**IN THE SUPREME COURT OF THE STATE OF NEVADA**



SARAH JANEEN ROSE

Appellant,

vs.

DAVID JOHN ROSE

Respondent.

CASE NO. 84295

**PETITION FOR REHEARING**

RACHEAL H. MASTEL, ESQ.
Nevada Bar No. 11646
KAINEN LAW GROUP, PLLC
3303 Novat Street, Suite 200
Las Vegas, Nevada 89129
Tel: (702) 823-4900
Fax: (702) 823-4488
Email: service@kainenlawgroup.com

ATTORNEYS FOR APPELLANT

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

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

Statutes

## INTRODUCTION

The Nevada Supreme Court issued an *Order of Affirmance* in this case on April 27, 2023. The panel which issued the decision failed to consider the statutory impact of NRS 125.155(3) and the conflicts in the case law when determining the nature of the survivor benefits and misapprehended the law as to whether the survivor benefits became omitted assets under NRS 125.150(3), as well as the impact of Respondent's (hereinafter "David") duty to read on the relief under NRCP 60(b). This case should be reviewed to correct those errors.

## QUESTIONS PRESENTED FOR REVIEW

1. The impact of NRS 125.155(3), and the conflicts in case law, on whether survivor benefits are community property in Nevada;
2. Whether by virtue of the nature of survivor benefits, or by virtue of removing an "asset" from the Decree, the survivor benefit became an omitted asset under existing Nevada law;
3. What impact a party's duty to read has on a court's ability to find relief is appropriate under NRCP 60(b)(1)-(3).

## REASONS REVIEW IS WARRANTED

The Supreme Court panel which issued the decision in this matter continues the trend of conflicting decisions on the issue of survivor benefits; further, the Court failed to address the legal issues raised by NRS 125.155(3) and what the law is surrounding a party's duty to read a document they signed, especially as it relates to the ability to seek NRCP 60(b) relief. Finally, the panel erred as a matter of fact and law when it found that the survivor benefit option was not an omitted asset under existing Nevada law.

## FACTS

On February 22, 2017, David filed his Complaint for Divorce. **APPX I:0001-0006.** Sarah filed her Answer and Counterclaim on September 26, 2017. **APPX I:0007-0014.** In March 2018, the parties participated in mediation with Judge Rhonda Forsberg, prior to her appointment the bench. **APPX IX:1703.** The parties concluded the mediation with a short two-and-a-half page Memorandum Of Understanding ("MOU"). **APPX X:1870-1871, II:0298-0300**. The MOU was silent as to the survivor benefit provision, merely addressing the division of the retirement as a whole. **APPX II:0298-**

**0300.** The parties immediately relocated to Pecos Law Group, which was nearby, to utilize a computer to finalize the Decree. **APPX X:1871.** The final drafted Decree was 39 pages and addressed the survivor benefit provision. **APPX I:0032-0070.** Sarah, David, Ms. McConnell, and Ms. Cooley signed the Decree that day. **APPX V:0895-0896, VI:0952.**

On April 25, 2018, David filed a Motion to set aside the survivor benefit option, claiming that he had made a "mistake," because he did not read the Decree before signing. **APPX I:0188-0197.** On May 8, 2019, David filed a Motion to Enforce the MOU. **APPX II:0289-0301.** The Motion argued that the MOU was the only valid contract between the parties and because it did not mention the survivor benefit option at all, the Decree could not do so. **APPX II:0292-0293.**

The trial was set for September 23, 2021. **APPX IX:1697.** A second day of trial was held on November 15, 2021. **APPX X:1843.** Ultimately the Court concluded that 1) the MOU is an enforceable contract despite a subsequent written "contract" (the Decree); 2) that no term(s) may be changed or added from an MOU in the final drafting; 3) that there was no

"meeting of the minds," with respect to the Decree; 4) that Ms. McConnell's testimony (despite contradicting itself and despite the fact that David was suing her) was more credible than Ms. Cooley's; and 5) that because "survivor benefits" have never been declared to be community property, they cannot be an "omitted asset." **APPX VIII:1522-1530.** As such, Sarah filed her Notice of Appeal on February 15, 2022. **APPX IX:1600-1601.**

The panel of the Supreme Court which heard the appeal determined that there was sufficient evidence for the Court to have granted NRCP 60(b) relief, although use of contract law principles was improper; that the district court did not err in finding that the SBP was not community property; and that there was no error in finding the SBP was not an omitted asset.

