6A B05F**  
**Sunny Bailey**  
**District Court Judge**

1 CSERV

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA  
4

5  
6 David Rose, Plaintiff

CASE NO: D-17-547250-D

7 vs.

DEPT. NO. Department I

8 Sarah Rose, Defendant.  
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Order was served via the court's electronic eFile system to all  
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/25/2021

15 Racheal Mastel

racheal@kainenlawgroup.com

16 Service KLG

service@kainenlawgroup.com

17 Kolin Niday

kolin@kainenlawgroup.com

18 David Rose

daverose08@gmail.com

19 Shelley Lubritz

shelley@lubritzlawoffice.com  
20  
21  
22  
23  
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28

## **EXHIBIT “6”**

*Steven D. Grierson*

1 **NEOJ**  
2 Shelley Lubritz, Esq.  
3 Nevada Bar No. 005410  
4 **LAW OFFICE OF SHELLEY LUBRITZ, PLLC**  
5 375 E. Warm Springs Road Suite 104  
6 Las Vegas, Nevada 89119  
7 Telephone: (702) 833-1300  
8 Facsimile: (702) 442-9400  
9 E-mail: [shelley@lubritzlawoffice.com](mailto:shelley@lubritzlawoffice.com)

**E-SERVED**

JUN 30 2021

7 *Attorney for Plaintiff*  
8 *David John Rose*

9 CLARK COUNTY DISTRICT COURT, FAMILY DIVISION

10 CLARK COUNTY, NEVADA

11  
12 DAVID JOHN ROSE,  
13 Plaintiff,

Case No.: D-17-547250-D  
Dept. No.: I

14 vs.

Hearing Date: April 9, 2021  
Hearing Time: 8:30 a.m.

15 SARAH JANEEN ROSE,  
16 Defendant

17 **NOTICE OF ENTRY OF**  
18 **ORDER AFTER HEARING (APRIL 9, 2021)**

19 TO: SARAH JANEEN ROSE, Defendant and

20 TO: RACHEAL MASTEL, ESQ., her attorney:

21  
22 . . .

23 . . .

24 . . .

25 . . .

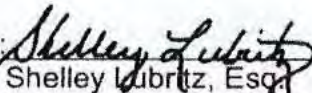
26 . . .

27 . . .

1 Please take notice that on June 25, 2021, an Order was filed in the above-entitled  
2 matter, a copy of which is attached hereto.

3 Dated this June 30, 2021.

4  
5 LAW OFFICE OF SHELLEY LUBRITZ,  
6 PLLC

7 By:   
8 Shelley Lubritz, Esq.  
9 Nevada Bar No. 5410  
10 375 E. Warm Springs Road Suite 104  
11 Las Vegas, Nevada 89119  
12 Attorney for Plaintiff  
13 David John Rose  
14  
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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30<sup>th</sup> day of June, 2021, I caused to be served the  
*Notice of Entry of Order after Hearing (April 9, 2021)* to all interested parties as follows:

\_\_\_\_ BY MAIL: Pursuant to NRCP S(b), I caused a true copy thereof to be placed  
in the U.S. Mail, enclosed in a sealed envelope, postage fully prepaid thereon, addressed  
as follows:

\_\_\_\_ BY CERTIFIED MAIL: I caused a true copy thereof to be placed in the U.S.  
Mail, enclosed in a sealed envelope, certified mail, return receipt requested, postage fully  
paid thereon, addressed as follows: his last known address

\_\_\_\_ BY FACSIMILE: Pursuant to EDCR 7.26, I caused a true copy thereof to  
be transmitted, via facsimile, to the following number(s):

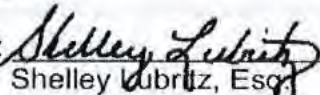
  X   BY ELECTRONIC MAIL: Pursuant to EDCR 7.26 and NEFCR Rule 9, I  
caused a true copy thereof to be served via electronic mail, via Wiznet, to the following  
e-mail address(es):

Attorney for Plaintiff

*Service@KainenLawGroup.com*

Dated this 30<sup>th</sup> day of June, 2021.

LAW OFFICE OF SHELLEY LUBRITZ,  
PLLC

By: 

Shelley Lubritz, Esq.  
Nevada Bar No. 5410

375 E. Warm Springs Road Suite 104  
Las Vegas, Nevada 89119

Attorney for Plaintiff  
*David John Rose*

1 **ORDR**

2  
3 CLARK COUNTY DISTRICT COURT, FAMILY DIVISION  
4 CLARK COUNTY, NEVADA

5  
6 DAVID JOHN ROSE,  
7 Plaintiff,

Case No.: D-17-547250-D  
Dept. No.: I

Date of Hearing: April 9, 2021  
Time of Hearing: 8:30 a.m.

8 vs.

9  
10 SARAH JANEEN ROSE,  
11 Defendant

12 **ORDER AFTER HEARING**  
13 **(APRIL 9, 2021)**

14 THIS MATTER having come on for hearing this 9<sup>th</sup> day of April, 2021,  
15 before the Honorable Sr. Judge Cynthia Dianne Steel, *Defendant's Motion for*  
16 *Judgment Pursuant to NRCP 52(C) or in the Alternative Motion for Summary*  
17 *Judgment and Countermotion for Attorney's Fees and Costs*; Plaintiff, David John  
18 Rose, present and represented by and through his attorney, Shelley Lubritz, Esq.,  
19 of the Law Office of Shelley Lubritz, PLLC; Defendant, Sarah Janeen Rose,  
20 present and represented by and through her attorney, Racheal H. Mastel, Esq. of  
21 the Kainen Law Group, PLLC, and the Court having heard oral argument, having  
22 read the pleadings and papers on file herein, being fully advised in the premises  
23 and good cause appearing, makes the following Findings and Orders:  
24  
25  
26  
27  
28

1  
2  
3                   **RELEVANT PROCEDURAL HISTORY**

4   02/22/17     Plaintiff files Complaint for Divorce

5   09/26/17     Defendant files Answer and Counterclaim

6  
7   12/15/17     Plaintiff files Reply to Counterclaim

8   03/23/18     The parties met with their counsel and mediated a MEMORANDUM  
9  
10               OF UNDERSTANDING granting each their "interest in his Nevada  
11               PERS pursuant to *Gemma v. Gemma*"; drafted and signed a Decree of  
12               Divorce; and submitted the proposed Decree of Divorce to the Court.

13  
14   03/23/18     Plaintiff files Affidavit in Support of and Request for Summary  
15               Disposition of Decree of Divorce, wherein he states: "14. That the  
16               parties have entered into and executed an equitable agreement settling  
17               all issues regarding spousal support."

18  
19   04/11/18     Stipulated Decree of Divorce and the Notice of Entry Decree filed.  
20  
21               Page 21, lines 8-22 award Defendant ½ of Plaintiff's pension with  
22               LVMPD based on a selection of Option 2 reserving to Defendant the  
23               position of irrevocable survivor beneficiary of Plaintiff's pension  
24               benefits upon death. The MOU was attached as Exhibit to the Decree  
25               of Divorce.  
26  
27  
28

1 04/25/18 Plaintiff files Motion to Set Aside the Paragraph Regarding Survivor  
2 Benefits in the Decree of Divorce Based upon Mistake. Plaintiff  
3  
4 claims:

- 5 1. His indication that "he wanted his children taken care of in  
6 the future" does not translate into giving Defendant any  
7 survivor benefits.
- 8 2. His attorney did not see that the option for survivor benefits  
9 was listed and awarded to Defendant during her review prior  
10 to signing the Decree.
- 11 3. David had reason to believe the Decree would Mirror the  
12 MOU.
- 13 4. Indicates it is Nevada law that parties must specifically  
agree to award survivor benefits, or it is not considered a  
part of the pension. (no citation given)

14 05/10/18 Defendant files Opposition to Motion to Set Aside the Paragraph  
15 Regarding Survivor Benefits in the Decree Based on Mistake....  
16  
17 Defendant Argues:

- 18 1. The Agreement complies with Rule 7.50 as it was signed by  
19 all parties and their respective counsel at the close of the  
20 mediated settlement.
- 21 2. The Decree provides that the Decree will supersede any  
22 prior agreement made between the parties. [Including the  
MOU].
- 23 3. The parties amply addressed the contingencies for an  
24 omitted asset from this Decree.
- 25 4. The Decree is a valid binding Contract enforceable by Court.
- 26 5. Plaintiff's counsel was actively participating in the drafting  
of the Decree, suggesting terms and wording.
- 27 6. Both counsel reviewed the drafted Decree prior to printing.

1 7. Plaintiff's counsel reviewed the Decree with Plaintiff prior  
2 to all parties and counsel signing the final draft of the  
3 Proposed Decree of Divorce.

