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# IN THE SUPREME COURT OF THE STATE OF NEVADA
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ROD E. MASON

Appellant,

vs.

MARTINE CUISENAIRE

Respondent.

S.C. NO. 40338
D.C. NO: 273923

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## RESPONDENT'S ANSWERING BRIEF
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## STATEMENT OF THE CASE

Appeal from post-divorce order filed September 11, 2002. App. 307-310.[1] Eighth Judicial District Court, Hon. Steven E. Jones, presiding.

The order appealed from found that the court had personal jurisdiction over Rod, that Nevada was the proper jurisdiction for the setting and enforcement of child support, and that there were omitted assets not previously litigated or adjudicated. The order denied Martine's entitlement to request alimony, but awarded to Martine current and back child support, and found that Martine was entitled to her pro rata share of the military retirement benefits earned during the marriage. All other assets and debt issues were reserved to an evidentiary hearing that was to be held October 10, 2002.[2] Rod filed his *Notice of Appeal* on October 9.[3]

The underlying Federal international kidnaping case and North Carolina divorce case, both of which preceded and gave rise to this matter, are discussed in the Statement of Facts that follows.[4]

---

[1] The two volumes of Appendix submitted by Rod are referenced as "App.", and the one volume submitted by Martine is referenced as "R. App."

[2] The evidentiary hearing was never held. As discussed below, the case was transferred from Judge Jones to Judge Steel after entry of the *Order* appealed from. Judge Steel ordered that no further proceedings would be entertained at the district court level – on discovery, sanctions, or the issues reserved by Judge Jones for an evidentiary hearing – until this appeal was decided.

[3] In disregard of NRAP 30(a), Rod's counsel did not confer with our office regarding the possibility of filing a joint appendix. Rod's Appendix is deficient. Martine's appendix includes omitted documents, including Rod's *Declaration Under Child Custody Jurisdiction Act*, and all *Affidavits of Financial Condition* filed by either party. Martine has also included a complete copy of her *Motion for Child Support, Alimony, Division of Assets, and Attorney's Fees* filed February 14, 2002, as Rod deleted various exhibits from the copy he included in his appendix, apparently to prevent this Court from seeing the representations made in the Hague Convention proceedings in Federal court, and certain financial facts. App. 52; R. App. 10. There are multiple additional errors in Rod's Appendix, mainly as to combining items that were separately filed, and documents (and pages of documents) that are simply missing. Those errors should not affect the Court's review in any significant way, given our Appendix. Please also see footnote 20, *infra*.

[4] Rod incorrectly states that his *Motion* to change custody in August, 2001, was the "initial" action. AOB at 2. The actual sequence of filings and cases is detailed below.



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# STATEMENT OF FACTS[5]

Rod is an enlisted member of the United States Air Force, and has been in service since 1985. App. 204. Martine is a native and citizen of Belgium, a small European country in which the national language is French. App. 295. The parties met in Belgium while Rod was stationed there, and married in Hastire, Belgium on December 12, 1988. App. 20; R. App. 153.

Weeks later, Rod was reassigned to a duty station in New Hampshire, where both parties moved. Their daughter, Audrey, was born in New Hampshire on June 8, 1990. App. 20; R. App. 153. Martine was a stay-at-home housewife and mother. R. App. 23.

Rod, Martine, and Audrey moved to Louisiana in July, 1990, when Rod was again reassigned. The parties spent the bulk of their marriage there – nearly eight years. App. 20. Louisiana, of course, is a community property state following the French civil law system, and French is commonly spoken there, which made things easier on Martine.

In 1991, the parties borrowed $75,000.00 from Martine's mother, and used the money to put a down payment on a Louisiana home in both their names. R. App. 12-13, 31-43. Martine states that the loan was never repaid, and that when the house was sold in 1997, Rod simply kept the proceeds; Rod claims that he repaid most of the money, and spent the remainder on "community

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[5] NRAP 28(b) provides that Respondent may provide a Statement of the Case if "dissatisfied" with that of the Appellant. The "Statement of the Case" in Rod's *Opening Brief* freely mixes procedure, factual assertions (some accurate, and some not), arguments, and legal conclusions (some of which are simply false, in addition to being misplaced).