A complete recitation of the facts and the district court case is set forth in Appellant's Opening Brief.

## I. The Court Failed to Address the Conflict of Law Existing Within the Current Case Law and Whether NRS 125.155(3) Directed the SBP to Be Considered Community Property.

In the *Order of Affirmance* , the panel cited to *Henson v. Henson*, 130 Nev. 814, 334 P.3d 933 (2014), for the premise that only the unmodified

lifetime benefit is divisible community property. Yet, the panel ignored the conflicts that the *Henson* decision created within the case law. The panel further ignored the plain language of NRS 125.155(3), and failed to address the impact of that statute on both the case law, and the nature of the SBP. *See Appellant's Opening Brief,* pages 14-18.

With respect to the statute, the courts do not have the power to disregard the legislature's intent, except where a statute is unconstitutional. *Rivero v. Rivero*, 125 Nev. 410, 443 - 444, 216 P.3d 213, 236 (2009) (J. Pickering, *concurring in part and dissenting in part).* That is true, even where the statutes modify prior case law. *See Kilgore v. Kilgore*, 135 Nev. 357, 449 P.3d 843 (2019). Therefore, it was necessary, in issuing the decision, for the panel to have considered whether the district court committed in error in law, based on NRS 125.155(3).

NRS 125.155(3)(b) (passed as AB 292 in 1995) allows the Court to designate that a party's interest or entitlement be continued past the death of either party. It is unquestionable that the legislature considers retirement . . .

accounts to be community property. A.B. 292, Chapter 576, Nev. Legislature 68th Session, 11 (1995).

The legislative history does not provide any guidance for why the provision related to survivor benefits was added. In fact, prior to the third reading in the Senate, the language had the benefits terminating at the death of either party. *Id.* at 4, 50, 54, 64, 85-87. The amendment, which added the ability to address survivor benefits, was proposed by the Committee on the Judiciary, but no remarks related to the modification of the survivor benefit language were included. *Id.* at 90-91. The bill passed as amended in the Senate with no comments regarding the addition of the survivor benefit language and was returned to the Assembly for consideration and passed. *Id.*

While there is no direct statements regarding the addition, it is clear from the legislature history is that substantial discussion revolved around equity and effectuating an equal division of community property. The addition of the language related to survivor benefits can only be part of effectuating that division.

. . .

Statutes are not considered in a vacuum. *Knickmeyer v. State*, 133 Nev. 675, 680, 408 P.3d 161 (Nev.App. 2017) ("We presume that the Legislature enact[s a] statue with full knowledge of existing statutes relating to the same subject."). The statute just preceding NRS 125.155 is NRS 125.150 - which specifically addresses how community property is to be divided, and was already the law when NRS 125.155 was adopted.

When read together, the statutes clearly indicate that it was the intention of the legislature to continue the court's existing discretion to make an unequal distribution of property when addressing retirement benefits, including the survivor benefit provisions. This analysis comports with this court's analysis in *Kilgore,* supra, which specifically considered NRS 125.155 within the limitations set forth in NRS 125.150(1)(b).

In this case, the panel failed to consider that NRS 125.155(3) provides statutory evidence that the SBP is community property, regardless of the Court's decision in *Henson.*

. . .

. . .

Further, the panel failed to address the issues created by *Henson*, with respect to the stated policies and decisions set forth in other case law surrounding retirement interests. *See Appellant's Opening Brief*, pages 10 -14.

An employee spouse's options in controlling their retirement are subject to the rights of the non-employee spouse and cannot be used to defeat their community property interests. *See O'Hara v. State ex. rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 644, 764 P.2d 489 (1988) (stating, "An employee spouse may select among retirement options so long as the community property interest of the nonemployee spouse is not defeated."), *Kilgore,* supra (stating, "an employee spouse should not be able to defeat the non-employee spouses' interest in the community property by relying on a condition solely within the employee spouses's control). *See also Carlson v. Carlson,* 108 Nev. 358, 832 P.2d 380 (1992).

The panel failed to consider that the reduction of the lifetime benefit to pay for the cost of the SBP is taken from the total benefit, unless PERS is directed to take it from a specific party. Therefore, inherently, allowing the employee spouse unlimited control over the SBP provision defeats the non-

employee spouses community interest, as their benefit is reduced to pay for the SBP to go a *different* person. Unless the SBP is a community property interest (which, pursuant to NRS 125.150(1)(b), does not prevent the Court from making an unequal division of the same), then the Court can make no orders preventing the employee spouse from exercising their choice of beneficiary in a way that defeats the community interest of the non-employee spouse.