4 08/28/18 Senior Judge Kathy Hardcastle, sitting for Judge Moss, entertained all  
5 pending motions and ordered the parties to REMOVE the Survivor  
6 Benefits language from the Decree of Divorce and submit the QDRO  
7 to PERS.  
8

9 09/25/18 Judge Hardcastle's Order to remove the survivor benefit language  
10 filed. Court found:  
11

- 12 1. The Decree granted the Benefits of the Pension be divided  
13 pursuant to Option 2
- 14 2. That the Survivor benefits are usually not provided when  
15 dividing a pension pursuant to QDRO
- 16 3. That PERS will tell parties what benefits Defendant is  
17 entitled to receive based on the time rule
- 18 4. The survivor benefits must be removed from the Decree
- 19 5. The parties should submit the QDRO to PERS for their  
20 determination of the benefits Defendant is entitled to.
- 21 6. The survivor benefits option is not selected until the person  
22 entitled to the PERS benefit retires.
- 23 7. There has never been a case that the Court is aware of where  
24 the court has forced a person to agree that years down the  
25 road that person is going to select the option dictated in the  
26 divorce decree filed years earlier.
- 27 8. That Defendant is entitled to a certain portion of Plaintiff's  
28 benefit under the time rule.

10/09/18 Motion to Alter and Amend the Findings and Judgement regarding the  
9/25/18 Order filed by Defendant or for the Court to set a trial on the

1 matter of survivor benefits awarded in the Decree of Divorce.

2  
3 Defendant argues:

- 4 1. Plaintiff admitted he and his attorney did not actually
- 5 review the Decree
- 6 2. That Judge Hardcastle, in her 9/25/18 Order, did not address
- 7 the claim of Mistake claimed by Plaintiff.
- 8 3. The survivor benefits are a community asset.
- 9 4. The Court erred under the law by setting aside the Order that
- 10 Husband select Option 2 upon divorce and grant wife the
- 11 survivor benefits.
- 12 5. Defendant is entitled to a new trial unless parties can agree
- 13 to an award of survivor benefits. If Court determines that
- 14 there was no mutual agreement or intent to include the
- 15 survivor benefits in the Decree, then the Survivor benefits
- 16 becomes an omitted asset.
- 17 6. Plaintiff's Motion to Set Aside the Stipulated Decree of
- 18 Divorce should have been denied by Judge Hardcastle. The
- 19 Plaintiff cannot claim mistake where he failed to engage in
- 20 his duty to read the Decree in full before signing the Decree.

17 10/24/18 Plaintiff's Opposition to Defendant's Motion to Alter or Amend  
18 Judgment or in the Alternative for New Trial Pursuant to 59(a)(7),  
19  
20 argues:

- 21 1. The MOU did not specify that Defendant would receive any
- 22 survivor benefits from Plaintiff's pension "because the
- 23 parties did not agree to any such term."
- 24 2. That the Order of Amendment does not comport with the
- 25 evidence.
- 26 3. NRS 125.155(3) permits but does not require the court to
- 27 order division of the retirement benefit.
- 28 4. Defendant has not set forth valid reason to grant a new trial
- where there was no initial trial before the court. Failure to

1 include an item in the decree that was not agreed to by both  
2 parties is not an omitted asset; it is an item that remains in  
3 the control of the Plaintiff.

4 10/30/18 Defendant's Reply argues that:

- 5 1. Plaintiff had a duty to read the Decree before filing.
- 6 2. Plaintiff has not asked to set aside the order that he alone be  
7 responsible for health insurance which was also absent from  
8 the MOU.
- 9 3. Plaintiff is experiencing buyer's remorse.
- 10 4. Judge Hardcastle made no findings or orders regarding  
11 Plaintiff's claim of mistake or whether or not the set aside is  
12 appropriate under any portion of NRCp 60(b).

13 11/6/18 Hearing regarding pending motions to amend Judge Hardcastle's  
14 Order removing the language regarding survivor benefits from the  
15 decree of divorce.

16 06/16/19 Order filed from 11/6/18 hearing where Judge Moss:

- 17 1. Found that Judge Hardcastle's Order is insufficient and  
18 ordered that it be set aside;
- 19 2. Found that an Evidentiary Hearing is necessary and ordered  
20 that the request be granted;
- 21 3. Orders that the scope of the Evidentiary Hearing shall be:
  - 22 a. the intent of the parties,
  - 23 b. why the survivorship provision was included, and
  - 24 c. whether it would be void as a matter of law;
- 25 4. Plaintiff's original motion will be reheard and is pending as  
26 are the post-decree pleadings file by Defendant; and
- 27 5. That Defendant shall retain Marshal Willick, Esq. as her  
28 expert on the PERS matter, permitting Defendant to retain  
his own expert for rebuttal.

1 01/22/19 Defendant files Expert report in essence stating that the survivor  
2 benefit is a community asset. [Said Report stricken from the record,  
3 but not removed from the register of action by the clerk's office.]  
4  
5 05/08/19 Plaintiff's Motion to enforce the MOU filed. Since it was not merged  
6 it is not modifiable by the court and is binding on the parties. The  
7 Decree should be amended to reflect the agreement of the parties  
8  
9 05/22/19 Defendant's Opposition to Plaintiff's Motion to Enforce MOU filed.  
10 Defendant notes that Plaintiff's motion argues that only the terms in  
11 the MOU should have been included in the Decree. Were that so,  
12 several required items for a decree would have been absent from the  
13 Decree and the Decree would not have been approved and signed by  
14 the court.  
15  
16 06/02/19 Plaintiff's Reply to Opposition filed. Plaintiff notes that Defendant's  
17 Opposition contained no citation to case law or other legal authority  
18 therefore, the Court should rule in Plaintiff's favor. Plaintiff made  
19 repeat arguments found in other pleadings as well.  
20  
21 10/23/19 Evidentiary Hearing (Moss) Day One.  
22  
23 01/27/20 Evidentiary Hearing (Moss) Day Two.  
24  
25 03/10/20 Settlement Conference (Moss) Day One.  
26  
27  
28

1 03/27/20 Settlement Conference (Moss) Day Two.

2 08/13/20 Evidentiary Hearing (Moss) Day Three. [Vacated.]  
3  
4

5 **Questions pending:**  
6

7 **1. Whether the procedural peculiarities should be overlooked by the**  
8 **undersigned Senior Judge, where a previous Senior Judge made a decision**  
9 **which was reversed by the assigned District Court Judge, followed by the**  
10 **initiation of a trial hearing. The trial was not completed by the assigned**  
11 **District Judge prior to her retirement from the bench due in part to covid19**  
12 **restrictions. This case has languished in the system far too long. As a**  
13 **discretionary call, the undersigned will proceed to questions still pending in order**  
14 **to bring finality to the parties.**  
15  
16

17 **2. Whether there was an agreement between the parties regarding the**  
18 **survivor benefits. Judge Moss granted a trial to make this determination. It has**  
19 **not yet been tried for a preponderance of the evidence to bring the answer to light**  
20  
21

22 **3. Whether Nevada PERS irrevocable survivor benefits are the property**  
23 **right of both spouses. Neither party has brought forth definitive statute or case**  
24 **law on this specific right. The analysis tends toward something of value, gained**  
25  
26  
27  
28

1 during the marriage which makes it community property. There has been no  
2 affidavit from the agency to determine the PERS position on the claim.  
3

4 **4. Whether these matters can be determined on a summary judgement**  
5 **motion once the trial is initiated, or in the alternative grant a new trial.** The  
6 current procedure pursuant to orders of the court is that a trial would be necessary  
7 to determine the intent of the parties. The trial commenced, there were  
8 continuances and covid19 interruptions. To invoke summary judgement prior to  
9 the court's decision on the merits of the parties' intent would not comply with the  
10 law of the case.  
11  
12

13 **5. Whether the Court would enter a directed verdict on the information**  
14 **produced in the trial transcript.** The court expressed concern to make a decision  
15 on a transcript of a prior judge's unfinished trial. The undersigned did review the  
16 transcript provided on the record and determined it was not comfortable rendering  
17 a decision based solely on that transcript.  
18  
19

20 **6. Whether the MOU is a contract that survives the Decree of Divorce as**  
21 **it was not merged into the Decree of Divorce.** Under most circumstances the  
22 MOU will control where the Decree is silent on an issue. In this case, the Decree  
23 restated the terms in the MOU along with additional terms not addressed in the  
24 MOU. One term in the Decree stated that the Decree supersedes any other  
25  
26  
27  
28

1 agreement of the parties. The MOU was an agreement that was signed prior to the  
2 stipulated Divorce Decree.  
3

4 **7. Whether the 3/23/18, MOU memorialize the parties' agreement as to**  
5 **a division of all community property assets and debts?** There appears to be at  
6 least two issues that were not mentioned in the MOU that were included in the  
7 Decree. One was the party responsible to pay the children's health insurance and  
8 the property designation of the irrevocable survivor benefit rights. The MOU did  
9 not list the survivor benefit asset as Plaintiff's separate property.  
10  
11

12 **8. Whether the MOU binds the parties to its terms.** Under strict  
13 compliance regarding the formation, agreement, and signing of the MOU it is a  
14 binding contract. Attaching it to the Decree must also avoid any conflicting  
15 terminology in the subsequently signed agreement.  
16  
17

18 **9. Whether Nevada Law allows (or requires) this Court to make a**  
19 **ruling on a dispute concerning the election of survivor benefits under the**  
20 **PERS retirement system: What is the proper ruling in this case.** The family  
21 bench must address all matters in dispute between divorcing spouses dealing with  
22 community property, and separate property. As the Plaintiff is asserting his  
23 separate property right to the survivor benefit, there is a property of value, earned  
24 during the marriage which has not been adjudicated, unless the court finds after  
25  
26  
27  
28