For example, Rod claims that he "made child support payments" following the 1999 divorce, even though he provided no evidence of such, and the district court found that he paid nothing until the eve of the child support hearing in Las Vegas in 2002. *Cf.* AOB at 2 *with* App. 308-309, 312. Rod also asserts that he is "willingly" making child support payments, and is "currently paying" both current and arrearage sums (AOB at 3-4), belying the reality that after he stone-walled payment of child support for about a year, we instituted a wage assignment and garnishment action through the government that executes against his paycheck. Further, Rod makes claims about the "validity" of the North Carolina orders, thus assuming matters that are at issue in this appeal, and even gives opinions as to what judges rendering rulings were allegedly thinking, as opposed to reciting what their decisions state. *See* AOB at 3.

Many "facts" and conclusions submitted in the *Opening Brief* are drawn from Rod's own claims (or even his lawyer's memorialized recollection of third party hearsay as to those claims), much of which have neither been litigated nor established at trial, and some of which are directly ***opposite*** to findings of fact that ***have*** been entered. Throughout, there is a recurrent failure to acknowledge matters on which conflicting testimony was submitted, instead offering Rod's testimony (or even his attorney's unsubstantiated argument) as "fact," and even when the assertions are contradicted by other evidence, or direct findings by the trial court

Accordingly, Rod's "Statement of the Case" is deficient, and the Court is asked to refer to the recital in this Answering Brief pursuant to NRAP 28(b).

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bills," but he has refused to produce any evidence to support that claim. R. App. 13, 22-23, 45; App. 184-85, 236, 302-303.

Some time in 1998, Rod was again reassigned, this time to North Carolina, and the family moved there. Around March, 1999, Martine visited Belgium for about three months, while Audrey visited her grandparents in Connecticut. App. 59, 284; R. App. 13. Martine returned, picked up Audrey around June, 1999, and returned to North Carolina.

Rod informed her that the marriage was over and that he was having divorce papers drawn up. R. App. 13. He filed his *Complaint for Divorce* on August 23, 1999, falsely swearing that he had been "separated" from Martine for over a year.[6] App. 295.

The parties agree that Martine does not speak English, and that Rod therefore told Martine what the divorce *Complaint*, *Answer*, and proposed *Decree* said and meant when he brought her to his lawyer's office to get her signature on the *Answer*. App. 185, 303. While Rod alleges that Martine "fully understood" their content, Martine claims that she had "no input" into the papers, and that Rod lied to her, telling her (among other things) that he would "see to the legal aspects and watch out for my and Audrey's interests," and that he "specifically assured me that the decree would provide the standard amount of child support for Audrey." App. 187, 235, 303.

Martine also asserts that, along with his promises, Rod made the threat that if she questioned the paperwork in any way, "he would arrange it" so that Martine would "never see Audrey again." R. App 13.[7] Martine did not speak directly to Rod's attorney. Everything that was said was "interpreted" through Rod. She asked no questions, and signed where she was told to sign.[8]

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[6] It was not until the current litigation that Martine learned that the reason Rod lied about their separation period was for the purpose of evading the North Carolina law requiring separation for a year before filing. He instructed her that if anyone asked, she was to respond that she had been "living in Belgium." No one asked.

[7] In the Nevada proceedings, Rod did not deny making either the promises or the threats as asserted by Martine, but he did deny that the result – by which he kept all the assets and paid no support – was in any way "unfair." App. 176-187, 181.

[8] Martine had no independent counsel. When our *Motion* was filed in 2002, Martine did not believe that she had filed an *Answer* in the divorce case. R. App. 13. When the Clerk of the North Carolina court produced the full file, however, it included sheets with Martine's signature, including an *Acceptance of Service* and a one-page "*pro se*" *Answer*. App. 287-89. All documents were written by Rod's attorney, and dated and notarized by the notary working for Rod's attorney. *Id*.

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The divorce paperwork was silent as to child support, spousal support, or property division. The *Complaint* said only that "there are no pending claims for post-separation support, alimony, or equitable distribution pending in this or any other jurisdiction."[9] App. 295. The *Answer* said nothing specific at all, but just that the "relief requested by the Plaintiff" should be allowed, and that the court should "order such other and further relief as the court deems just and proper." App. 287.