Additionally, in *Wolff v. Wolff,* 112 Nev. 1355, 929 P.2d 916 (1996), this court recognized that "[a]lthough a former spouse's estate is not encompassed by the definition of alternate payee in NRS 286.6703(4), we conclude that [the] estate should be entitled to [its] share of [the] retirement..." 112 Nev. at 1362. *Wolff* then clearly states that the estate is encompassed within a spouse's community interest. Therefore, by finding that *Hansen* dictates that only the lifetime benefit is community property, the panel has inherently disregarded the finding in *Wolff*, that a spouse's estate is encompassed as part of the alternate payee. The only way to effectuate *Wolff* is through the award of the SBP.

This conflict was made worse by *Peterson v. Peterson*, 463 P.3d 467 (Table) (Order of Reversal and Remand May 22, 2020) and *Holguin v. Holguin*,

Docket No 81373, 491 P.3d 735 (Table) (Order Affirming in Part July 23, 2021). *Holguin* recognized the *Henson* holding that survivor benefits can be ordered in the Decree of Divorce, despite stating that "Nevada does not consider a survivorship interest to be a community property asset." However, only a year prior in *Peterson*, the Court stated, "We have repeatedly held that benefits earned during marriage are community property even when the member spouse receives the benefit only after the marriage." The Court thereafter permitted the survivor benefit to be a "community asset," because both parties admitted it was. The Court in *Peterson* allowed the parties to stipulate to the nature of the asset, while in *Holguin*, the Court specifically found that the asset was *not* community property.

Further, *Holguin* ignores the fact that, unless being awarded as spousal support, the court has no authority to divide separate property. *Dimick v. Dimick*, 112 Nev. 402, 915 P.2d 254 (1996). Retirement interests cannot be spousal support because that would subject them to later modification. *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992). Therefore *Holguin,* in interpreting *Henson*, creates an untenable consequence, either the court must act in flagrant

disregard of the legislature to divide separate property, or act in disregard of the long standing case law and statutes that make property divisions unmodifiable.

Fundamentally, therefore, the panel's holding in this case, based on its determination of the decision in *Henson*, creates an unequal distribution of property by operation of law. As the panel failed to consider these issues, reconsideration is appropriate and necessary.

## II. The Court Misapprehended the Law with Respect to Omitted Assets

The Panel's decision on this matter stated that because of its determination that *Henson* stood for the prospect that the SBP was not community property, and because the district court found that the SBP had been discussed during mediation, the same was not an omitted asset. The panel relied on *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990) and *Doan v. Wilkerson*, 130 Nev. 449, 327 P.3d 498 (2014).

It is no longer sufficient to simply state that because it was "discussed," it cannot be omitted. NRS 125.150(3) allows a post judgment motion for any asset omitted by fraud or mistake. Clearly, the fact that Sarah believed that it was necessary to address the SBP in the Decree (and the fact that the MOU was

wholly silent on the SBP itself) shows that there a mistake is created by operation of law when the SBP was removed from the Decree. At that point, the Court had an obligation to determine what the appropriate Orders were for the SBP (whether to award any option and/or which option, and the division of payment for the same). This is true regardless of whether the SBP is community property. *See Peterson,* supra.

The panel failed to recognize that, under NRS 125.150, the removal of the SBP provision from the Decree created, by operation of law, an omitted asset that needed to be addressed by the Court. Therefore, reconsideration of this issue is appropriate. *See Appellant's Opening Brief*, pages 12-13; 18-19.

## III. A Party's Duty to Read

While the panel found that there was evidence to support the Court's finding under NRCP 60(b); the panel failed to address what impact a party's duty to read should have on their ability to request or receive NRCP 60(b) relief. *See Appellant's Opening Brief,* pages 43-53.