1 trial that the parties intended for the Plaintiff to maintain the survivor benefit as a  
2 trade-off for the lump sum, sum certain alimony. The court is allowed and even  
3 required to resolve the dispute. The proper ruling would naturally be determined at  
4 the close of the trial.  
5

6  
7 **10. If the provision related to survivor benefits contained in the 4/11/18**  
8 **Decree in this case is set aside, is Doan v. Wilkerson, 130 Nev. 449 (2014)**  
9 **applicable?** In the Doan case, the court found that all parties were aware of the  
10 Survivor Benefit pursuant to the evidence and pleadings on file at the time the  
11 parties entered into the decree and therefore denied the request to divide the asset  
12 several years later as an omitted asset. In the case at bar, the asset is addressed in  
13 the Decree, and the Plaintiff is requesting that the asset be removed from the  
14 Decree, having found the entry and motioned for its removal within the 6 months  
15 to request a review of the property and asset division.  
16  
17

18  
19 **THE COURT HEREBY NOTES** that the Defendant was awarded her  
20 community property interest in the Plaintiff's PERS pursuant to the timeline rule  
21 by the Stipulated Decree of Divorce as defined within Gemma v. Gemma, 105 Nev.  
22 458 (1989) and Fondi v. Fondi, 106 Nev. 856 (1990).  
23  
24

25 **THE COURT FURTHER NOTES** that the Defendant was also awarded a  
26 sum certain, lump-sum alimony award in the Stipulated Decree of Divorce.  
27  
28

1       **THE COURT FURTHER NOTES** that the Stipulated Decree of Divorce  
2 also included the "Option 2" language, which granted the defendant the irrevocable  
3 survivor benefit of the Plaintiff's Nevada PERS.  
4

5       **THE COURT FURTHER NOTES** that all litigants have (6) six months to  
6 seek relief pursuant to NRCF 16(b) from a Decree of Divorce regarding property  
7 rights.  
8

9       **THE COURT FURTHER NOTES** that the Stipulated Decree of Divorce  
10 was filed on April 11, 2018 and was challenged by the Plaintiff (14) fourteen days  
11 later, on or about April 25, 2018, declaring grounds of mistake because he had not  
12 read the Stipulated Decree thoroughly.  
13  
14

15       **THE COURT FURTHER NOTES** that on or about 08/28/18, Senior Judge  
16 Kathy Hardcastle, covering the cases for Department I, made a ruling that the  
17 irrevocable Survivor Benefits, found within the terms of the Stipulated Decree of  
18 Divorce for the parties herein, to a Nevada PERS pension are not community  
19 property. Her decision granting Plaintiff's motion to set aside was filed on or  
20 about 09/25/18, making findings that were not presented or briefed on the nature of  
21 Survival Benefits as community or separate property. Her order did not address  
22 the grounds for the Plaintiff's request to set aside the Order, (Plaintiff's failure to  
23  
24  
25  
26  
27  
28

1 thoroughly read the Stipulated Decree prior to signing same rising to the level of a  
2 mistake).

3  
4 **THE COURT FURTHER NOTES** that the decision was not remanded to  
5 Sr. Judge Hardcastle for reconsideration or clarification, but rather the Defendant's  
6 Motion to Alter or Amend, or in the Alternative New Trial pursuant to NRCP 59  
7 (a)(7) and for Attorney Fees and Costs (Motion to Amend) filed on or about  
8 October 9, 2018, was heard by the assigned District Court Judge, Judge Cheryl  
9 Moss. This placed Judge Moss in the untenable position of sitting as an appellate  
10 court to affirm or reverse the decision made by Sr. Judge Hardcastle.  
11

12  
13 **THE COURT FURTHER NOTES** that at the hearing on November 16,  
14 2018, Judge Moss set the matter for evidentiary Non-Jury Trial. Pursuant to  
15 several delays and stipulations to continue the trial, the trial motions in limine  
16 began on or about October 23, 2019, regarding the intention of the parties  
17 regarding the Survivor Benefit, why Option 2 was included in the Stipulated  
18 Decree and whether the matter would be void as a matter of law. Judge Moss also  
19 set aside Judge Hardcastle's judgment.  
20  
21

22  
23 **THE COURT HEREBY FINDS** that in the March 23, 2018 Memorandum  
24 of Understanding, [hereinafter "MOU"] was declared to be its own independent  
25  
26  
27  
28

1 document, the parties settled on lump sum, sum certain alimony. There was no  
2 mention of or provision for additional alimony in the MOU.  
3

4 **THE COURT HEREBY FINDS** that there was no mention in the MOU of  
5 any discussion or controversy regarding the irrevocable survivor benefit.  
6

7 **THE COURT FURTHER FINDS** that Plaintiff has alleged factors for  
8 NRCP 60b to satisfy the requirements for the court to consider his request for relief,  
9 including:  
10

- 11 1. Prompt application to remove the judgment;
- 12 2. Lack of intent to delay the proceedings; and
- 13 3. A meritorious defense to the claim of relief.

14 **THE COURT FURTHER FINDS** that no documentation was submitted to  
15 the Court that the parties, or their counsel, renegotiated the terms of the MOU  
16 giving Defendant lump sum alimony and the irrevocable survivor benefits to  
17 Plaintiff's Nevada PERS [aka "Option 2"] between signing the MOU and signing  
18 the Decree of Divorce.  
19

20 **THE UNDERSIGNED COURT NOTES** that it was not provided with the  
21 benefit of a transcript or any video record evidencing that the parties made  
22 additional agreements other than those set forth in the MOU. The Court had no  
23 records or notes that show:  
24

- 25 1. The discussion for inclusion or exclusion of Option 2 rights for  
26 irrevocable survivor benefit rights,  
27

2. The agreement for the inclusion or exclusion of Option 2 rights for irrevocable survivor benefits, or
3. Any agreement that the lump sum, sum certain alimony would be supplemented by the PERS irrevocable survivor benefits in the future.

**THE COURT FURTHER FINDS** that in a Settlement Conference procedure, parties have an expectation that only agreed upon terms will be set forth in the final Decree of Divorce, along with statutorily required language such as residency, cause for the divorce, declaration of divorce, etc..

**THE COURT FURTHER FINDS** that these parties have a fiduciary duty to point out the inclusion or exclusion of material changes to the MOU in a stipulated decree of divorce.

**THE COURT FURTHER FINDS** that, according to the pleadings, the Stipulated Decree of Divorce could have been negotiated, prepared, signed and submitted to the Court all on the same day. It possible that the Option 2 language was mistakenly included in the Decree prepared by Defendant's counsel ["boiler plate" comes to mind] and/or overlooked by Plaintiff and Plaintiff's counsel, or both.

**THE COURT FURTHER FINDS** that according to the MOU, "David shall receive \$5,000 from the approximate \$54,868.45 in proceeds of the marital home and Sahara shall receive remainder. Of the remainder of the sale proceeds

1 \$22,434.22 shall be as and for lump-sum non-modifiable alimony. The parties  
2 agree that the alimony amount shall be tax deductible to David and taxed as  
3 income to Sarah.”  
4

5 **THE COURT FURTHER FINDS** that in this particular case, to grant the  
6 defendant the irrevocable survivor benefit from the Plaintiff’s PERS could award  
7 additional spousal support as to the half of the reduction to the Defendant by way  
8 of decreasing future pension payments to the plaintiff during his lifetime on top of  
9 the lump sum, sum certain alimony bargained for in the MOU and, thereafter,  
10 included in the Stipulated Decree of Divorce.  
11  
12

13 **THE COURT FURTHER FINDS** that the rights for irrevocable survivor  
14 benefits to a Nevada PERS pension is an issue that needs to be decided as a matter  
15 of statute and case law.  
16  
17

18 **THE COURT FURTHER FINDS** that 100% of the Plaintiff’s pension and  
19 benefits were obtained during the marriage of nearly 12 years.  
20

21 **THE COURT FURTHER FINDS** that the issue is muddled by the lack of  
22 evidence that the parties knew and intended that the rights be awarded to the  
23 Defendant in addition to the lump sum, sum certain alimony negotiated by the  
24 parties or, in the alternative, that the lump sum alimony included her community  
25 property right to the benefit.  
26  
27  
28

1       **THE COURT FURTHER FINDS** that if the Court's findings are amended  
2 to grant the Set Aside of survivor benefits from the decree, the district court must  
3 then address the benefit as an omitted asset. Either the parties negotiated a  
4 determination on the survivor benefit, or the Court must make one.  
5

6       **THE COURT FURTHER FINDS** that, procedurally, the district court  
7 ordered a trial to determine the intent of the parties, the summary judgement  
8 motion is not available to the Defendant as there is a question of fact which needs  
9 to be determined, and that the Court is under a duty to follow the order of the  
10 previous Court to proceed to trial.  
11

12       **THE COURT FURTHER FINDS** that the Court is not denying the  
13 Defendants' right to proceed to trial when it permits certification of this order.  
14

15       **THE COURT FURTHER FINDS** merit in Defendant's argument that the  
16 Survivor Benefit is community property, having been acquired during the marriage.  
17

18       **THE COURT FURTHER FINDS** that the failure to address the survivor  
19 benefit, now that it has been ordered removed from the Decree of Divorce by  
20 Judge Hardcastle, said order being set aside by Judge Moss, the asset must be  
21 considered an omitted asset, unless Plaintiff can show the Parties addressed the  
22 asset and intended the asset to be exchanged for lump sum, sum certain alimony  
23 through mutual agreement.  
24  
25  
26  
27  
28