The *Decree* provided that Audrey would be "placed in the primary care" of Martine, and that Rod would have "secondary custody," defined as being exercised "every summer from one week after school dismisses for the summer break until one week prior to school reconvening." App. 285. It did not, however, make provision for child support, alimony, or division of property, and had no mention anywhere of any debts owed by the parties – to one another or to any third party, stating only that "there are no pending claims for post-separation support, alimony, or equitable distribution."[10] App. 285.

The parties agree that, immediately following the divorce, Martine and the child moved to Belgium. App. 20; R. App. 14. Rod has taken a number of conflicting positions regarding that move. In August and September, 2001, he swore that he had never given "permission" for Martine to move back to Belgium. App. 20, 23; R. App. 165. In May, 2002, however, Rod swore that it was "mutually agreed" that Martine would move to Belgium with Audrey "to live with her wealthy mother" and that custody of Audrey and the move to Belgium were granted in exchange for Rod paying no child support or spousal support.[11] App. 177, 184.

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[9] Unlike Nevada procedure, which calls for all claims to be brought and heard in a single action if possible, North Carolina procedure permits any number of simultaneous proceedings to be filed by the parties, seeking custody, support, property division, etc. *Cf.* NRS 125.150 and *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979) *with* N.C. GEN. STAT. CH. 50 (1997) and *Harroff v. Harroff*, 398 S.E.2d 340 (N.C. Ct. App. 1990) (claims for property distribution generally should be made prior to processing of divorce, but can be contemporaneous or even post-divorce if there is fraud by a party, and such fraud includes violating the duty of full disclosure and the fiduciary relationship between the parties, which are not waived when an attorney is involved).

[10] Rod misrepresents this portion of the record, falsely claiming that it contains an assertion by Martine that there "were no marital assets for equitable division." AOB at 12. Neither party asserted any such thing in the court papers (even if Martine had been capable of reading them) – they say only that no such claims had up until then been filed.

[11] On appeal, Rod has dropped the argument that Martine returned to Belgium without his "permission," adopting the position that he explicitly bargained custody of the child in exchange for non-payment of child support. AOB at 14-15. He claims that there was "evidence presented" of such a deal, by which he refers to his attorney's argument. *Id.* Of course, if there was any "deal" to exchange child custody for non-payment of support, in Rod's mind

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In any event, it is clear from the documentary evidence that Rod personally arranged for Martine's move back to Belgium immediately after the divorce in September, 1999, and that Rod shipped to her the tiny bit of personal property (and her dog) that Martine took from the marriage. R. App. 14, n.5, 51-56. Audrey was enrolled in school in Belgium, and Rod relocated to California. R. App. 14; App. 21.

In accordance with the *Decree*, Martine sent Audrey to Rod's new home for summer visitation in July, 2000. R. App. 14; App. 21. Rod moved to Las Vegas in August, 2000, and took Audrey with him. R. App. 8. He did not return Audrey to Martine at the end of the summer visitation, however. Audrey called Martine and stated that she wanted to stay with Rod, but Martine believed that the child was forced to say so by her father. R. App. 153.

Months passed, during which Martine pleaded with Rod to return the child, and during which Martine was never able to speak with Audrey without their conversation being monitored. R. App. 14, 153. One day, when Audrey could finally speak freely, she told Martine that she wanted to return to Belgium, but that she was being forced to stay and to be a housekeeper and caretaker for Rod's new wife's children. R. App. 153.

Martine states that Rod refused to send Audrey back to Belgium because "he was afraid that she might not want to go see him again." R. App. 153. Rod claims that Martine was in trouble with the law and facing arrest, that Martine and her mother were alcoholics, and that Rod "realized I needed to get paperwork providing me with primary custody."[12] App. 21-22. Martine continued to hope that Rod would return Audrey in the summer of 2001. R. App. 153.

In June, 2001, however, Rod had his North Carolina attorney send Martine a proposed "stipulation" that would have transferred custody of Audrey from Martine to himself. R. App. 92-100. Obviously not expecting agreement, Rod filed a motion for a change of custody the same day

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or elsewhere, it would be contrary to public policy. *See*, *e.g.*, Bounds of Advocacy 2.25 ("An attorney should not contest child custody or visitation for either financial leverage or vindictiveness"); EDCR 5.04 (adopting Bounds as aspirational goals).