The Nevada Court, and other courts, "have consistently held that one is bound by any document one signs in spite of any ignorance of the document's

content, provided there has been no misrepresentation." *Yee v. Weiss*, 110 Nev. 657, 877 P.2d 510, 513 (1994), citing *John Call Engineering v. Manti City Corp.*, 743 P.2d 1205 (Utah 1987); *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 745 P.2d 37 (1987). *Yee* also cites to the Restatement (Second) of Contracts § 172 (1981), "[a] recipient's fault in not knowing or discovering the facts before making the contract does not make his reliance unjustified unless it amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing." *Id.* The Court went on to note that "the comments [] note that if the recipient should have discovered the falsity by making a cursory examination, his reliance is clearly not justified and he is not entitled to relief, he is expected to use his sense and not rely blindly on the maker's assertions." *Id.*

This position, that a party is bound to a contract he chooses not to read is supported by long standing case law from the United States Supreme Court. Nearly 150 years ago, the U.S. Supreme Court stated in *Upton, Assignee v. Tribilcock*:

> It will not do for a man to enter into a contract, and, when called upon to respond to its obligations, to say

> that he did not read it when he signed it, or did not know what it contained. If this were permitted, contracts would not be worth the paper on which they are written. But such is not the law. A contractor must stand by the words of his contract; and, if he will not read what he signs, he alone is responsible for his omission.

91 U.S. 45, 50, 23 L.Ed. 203 (1875).

In fact, in many states across the country is that a party's duty to read binds him to a contract, regardless of whether or not he does so. *See e.g., Atlanta Postal Credit Union v. Holiday*, 885 S.E.2d 196 (Ga. App. 2023); *Iyere v. Wise Auto Group*, 87 Cal. App.5th 747, 303 Cal.Rptr.3d 835 (Cal.App.1st 2023); *Lopez v. GMT Auto Sales, Inc.*, 656 S.W.3d 315 (Mo.App. 2022); *745 Olive Street, LLC v. Optimal Wellness, LLC*, 351 So.3d 890 (La.App. 2 Cir. 2022); *Doyle v. P.A. Sports Authenticator*, 175 N.Y.S.3d 841, 76 Misc.3d 38 (2022).

This panel failed to consider what impact David's failure to read and review the document had on his ability to seek relief under NRCP 60(b). The district court determined that there was an "agreement" that his counsel would

review the Decree *after* he affixed his signature and determine if the same was correct. It must be presumed, based on the panel's decision, that finding was part of the basis for determining that David's signature "did not count." However, even if the agreement existed (which the evidence does not conclusively state), David still had an obligation to *read* before he affixed his signature -- even if he thought his attorney was going to review the Decree prior to its submission. His signature is his burden. And any reliance he had on poor advice from his attorney (that affixing his signature did not "count," until after her review), is a malpractice issue. It is not a NRCP 60(b) issue, because it was not a behavior of *Sarah's* which caused the issue.

As such, this panel should have considered whether David's duty to read, specifically *estopped* him from claiming relief under 60(b). The only basis for obviating David's duty to read would be if there was fraud (by Sarah) or a valid mistake under Nevada law. While the panel determined that evidence existed to uphold the Court's ruling under NRCP 60(b), the panel did not address whether there was a basis under Nevada law to find fraud, unilateral, or mutual mistake - or if the basis for the panel's decision was one of the other findings. Pursuant to

Nevada Law, and consistent with the law in other jurisdictions, David's failure to read must have somehow been *Sarah's* fault, not his attorney's, in order for NRCP 60(b), to be appropriate. Nevada law, as set forth in Sarah's Opening Brief, do not support either a finding of Fraud against Sarah, or a valid mistake on David's part. As the panel did not consider this matter, rehearing is appropriate.

## CONCLUSION

Based on the foregoing, the Court failed to consider, or misapprehended, material questions of law and failed to address dispositive decisions which impact this case. As such, rehearing is appropriate.

By: _____

RACHEAL H. MASTEL, ESQ.,
Nevada Bar No. 11646
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this appellate brief has been prepared in a proportionally spaced typeface using Word Perfect X5 in 14-point Times New Roman style;

2. I further certify that this petition for rehearing complies with the page- or type-volume limitations of NRAP 32(a)(7)(A) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 3101 words;

3. Finally, I hereby certify that I have read this petition for rehearing, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to page and volume number, if any, of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the accompanying

brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15 day of May, 2023.

By: _____
RACHEAL H. MASTEL, ESQ.
KAINEN LAW GROUP, PLLC
3303 Novat Street, Suite 200
Las Vegas, Nevada, 89117
(702) 823-4900
Email: service@kainenlawgroup.com
Attorneys for Appellant

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 15th day of May, 2023, I caused to be served the ***Petition for Rehearing*** 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 Lubritz

An Employee of
KAINEN LAW GROUP, PLLC