1       **THE COURT FURTHER FINDS** that should this case proceed to trial, the  
2 prior testimony and evidence provided in previous trial days would be stricken and  
3 the trial would be heard *de novo*.  
4

5       **THE COURT FURTHER FINDS** that the court is bound to comply with  
6 NRS 125.150(3) mandating equal division of Community Property, unless it finds  
7 a compelling reason to dispense with the property by other means. The compelling  
8 reason must be set forth in writing.  
9  
10

11       Therefore, good cause appearing,

12       **IT IS HEREBY ORDERED** that Defendant's Motion for Judgment  
13 pursuant to NRCp 52(C) or in the Alternative, Motion for Summary Judgment is  
14 hereby denied as there is a question of fact to be addressed.  
15

16       **IT IS FURTHER ORDERED** that Option 2 Survivor Benefits should not  
17 have been entertained in the Decree absent the affirmative consent of both parties;  
18

19       **IT IS FURTHER ORDERED** that once the April 9, 2021 order has been  
20 filed; the Court will certify this Order as a final Order if requested by either party,  
21

22       **IT IS FURTHER ORDERED** that if this Order is Certified to the Supreme  
23 Court, the Court will stay any further proceedings or decisions regarding the issue  
24 of the irrevocable survivor benefits until further request by the parties and Order of  
25 the Court, or direction by the Supreme Court.  
26  
27  
28

1       **IT IS FURTHER ORDERED** that failure to file and action with the  
2 Supreme Court within 21 days of the filing of this order will constitute grounds for  
3 a hearing to re-set the trial date. The matter will be set on Chambers calendar for  
4 review 21 days after the filing of a request to certify this order and the Order  
5 granting certification.  
6

7  
8       **IT IS FURTHER ORDERED** that at trial, if warranted, the court will  
9 determine:  
10

- 11           1. Whether or not the Survivor Benefit has been determined in the  
12           Memorandum of Understanding to be the separate property of the  
13           plaintiff;  
14           2. Whether the Survivor Benefit should be divided as community  
15           property as an omitted asset; and  
16           3. If the Survivor Benefit is determined to be community property,  
17           whether the court will divide it by awarding the asset to the  
18           Defendant as the sole beneficiary, by denying the defendant an  
19           interest in the survivor benefit, or to order some alternative form of  
20           equitable relief.

21       **IT IS FURTHER ORDERED** that attorney's fees will be deferred.  
22  
23 DATED this \_\_\_\_ day of June, 2021.

Dated this 25th day of June, 2021

24   
25 DISTRICT COURT JUDGE  
26 FOR SENIOR JUDGE DIANNE STEEL

27 A38 A75 BE6A B05F  
28 Sunny Bailey  
District Court Judge

1 CSERV

2 DISTRICT COURT  
3 CLARK COUNTY, NEVADA

4  
5  
6 David Rose, Plaintiff

CASE NO: D-17-547250-D

7 vs.

DEPT. NO. Department I

8 Sarah Rose, Defendant.  
9

10 **AUTOMATED CERTIFICATE OF SERVICE**

11 This automated certificate of service was generated by the Eighth Judicial District  
12 Court. The foregoing Order was served via the court's electronic eFile system to all  
13 recipients registered for e-Service on the above entitled case as listed below:

14 Service Date: 6/25/2021

15 Racheal Mastel

racheal@kainenlawgroup.com

16 Service KLG

service@kainenlawgroup.com

17 Kolin Niday

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18 David Rose

daverose08@gmail.com

19 Shelley Lubritz

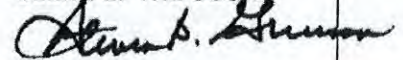
shelley@lubritzlawoffice.com  
20  
21  
22  
23  
24  
25  
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27  
28

**EXHIBIT “7”**

**E-SERVED**

JAN 31 2022

Electronically Filed  
1/31/2022 2:53 PM  
Steven D. Grierson  
CLERK OF THE COURT



1 **FFCL**

2 **DISTRICT COURT**  
3 **CLARK COUNTY, NEVADA**

4 **DAVID ROSE**  
5 **PLAINTIFF,**

6 **v.**

7 **SARAH ROSE**  
8 **DEFENDANT.**

**CASE NO. D-17-547250-D**  
**DEPT NO. 1**

**DATE OF HEARINGS:**  
**DAY 1: 09-23-2021**  
**DAY 2: 11-15-2021**

9 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

10 **DAVID JOHN ROSE, Plaintiff [hereinafter "DAVID"] v. SARA JANEEN**  
11 **ROSE, Defendant [hereinafter "SARAH"] appeared for trial before Senior Judge**  
12 **Cynthia Dianne Steel regarding David's Post Divorce Motion to Set Aside the**  
13 **Paragraph Regarding Survivor Benefits in the Stipulated Decree of Divorce Based**  
14 **upon Mistake. The parties were represented by SHELLY LUBRITZ, ESQ., LAW**  
15 **OFFICE OF SHELLY LUBRITZ, PLLC, for the Plaintiff and RACHEL H.**  
16 **MASTEL, ESQ., KAINEN LAW GROUP, PLLC, for the Defendant.**

17 **FINDINGS OF FACT**

18 **THE COURT HEREBY FINDS** the following findings of fact pursuant to  
19 the pleadings filed, the evidence entered into evidence and the testimony of  
20 witnesses presented at trial.

- 1 • On 03/23/21, at approximately 9:00 am, the parties enter into mediation  
2 regarding the possibility of finalizing the terms of the Divorce to avoid trial.
- 3 • The parties were in separate rooms during the mediation and relocated to  
4 the same room to sign the final MOU.
- 5 • At the close of the mediation, conducted by Rhonda Forsberg, Esq., the  
6 parties entered into a Memorandum of Understanding signed by the parties  
7 and their prior respective counsel, REGINA M. McCONNELL, ESQ., for  
8 David, and SHELLY BOOTH COOLEY, ESQ., for Sarah. The  
9 Memorandum of Understanding did not specifically address the division of  
10 the Survivor Benefits of David's employer.
- 11 • The Decree was reduced to writing partially during the mediation and the  
12 reminder following the close of mediation by Sarah's attorney.
- 13 • The Survivor Benefit was discussed during the mediation, however, David  
14 declined to award the Survivor Benefit to Sarah.
- 15 • Testimony at trial revealed that Sarah's attorney went over the divorce  
16 terms with her client prior to signing off on the Decree.
- 17 • Sarah's attorney then tendered the original to David's attorney to sign off.
- 18 • David's attorney needed more time to review the terms of the divorce and  
19 had David sign off on the proposed Decree of Divorce. She explained that  
20 it would save the time to have him come to her office later to sign the

1 decree should she find that the Decree reflected the terms agreed to in the  
2 Memorandum of Understanding, after which, she too signed the Proposed  
3 Decree of Divorce and tendered a copy of the original Proposed Decree to  
4 Sarah's counsel.

- 5 • The attorneys agreed that David's attorney would hold the original  
6 Proposed Decree of Divorce with the original signatures and would either  
7 forward the original to Sarah's attorney after review or file the Decree.
- 8 • There was no fall back plan should David's attorney request a correction to  
9 the proposed decree.
- 10 • Approximately 3 days after the 3/23/18 mediation, David's attorney  
11 contacted Sarah's attorney to report a mistake in the Decree. Testimony  
12 was unclear as to the number of contacts between counsel, however,  
13 Sarah's counsel indicated that further mediation would be necessary to  
14 remove Sarah as the Survivor Beneficiary.
- 15 • Sarah told David it would "cost him" if she re-signed the decree.
- 16 • Sarah's attorney did not file the original Stipulated Decree of Divorce, but  
17 tendered the copy in her possession for the Court's signature.
- 18 • Sarah's attorney relayed to David's attorney that the Survivor Beneficiary  
19 designation needed to be included in the Decree or risk the possibility of  
20 litigating an omitted asset later.

- 1       • Sarah's attorney ultimately changed the terms of the oral agreement  
2       between the attorneys to file the original Decree after an opportunity to  
3       review and instead gave David's attorney a deadline to respond to her  
4       messages or she would file the Decree in her possession.
- 5       • Ultimately, over the stated objection to one of the terms by David's  
6       attorney, Sarah's attorney filed the Decree, on 4/11/18 without further  
7       notice.
- 8       • On 4/25/18 David's Motion to Set Aside the Paragraph Regarding the  
9       Survivor Benefits in the Decree of Divorce upon Mistake was filed, without  
10      undue delay.
- 11      • After a number of motions, including an Order granting the relief by a  
12      Senior Judge and a subsequent Order Setting Aside said relief signed by the  
13      Judge of record, a trial was granted to determine the intent of the parties.  
14      The case was re-assigned to a Senior Judge for further proceedings upon the  
15      retirement of the Judge of record.
- 16      • In retrospect, the testimony of Marshal Willick, Esq., regarding the law on  
17      Survivor Benefits was not appropriate and the Court, sitting without a jury  
18      did not utilize his testimony or his report to decide the question before the  
19      court in this case.

## DISCUSSION

David argues that he never agreed to or intended for his Survivor Benefit to be awarded to Sarah. It was mentioned during the mediation, however the award was intentionally omitted from the Memorandum of Understanding. It is David's position that the Survivor/Death Benefit is not community property to be divided and that were it not addressed in the Decree of Divorce it would not rise to the level of an omitted asset.

David further argues that an agreement made pursuant to a Memorandum of Understanding, standing alone, would only be enforced as to the material terms of the agreement. The time-line division of his Pension in the MOU does not automatically include the division of his death benefit. He further argues that the benefit must be determined at the time of retirement and, if married, the employee's current spouse must agree to and sign off on the Option selected by the employee.

Fraud is alleged against Sarah for the inclusion of the benefit in the Decree which was never David's intent or the agreement of the parties, arguing that there was no meeting of the minds for this term to be included in the Decree.

David argues that a fiduciary duty is warranted during a settlement conference where all cards are to be laid on the table and that the subsequent addition of the Survivor Benefit Option 2 should have been brought to the

1 attention of himself and his attorney as it went above and beyond the stated  
2 terms of the MOU. Since both parties were represented, it stands to reason that  
3 the duty was not owed to one spouse or the other, but to the process.

4 Finally, the MOU was not to merge into the Decree of Divorce pursuant to  
5 a clear statement in the MOU and yet the proposed Decree included a contrary  
6 term merging the MOU into the Stipulated Decree of Divorce.

7 Both David and his prior counsel alleged that neither Sarah or her attorney,  
8 the drafter, brought the inclusion of the merger of the MOU or the award of  
9 David's Survivor Benefit Option 2 to their attention upon presentation of the  
10 Decree for signature. Sarah and her prior attorney believed David and David's  
11 attorney knew of the inclusion of the Survivor Benefit because David's  
12 attorney was able to see the computer screen during the time the document was  
13 being prepared.

14 Credible testimony established that Sarah's attorney began drafting the  
15 decree during the negotiations, while the parties were negotiating from  
16 separate rooms, and finished the Decree terms after the MOU was signed.  
17 Testimony also established that David's attorney was observing the preparation  
18 of the Decree after the MOU was signed. Sarah expressed surprise when she  
19 read the Decree and discovered that David had relented and awarded her the  
20 Survivor Benefit after all.

1 Sarah argues that David should have reviewed the Decree prior to signing  
2 the document and that he was merely experiencing "buyer's remorse" when he  
3 filed his motion requesting that the Survivor Benefit be eliminated from the  
4 Decree. She also testified that the Survivor Benefit was not agreed to during  
5 the negotiations prior to signing off on the Memorandum of Understanding and  
6 that there were no further negotiations between herself and David to include  
7 the award of survivor benefits to her after the MOU was signed.

8 Sarah further argues that David should have insisted on time to review the  
9 Decree prior to signing and that his negligence to sign off before reading and  
10 reviewing the terms bound him to the terms once the Decree was signed by the  
11 Judge.

12 According to Sarah, no fiduciary duty attaches between spouses where they  
13 are on equal footing during a settlement/mediation effort.

#### 14 CONCLUSIONS OF LAW

15 *May v. Anderson*, 119 P. 3d1254 (2005) was cited by both parties as a basis  
16 that a Memorandum of Understanding is an enforceable contract. The *May*  
17 Court confirmed that once a settlement contract is formed, the parties having  
18 agreed to its material terms, it is enforceable. In addition, no term may be  
19 changed or added in the final drafting of the agreement. While defining the  
20 elements for the test of a contract, the court included a test which states that a

1 contract requires an offer and acceptance, the meeting of the minds of those to  
2 be bound by the contract and consideration.<sup>1</sup>

3 The MOU in the present case was formed when all parties agreed to the  
4 stated terms and signed off on the written agreement.<sup>2</sup> The MOU stated clearly  
5 that the terms of the agreement would not merge into the Decree. The MOU  
6 was silent as to any agreement to select Option 2 on David's Survivor  
7 Beneficiary designation by agreement of the parties in favor of Sarah. Sarah's  
8 attorney included both provisions in the proposed Stipulated Decree of Divorce  
9 without further agreement from David or his attorney.

10 No testimony was tendered that the parties subsequently agreed in further  
11 negotiations to merger of the terms of the MOU into the Decree or to the  
12 granting of David's Survivor Beneficiary to be designated to Sarah. There was  
13 no offsetting consideration amendment given in the final decree to show an  
14 amendment to the MOU contract. Using this test, the court finds no meeting of  
15 the minds to the additional terms incorporated into the proposed Decree  
16 independently by Sarah's Attorney as no meeting of the minds can be  
17 determined and no additional consideration identified.

18 As to the element of meeting of the minds, neither David nor Sarah testified  
19 that the agreement contained in the Decree had an affirmative agreement in the

20 <sup>1</sup> *Certified Fire Prot. Inc. v. Precision Constr.* 128 Nev. 371, 378, 283 P.3d 250, 255 (2012).

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1 MOU, and there were no further negotiations after the MOU pursuant to Sarah,  
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3 When David and his attorney made immediate steps to address the  
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6 where a trial could have been held for the benefit of the parties closer to 2018.

7 No one testified that the Survivor Beneficiary had been affirmatively agreed  
8 to by an offer, an acceptance, the meeting of the minds of those parties to be  
9 bound or consideration.<sup>3</sup> The Survivor Beneficiary term is a material term as it  
10 has significant financial implications either at the retirement of David, or his  
11 death while employed by his current employer. Those consequences were not  
12 addressed in the Decree.

13 Sarah cites *Yee v. Weiss*<sup>4</sup> to strengthen her argument that a signature on the  
14 Decree is final and therefore, David is bound to the Decree's terms absent his  
15 reading of the terms prior to signing the Decree. She argues that his remedy is  
16 to pursue a malpractice complaint against his prior attorney. It is the  
17 contention of Sarah that a signature is final unless there was a failure to act in  
18 good faith and in accordance with fair play.

19  
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1       The remedy is not financially calculable as it is unknown when David will  
2 retire, the cost to his pension for the invocation of the Survivor Benefit, Option  
3 2; who would pay for the benefit; or if David may die prior to his retirement  
4 with his current employer. There was no indication in testimony that any of  
5 those consequences were known at the time of signing the Decree.

6       David has alleged fraud against Sarah and her former attorney. In  
7 testimony Sarah responded differently than her former attorney as to whether  
8 further negotiations were entertained and agreed to after the MOU was signed.  
9 Sarah indicated there were no further negotiations, while her attorney stated  
10 there was. Sarah also denied that there was consideration for the additional  
11 term's inclusion.

12       Sarah's former attorney was the drafter of the proposed Decree. Placing the  
13 Survivor Benefit in the Decree of Divorce without the provision appearing in  
14 the MOU was a direct violation of the written negotiations within the MOU  
15 and should have been specifically addressed when the proposed Stipulated  
16 Decree of Divorce was presented to David's attorney. Without the disclosure,  
17 she surreptitiously inserted the Survivor Beneficiary and the merger terms into  
18 the Decree, informing only her client. She failed to discuss the inclusion of the  
19 Survivor Benefit term with David's prior attorney prior to the signing of the  
20 Decree.

1 The pivotal point of the signing of the decree was that the attorneys agreed  
2 to hold the signed Decree until David's attorney had a chance to review it.  
3 Once she reviewed it and discovered the inclusion of the Survivor Benefit, she  
4 immediately notified Sarah's attorney, who then wanted further negotiations or  
5 she would file the copy in her possession.

6 David's prior attorney was more credible in her testimony than Sarah's  
7 attorney. While Sarah's attorney testified that she filed the Decree with the  
8 original signatures, when pressed, she was not certain. David's attorney  
9 presented the original Decree in her possession during trial. Her retention of  
10 the Original Decree corroborates the agreement between counsel to wait to file  
11 the original once David's attorney had the opportunity to review it more fully,  
12 a condition subsequent. David's disagreement with awarding the Survivor  
13 Benefits and merger terms was timely addressed. Emails from Sarah's  
14 attorney to David's attorney not only corroborates the oral agreement that  
15 David's attorney was given time to review the Decree prior to the validation of  
16 the signatures on the original document, it reveals that she knew there was a  
17 conflict.

18 Notice of the failure to agree on the Decree should have voided David's  
19 signature. Instead, Sarah's attorney filed her copy of the Decree. The fact that  
20 she waited from March 23, 2018 until April 11, 2018 to file the Decree further

1 corroborates David's prior attorney's testimony that even though the Decree  
2 was signed by all, that she would be given an opportunity to fully review the  
3 Decree prior to filing in order to ensure that the Decree was accurate and in  
4 line with the MOU, and that the attorneys intended that the original be filed  
5 with the court. As acknowledged by Sarah, the signed MOU went from 3  
6 pages to 39 pages in the final hours of the meeting, warranting a review by  
7 David's attorney.

8 The fact that David and his attorney signed the Decree is uncontroverted,  
9 however, the circumstances brought to the attention of the court at trial shows  
10 that it was not valid unless his attorney reviewed and approved the Decree as  
11 written. The parties had negotiated the MOU and signed off between 9am and  
12 approximately 4pm. Ms. Forsberg, Esq., had to leave to catch a flight and  
13 afterward and the parties remained at her office to prepare the Decree. At  
14 some point it was necessary to travel to another location to finalize the terms  
15 and hopefully sign off on a final Decree. Due to the late hour and long day, the  
16 Attorneys agreed that the non-drafting attorney, David's attorney, would be  
17 given the opportunity to review the decree for accuracy prior to submitting the  
18 Decree for filing.

1       It is disingenuous to now declare that he is bound to his signature on the  
2       Decree, citing *Yee*,<sup>5</sup> where there was an oral agreement between the attorneys  
3       to give his attorney further time to review and submit the Decree. Both David  
4       and his attorney had the right to rely on the condition between the attorneys  
5       made subsequent to the signing of the Decree. The decision by Sarah's  
6       attorney to change the terms of the agreement smacks of unfair dealing and the  
7       failure to act in good faith.

8       If further negotiations were not possible, the parties should have notified the  
9       court to be assigned a trial date. Sarah's attorney could have filed a motion  
10      with the court to Approve the Stipulated Decree of Divorce as written. As it  
11      happened, Sarah's attorney filed her copy of the Stipulated Decree of Divorce  
12      without contacting David's attorney; the Court unwittingly signed off on  
13      contested provisions in the Decree; and thereby, the Court was denied the  
14      opportunity to hear the matter of the Survivor Benefit or the Merged MOU and  
15      to make a clear decision pursuant to testimony and evidence. Sarah is using  
16      the fact that the Court signed off on the Decree to claim that the Decree is final  
17      and binding, thereby superseding the agreements in the MOU.

18      The attorneys could have believed that the inclusion of the Survivor Benefit  
19      was necessary to the Decree, however, the nature of the Survivor Benefit has

---

20      <sup>5</sup> Id.

1 never been declared as community property in statute or by caselaw<sup>6</sup>, and  
2 therefore, a mistake as to the law.<sup>7</sup> *Holquin v. Holquin*,<sup>8</sup> though unpublished is  
3 persuasive that Nevada has not indicated or implied whether the Survivor  
4 Benefit is community property or not.

5 Sarah argues that the passage of Senate Bill 292<sup>9</sup> was addressing all benefits  
6 of the Public Employees Benefit Plan, including the Survivor Benefit or  
7 Benefit upon death. This court does not interpret the statute to read as  
8 portrayed by Sarah. The focus of the bill was to incorporate predictability in  
9 the Community Property rights of the Pension and the terms of the division at  
10 the time of filing the Decree of Divorce. No case law was presented at trial or  
11 in briefs to show that the Supreme Court had ever rendered a published opinion  
12 clearly indicating that the Survivor Benefit is indeed community property.

13 A court's ability to address Survivor Benefits at trial does not translate to a  
14 requirement that the Survivor Benefit designation must be included in the  
15 Decree. As a matter of caselaw, the Survivor Benefit can be considered and  
16 result in a court order after trial over the objection of the employee spouse only

17 <sup>6</sup> Upon noticing Sarah's attorney that the Survivor Benefit was not agreed to in the MOU, she opined to David's  
18 Attorney that the Survivor Benefit needed to be included in the Decree or risk an omitted asset, at which time  
negotiations broke down.

<sup>7</sup> *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-359, 741 P.2d 1355, 1356-1357 (1987)

<sup>8</sup> 491 P.3d 735 (Table)(Nev.2021).

19 <sup>9</sup> The Court makes the following disclaimer: The Court was an Assemblywoman during the 68<sup>th</sup> session of  
the Nevada Legislature in 1995, serving on the Judiciary Committee. This court was assigned to the  
subcommittee to further amend or approve legislation proposed in SB 292, which ultimately passed. There  
20 was no discourse regarding the Survivor Benefit, and if the Legislature had wanted to include it, it would  
have been clearly stated, not left for speculation or inference.

1 if (1) a compelling reason is found to do so, as well as (2) reducing the reason  
2 to writing in the Decree. This follows along with the court's ability to consider  
3 separate property of one spouse for the support of another spouse or child in  
4 certain circumstances utilizing the same requirements. As the Survivor Benefit  
5 has never been declared by statute or case law to be community property, its  
6 absence from the Decree would not have been an omitted asset.

7 A Court Order resulting from an affirmative agreement within the Decree  
8 is also enforceable, pursuant to caselaw. The parties may negotiate and agree  
9 at the time of the divorce to include the death benefit as part of negotiated  
10 terms within the Decree and once signed by the Court and filed in the Clerk's  
11 office it is enforceable. In this instance, testimony and the conduct of the  
12 parties betray Sarah's argument that an agreement was made regarding the  
13 Survivor Benefits and that the signatures were to be enforceable even if  
14 David's attorney discovered a mistake upon full review of the proposed  
15 Decree.

16 IT IS HEREBY ORDERED AND DECREED that the portion of the  
17 Stipulated Decree of Divorce, filed April 11, 2018, awarding the Survivor  
18 Benefit Option 2 selection by David to Sarah be set aside;  
19  
20

1 FURTHER ORDERED that the language be amended to delete the  
2 underlined portion of the following passage found on page 21 beginning at line  
3 17 of the Stipulated Decree of Divorce filed 4/11/2018:

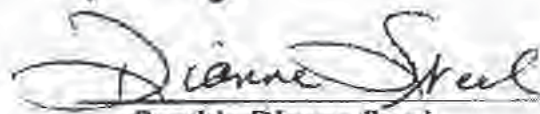
4 '("QDRO"), based upon a selection of Option 2 being made at the  
5 time of the retirement so as to name SARAH JANEEN ROSE as the  
6 irrevocable survivor beneficiary of DAVID JOHN ROSE'([s] *sic*)  
7 pension benefits upon death, to divide said retirement account.'

8 FURTHER ORDERED that the following underlined language be inserted  
9 and should read as follows:

10 '("QDRO") to divide said Pension between DAVID JOHN ROSE  
11 and SARAH JANEEN ROSE. The parties shall....'

12 FURTHER ORDERED that David is awarded his attorney fees in this  
13 matter upon filing a Memorandum of Fees and Costs for review by the Court  
14 pursuant to NRCP Rule 54.

15 SO ORDERED this 31<sup>st</sup> day of January, 2022.

16  
17   
18 Cynthia Dianne Steel,  
19 District Court Senior Judge  
20

1  
2  
3  
4 **CERTIFICATE OF SERVICE**

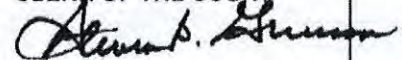
5 I hereby certify that on the above file stamp date, I E-Served pursuant to  
6 NEFCR 9, and/or mailed, via first-class mail, postage fully prepaid, the foregoing  
Decision and Order to:

7 Shelley Lubritz  
8 375 E Warm Springs Rd Ste 104  
9 Las Vegas, NV 89119  
10 Shelley@lubritzlawoffice.com

11 Racheal Mastel  
12 3303 Novat St Ste 200  
13 Las Vegas, NV 89129  
14 service@kainenlawgroup.com

15  
16  
17  
18  
19  
20  
Ruthanne Denning  
Ruthanne Denning  
Judicial Executive Assistant  
Department I

**EXHIBIT “8”**



1 NEO

2  
3 DISTRICT COURT  
4 CLARK COUNTY, NEVADA  
5 \*\*\*\*\*

E-SERVED  
JAN 31 2022

6 David Rose, Plaintiff  
7 vs.  
8 Sarah Rose, Defendant.  
9

CASE NO.: D-17-547250-D  
DEPT.: I

10 **NOTICE OF ENTRY OF ORDER**

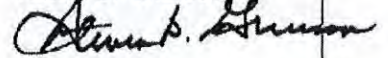
11 Please take note that a Findings of Fact, Conclusions of Law and  
12 Order was filed in this matter on January 31, 2022. A copy of the Order is  
13 attached hereto. I hereby certify that on the above filed stamped date:  
14

15 I E-Served pursuant to NEFCR 9, and/or, mailed, via first-class mail,  
16 postage fully prepaid, the foregoing Notice of Entry of Order to:  
17

18 Racheal H. Mastel  
19 3303 Novat St Ste 200  
20 Las Vegas, NV 89129  
21 service@kainenlawgroup.com

22 Shelley Lubritz  
23 375 E Warm Springs Rd Ste 104  
24 Las Vegas, NV 89119  
25 Shelley@lubritzlawoffice.com

26 Ruthie Denning  
27 Ruthie Denning  
28 Judicial Executive Assistant  
Department I



1 **FFCL**

2 **DISTRICT COURT**  
3 **CLARK COUNTY, NEVADA**

4 **DAVID ROSE**  
5 **PLAINTIFF,**

6 **v.**

7 **SARAH ROSE**  
8 **DEFENDANT.**

**CASE NO. D-17-547250-D**  
**DEPT NO. I**

**DATE OF HEARINGS:**  
**DAY 1: 09-23-2021**  
**DAY 2: 11-15-2021**

9 **FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

10 **DAVID JOHN ROSE, Plaintiff [hereinafter "DAVID"] v. SARA JANEEN**  
11 **ROSE, Defendant [hereinafter "SARAH"] appeared for trial before Senior Judge**  
12 **Cynthia Dianne Steel regarding David's Post Divorce Motion to Set Aside the**  
13 **Paragraph Regarding Survivor Benefits in the Stipulated Decree of Divorce Based**  
14 **upon Mistake. The parties were represented by SHELLY LUBRITZ, ESQ., LAW**  
15 **OFFICE OF SHELLY LUBRITZ, PLLC, for the Plaintiff and RACHEL H.**  
16 **MASTEL, ESQ., KAINEN LAW GROUP, PLLC, for the Defendant.**

17 **FINDINGS OF FACT**

18 **THE COURT HEREBY FINDS** the following findings of fact pursuant to  
19 the pleadings filed, the evidence entered into evidence and the testimony of  
20 witnesses presented at trial.

- 1 • On 03/23/21, at approximately 9:00 am, the parties enter into mediation  
2 regarding the possibility of finalizing the terms of the Divorce to avoid trial.
- 3 • The parties were in separate rooms during the mediation and relocated to  
4 the same room to sign the final MOU.
- 5 • At the close of the mediation, conducted by Rhonda Forsberg, Esq., the  
6 parties entered into a Memorandum of Understanding signed by the parties  
7 and their prior respective counsel, REGINA M. McCONNELL, ESQ., for  
8 David, and SHELLY BOOTH COOLEY, ESQ., for Sarah. The  
9 Memorandum of Understanding did not specifically address the division of  
10 the Survivor Benefits of David's employer.
- 11 • The Decree was reduced to writing partially during the mediation and the  
12 reminder following the close of mediation by Sarah's attorney.
- 13 • The Survivor Benefit was discussed during the mediation, however, David  
14 declined to award the Survivor Benefit to Sarah.
- 15 • Testimony at trial revealed that Sarah's attorney went over the divorce  
16 terms with her client prior to signing off on the Decree.
- 17 • Sarah's attorney then tendered the original to David's attorney to sign off.
- 18 • David's attorney needed more time to review the terms of the divorce and  
19 had David sign off on the proposed Decree of Divorce. She explained that  
20 it would save the time to have him come to her office later to sign the

1 decree should she find that the Decree reflected the terms agreed to in the  
2 Memorandum of Understanding, after which, she too signed the Proposed  
3 Decree of Divorce and tendered a copy of the original Proposed Decree to  
4 Sarah's counsel.

- 5 • The attorneys agreed that David's attorney would hold the original  
6 Proposed Decree of Divorce with the original signatures and would either  
7 forward the original to Sarah's attorney after review or file the Decree.
- 8 • There was no fall back plan should David's attorney request a correction to  
9 the proposed decree.
- 10 • Approximately 3 days after the 3/23/18 mediation, David's attorney  
11 contacted Sarah's attorney to report a mistake in the Decree. Testimony  
12 was unclear as to the number of contacts between counsel, however,  
13 Sarah's counsel indicated that further mediation would be necessary to  
14 remove Sarah as the Survivor Beneficiary.
- 15 • Sarah told David it would "cost him" if she re-signed the decree.
- 16 • Sarah's attorney did not file the original Stipulated Decree of Divorce, but  
17 tendered the copy in her possession for the Court's signature.
- 18 • Sarah's attorney relayed to David's attorney that the Survivor Beneficiary  
19 designation needed to be included in the Decree or risk the possibility of  
20 litigating an omitted asset later.

- 1 • Sarah's attorney ultimately changed the terms of the oral agreement  
2 between the attorneys to file the original Decree after an opportunity to  
3 review and instead gave David's attorney a deadline to respond to her  
4 messages or she would file the Decree in her possession.
- 5 • Ultimately, over the stated objection to one of the terms by David's  
6 attorney, Sarah's attorney filed the Decree, on 4/11/18 without further  
7 notice.
- 8 • On 4/25/18 David's Motion to Set Aside the Paragraph Regarding the  
9 Survivor Benefits in the Decree of Divorce upon Mistake was filed, without  
10 undue delay.
- 11 • After a number of motions, including an Order granting the relief by a  
12 Senior Judge and a subsequent Order Setting Aside said relief signed by the  
13 Judge of record, a trial was granted to determine the intent of the parties.  
14 The case was re-assigned to a Senior Judge for further proceedings upon the  
15 retirement of the Judge of record.
- 16 • In retrospect, the testimony of Marshal Willick, Esq., regarding the law on  
17 Survivor Benefits was not appropriate and the Court, sitting without a jury  
18 did not utilize his testimony or his report to decide the question before the  
19 court in this case.  
20

## DISCUSSION

David argues that he never agreed to or intended for his Survivor Benefit to be awarded to Sarah. It was mentioned during the mediation, however the award was intentionally omitted from the Memorandum of Understanding. It is David's position that the Survivor/Death Benefit is not community property to be divided and that were it not addressed in the Decree of Divorce it would not rise to the level of an omitted asset.

David further argues that an agreement made pursuant to a Memorandum of Understanding, standing alone, would only be enforced as to the material terms of the agreement. The time-line division of his Pension in the MOU does not automatically include the division of his death benefit. He further argues that the benefit must be determined at the time of retirement and, if married, the employee's current spouse must agree to and sign off on the Option selected by the employee.

Fraud is alleged against Sarah for the inclusion of the benefit in the Decree which was never David's intent or the agreement of the parties, arguing that there was no meeting of the minds for this term to be included in the Decree.

David argues that a fiduciary duty is warranted during a settlement conference where all cards are to be laid on the table and that the subsequent addition of the Survivor Benefit Option 2 should have been brought to the

1 attention of himself and his attorney as it went above and beyond the stated  
2 terms of the MOU. Since both parties were represented, it stands to reason that  
3 the duty was not owed to one spouse or the other, but to the process.

4 Finally, the MOU was not to merge into the Decree of Divorce pursuant to  
5 a clear statement in the MOU and yet the proposed Decree included a contrary  
6 term merging the MOU into the Stipulated Decree of Divorce.

7 Both David and his prior counsel alleged that neither Sarah or her attorney,  
8 the drafter, brought the inclusion of the merger of the MOU or the award of  
9 David's Survivor Benefit Option 2 to their attention upon presentation of the  
10 Decree for signature. Sarah and her prior attorney believed David and David's  
11 attorney knew of the inclusion of the Survivor Benefit because David's  
12 attorney was able to see the computer screen during the time the document was  
13 being prepared.

14 Credible testimony established that Sarah's attorney began drafting the  
15 decree during the negotiations, while the parties were negotiating from  
16 separate rooms, and finished the Decree terms after the MOU was signed.  
17 Testimony also established that David's attorney was observing the preparation  
18 of the Decree after the MOU was signed. Sarah expressed surprise when she  
19 read the Decree and discovered that David had relented and awarded her the  
20 Survivor Benefit after all.

1 Sarah argues that David should have reviewed the Decree prior to signing  
2 the document and that he was merely experiencing "buyer's remorse" when he  
3 filed his motion requesting that the Survivor Benefit be eliminated from the  
4 Decree. She also testified that the Survivor Benefit was not agreed to during  
5 the negotiations prior to signing off on the Memorandum of Understanding and  
6 that there were no further negotiations between herself and David to include  
7 the award of survivor benefits to her after the MOU was signed.

8 Sarah further argues that David should have insisted on time to review the  
9 Decree prior to signing and that his negligence to sign off before reading and  
10 reviewing the terms bound him to the terms once the Decree was signed by the  
11 Judge.

12 According to Sarah, no fiduciary duty attaches between spouses where they  
13 are on equal footing during a settlement/mediation effort.

#### 14 CONCLUSIONS OF LAW

15 *May v. Anderson*, 119 P. 3d1254 (2005) was cited by both parties as a basis  
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7 Beneficiary designation by agreement of the parties in favor of Sarah. Sarah's  
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9 without further agreement from David or his attorney.

10 No testimony was tendered that the parties subsequently agreed in further  
11 negotiations to merger of the terms of the MOU into the Decree or to the  
12 granting of David's Survivor Beneficiary to be designated to Sarah. There was  
13 no offsetting consideration amendment given in the final decree to show an  
14 amendment to the MOU contract. Using this test, the court finds no meeting of  
15 the minds to the additional terms incorporated into the proposed Decree  
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17 determined and no additional consideration identified.

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3 When David and his attorney made immediate steps to address the  
4 oversight they were met with a demand from Sarah's attorney to re-negotiate  
5 or the copy of the Decree would be filed. As a result, this case has lingered on  
6 where a trial could have been held for the benefit of the parties closer to 2018.

7 No one testified that the Survivor Beneficiary had been affirmatively agreed  
8 to by an offer, an acceptance, the meeting of the minds of those parties to be  
9 bound or consideration.<sup>3</sup> The Survivor Beneficiary term is a material term as it  
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11 death while employed by his current employer. Those consequences were not  
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13 Sarah cites *Yee v. Weiss*<sup>4</sup> to strengthen her argument that a signature on the  
14 Decree is final and therefore, David is bound to the Decree's terms absent his  
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16 to pursue a malpractice complaint against his prior attorney. It is the  
17 contention of Sarah that a signature is final unless there was a failure to act in  
18 good faith and in accordance with fair play.

19  
20 <sup>3</sup> See *May, id.*

<sup>4</sup> 110 Nev.657, 877 P.2d 510 (1994)

1       The remedy is not financially calculable as it is unknown when David will  
2 retire, the cost to his pension for the invocation of the Survivor Benefit, Option  
3 2; who would pay for the benefit; or if David may die prior to his retirement  
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5 those consequences were known at the time of signing the Decree.

6       David has alleged fraud against Sarah and her former attorney. In  
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9 Sarah indicated there were no further negotiations, while her attorney stated  
10 there was. Sarah also denied that there was consideration for the additional  
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12       Sarah's former attorney was the drafter of the proposed Decree. Placing the  
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18 the Decree, informing only her client. She failed to discuss the inclusion of the  
19 Survivor Benefit term with David's prior attorney prior to the signing of the  
20 Decree.

1       The pivotal point of the signing of the decree was that the attorneys agreed  
2 to hold the signed Decree until David's attorney had a chance to review it.  
3 Once she reviewed it and discovered the inclusion of the Survivor Benefit, she  
4 immediately notified Sarah's attorney, who then wanted further negotiations or  
5 she would file the copy in her possession.

6       David's prior attorney was more credible in her testimony than Sarah's  
7 attorney. While Sarah's attorney testified that she filed the Decree with the  
8 original signatures, when pressed, she was not certain. David's attorney  
9 presented the original Decree in her possession during trial. Her retention of  
10 the Original Decree corroborates the agreement between counsel to wait to file  
11 the original once David's attorney had the opportunity to review it more fully,  
12 a condition subsequent. David's disagreement with awarding the Survivor  
13 Benefits and merger terms was timely addressed. Emails from Sarah's  
14 attorney to David's attorney not only corroborates the oral agreement that  
15 David's attorney was given time to review the Decree prior to the validation of  
16 the signatures on the original document, it reveals that she knew there was a  
17 conflict.

18       Notice of the failure to agree on the Decree should have voided David's  
19 signature. Instead, Sarah's attorney filed her copy of the Decree. The fact that  
20 she waited from March 23, 2018 until April 11, 2018 to file the Decree further

1 corroborates David's prior attorney's testimony that even though the Decree  
2 was signed by all, that she would be given an opportunity to fully review the  
3 Decree prior to filing in order to ensure that the Decree was accurate and in  
4 line with the MOU, and that the attorneys intended that the original be filed  
5 with the court. As acknowledged by Sarah, the signed MOU went from 3  
6 pages to 39 pages in the final hours of the meeting, warranting a review by  
7 David's attorney.

8 The fact that David and his attorney signed the Decree is uncontroverted,  
9 however, the circumstances brought to the attention of the court at trial shows  
10 that it was not valid unless his attorney reviewed and approved the Decree as  
11 written. The parties had negotiated the MOU and signed off between 9am and  
12 approximately 4pm. Ms. Forsberg, Esq., had to leave to catch a flight and  
13 afterward and the parties remained at her office to prepare the Decree. At  
14 some point it was necessary to travel to another location to finalize the terms  
15 and hopefully sign off on a final Decree. Due to the late hour and long day, the  
16 Attorneys agreed that the non-drafting attorney, David's attorney, would be  
17 given the opportunity to review the decree for accuracy prior to submitting the  
18 Decree for filing.

1 It is disingenuous to now declare that he is bound to his signature on the  
2 Decree, citing *Yee*,<sup>5</sup> where there was an oral agreement between the attorneys  
3 to give his attorney further time to review and submit the Decree. Both David  
4 and his attorney had the right to rely on the condition between the attorneys  
5 made subsequent to the signing of the Decree. The decision by Sarah's  
6 attorney to change the terms of the agreement smacks of unfair dealing and the  
7 failure to act in good faith.

8 If further negotiations were not possible, the parties should have notified the  
9 court to be assigned a trial date. Sarah's attorney could have filed a motion  
10 with the court to Approve the Stipulated Decree of Divorce as written. As it  
11 happened, Sarah's attorney filed her copy of the Stipulated Decree of Divorce  
12 without contacting David's attorney; the Court unwittingly signed off on  
13 contested provisions in the Decree; and thereby, the Court was denied the  
14 opportunity to hear the matter of the Survivor Benefit or the Merged MOU and  
15 to make a clear decision pursuant to testimony and evidence. Sarah is using  
16 the fact that the Court signed off on the Decree to claim that the Decree is final  
17 and binding, thereby superseding the agreements in the MOU.

18 The attorneys could have believed that the inclusion of the Survivor Benefit  
19 was necessary to the Decree, however, the nature of the Survivor Benefit has

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20 <sup>5</sup> Id.

1 never been declared as community property in statute or by caselaw<sup>6</sup>, and  
2 therefore, a mistake as to the law.<sup>7</sup> *Holquin v. Holquin*,<sup>8</sup> though unpublished is  
3 persuasive that Nevada has not indicated or implied whether the Survivor  
4 Benefit is community property or not.

5 Sarah argues that the passage of Senate Bill 292<sup>9</sup> was addressing all benefits  
6 of the Public Employees Benefit Plan, including the Survivor Benefit or  
7 Benefit upon death. This court does not interpret the statute to read as  
8 portrayed by Sarah. The focus of the bill was to incorporate predictability in  
9 the Community Property rights of the Pension and the terms of the division at  
10 the time of filing the Decree of Divorce. No case law was presented at trial or  
11 in briefs to show that the Supreme Court had ever rendered a published opinion  
12 clearly indicating that the Survivor Benefit is indeed community property.

13 A court's ability to address Survivor Benefits at trial does not translate to a  
14 requirement that the Survivor Benefit designation must be included in the  
15 Decree. As a matter of caselaw, the Survivor Benefit can be considered and  
16 result in a court order after trial over the objection of the employee spouse only

17 <sup>6</sup> Upon noticing Sarah's attorney that the Survivor Benefit was not agreed to in the MOU, she opined to David's  
18 Attorney that the Survivor Benefit needed to be included in the Decree or risk an omitted asset, at which time  
negotiations broke down.

<sup>7</sup> *Home Savers, Inc. v. United Sec. Co.*, 103 Nev. 357, 358-359, 741 P.2d 1355, 1356-1357 (1987)

<sup>8</sup> 491 P.3d 735 (Table)(Nev.2021).

19 <sup>9</sup> The Court makes the following disclaimer: The Court was an Assemblywoman during the 68<sup>th</sup> session of  
20 the Nevada Legislature in 1995, serving on the Judiciary Committee. This court was assigned to the  
subcommittee to further amend or approve legislation proposed in SB 292, which ultimately passed. There  
was no discourse regarding the Survivor Benefit, and if the Legislature had wanted to include it, it would  
have been clearly stated, not left for speculation or inference.

1 if (1) a compelling reason is found to do so, as well as (2) reducing the reason  
2 to writing in the Decree. This follows along with the court's ability to consider  
3 separate property of one spouse for the support of another spouse or child in  
4 certain circumstances utilizing the same requirements. As the Survivor Benefit  
5 has never been declared by statute or case law to be community property, its  
6 absence from the Decree would not have been an omitted asset.

7 A Court Order resulting from an affirmative agreement within the Decree  
8 is also enforceable, pursuant to caselaw. The parties may negotiate and agree  
9 at the time of the divorce to include the death benefit as part of negotiated  
10 terms within the Decree and once signed by the Court and filed in the Clerk's  
11 office it is enforceable. In this instance, testimony and the conduct of the  
12 parties betray Sarah's argument that an agreement was made regarding the  
13 Survivor Benefits and that the signatures were to be enforceable even if  
14 David's attorney discovered a mistake upon full review of the proposed  
15 Decree.

16 IT IS HEREBY ORDERED AND DECREED that the portion of the  
17 Stipulated Decree of Divorce, filed April 11, 2018, awarding the Survivor  
18 Benefit Option 2 selection by David to Sarah be set aside;  
19  
20

1 FURTHER ORDERED that the language be amended to delete the  
2 underlined portion of the following passage found on page 21 beginning at line  
3 17 of the Stipulated Decree of Divorce filed 4/11/2018:

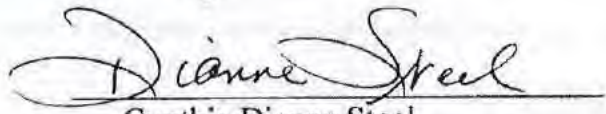
4 '("QDRO"), based upon a selection of Option 2 being made at the  
5 time of the retirement so as to name SARAH JANEEN ROSE as the  
6 irrevocable survivor beneficiary of DAVID JOHN ROSE'([s] sic)  
7 pension benefits upon death, to divide said retirement account.'

8 FURTHER ORDERED that the following underlined language be inserted  
9 and should read as follows:

10 '("QDRO") to divide said Pension between DAVID JOHN ROSE  
11 and SARAH JANEEN ROSE. The parties shall....'

12 FURTHER ORDERED that David is awarded his attorney fees in this  
13 matter upon filing a Memorandum of Fees and Costs for review by the Court  
14 pursuant to NRCP Rule 54.

15 SO ORDERED this 31<sup>st</sup> day of January, 2022.

16  
17   
18 Cynthia Dianne Steel,  
19 District Court Senior Judge  
20

1  
2  
3  
4 **CERTIFICATE OF SERVICE**

5 I hereby certify that on the above file stamp date, I E-Served pursuant to  
6 NEFCR 9, and/or mailed, via first-class mail, postage fully prepaid, the foregoing  
Decision and Order to:

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9 Las Vegas, NV 89119  
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19  
20  
*Ruthanne Denning*  
Ruthanne Denning  
Judicial Executive Assistant  
Department I