[12] Repeated demand has been made on Rod in discovery for any evidence supporting any of these allegations; Rod has produced nothing.

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his lawyer sent the letter to Martine. R. App. 105-108. Martine refused Rod's proposal in writing, stating that in no way did she approve of the contents of the "agreement." R. App. 102-103.

Martine, for the first time, sought independent legal counsel. She contacted "Child Focus Belgium," which directed her to make the August 3, 2001, police report regarding Rod's wrongful retention of Audrey in the United States, and to secure counsel in North Carolina to oppose Rod's motion. R. App. 149-154, 141-44.

Martine was put in touch with the Belgian Central Authority, which advised her to apply for Audrey's return under the Hague Convention.[13] R. App. 14. Pursuant to the treaty, the American Central Authority was notified, and ultimately, this office was contacted.[14] We initiated the Nevada Federal District Court case[15] under the Hague Convention and its implementing legislation, the International Child Abduction Remedies Act ("ICARA").[16] R. App. 125.[17]

In the meantime, Martine's North Carolina counsel filed a motion to dismiss Rod's North Carolina motion, noting that neither of the parties lived in North Carolina, and that Martine had initiated proceedings under the Hague Convention for recovery of the child, which law mandates that no custody proceedings go forward during the pendency of such an action.[18] R. App. 117-19. In accordance with the Convention, the North Carolina proceedings were continued. R. App. 121-23.

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[13] More formally, "The Convention on the Civil Aspects of International Child Abduction, done at the Hague on 25 Oct. 1980."

[14] We are privileged to be the Nevada contact attorneys for the National Center for Missing and Exploited Children, which coordinates the securing of counsel for the American Central Authority in international kidnaping cases. It was in the same capacity that we came to represent the victims in *Vaile v. District Court*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, Apr. 11, 2002).

[15] *Cuisenaire v. Mason*, No. CV-S-01-0972-RLH (LRL).

[16] 42 U.S.C. §§ 11601-11610.

[17] Rod deleted several of the Federal Court filings and other papers from the copy of the *Motion* that he included in his Appendix. *Compare* App. 56-174 *with* R. App. 10-222. Please also see footnote 20, *infra*.

[18] Article 16 of the Hague Convention strictly prohibits any court from making a custody determination during the pendency of a Hague Petition.



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On August 31, 2001, after service on Rod of the Hague Convention petition, but before the federal court hearing – and in direct defiance of the Convention's stay of custody proceedings[19] – Rod filed a *Complaint for Child Custody* and a *Motion for Change of Child Custody* in Nevada Family Court. App. 11-44. They were accompanied by Rod's *Affidavit of Financial Condition*, containing falsified income figures.[20] R. App. 1. The documents were sent to this office on September 5, 2001, and Martine was personally served with a *Verified Complaint for Child Custody* just outside the Federal Court before the Hague Petition hearing on September 6. R. App. 15.

In the meantime, on September 4, Rod filed his *Opposition* to the Hague Petition. R. App. 156. As part of his case, he claimed to attach a "true and correct copy" of Martine's Belgian police report, which he claimed verified that Martine had agreed to let Audrey stay with him in the United States, so that his retention of the child was not "wrongful." R. App. 167. Rod's translation was not provided to this office; apparently as a matter of strategy, it was omitted from the copy served on us. *See* App. 239, n.7.

It was not until weeks later that Rod's translation was obtained and compared with the official one, disclosing that he had "doctored" it severely, leaving out a full paragraph that did not suit his needs, and adding a sentence that did not exist in the original, but which would have helped his position in the Hague Convention case if Martine ***had*** said it.[21]

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[19] *Id.*

[20] Rod claimed that his pay was $2,890.00 per month. When we finally were able to obtain any records, however (in open court at the hearing of July 16, 2002), we found out that his ***actual*** pay had been $3,455.46 in July, 2001, and $3,742.74 in August, 2001. Rod has continued gamesmanship even in this appeal – he selectively deleted those substantive pages from his Appendix, including only the mailing address page, *see* App. 204-205, and completely omitted the *Affidavits of Financial Condition* containing the misrepresentations. We have therefore included complete copies of the records referenced below, as R. App. 238-244, and included the *Affidavits of Financial Condition* as R. App. 1, 223, and 231. This Court has previously commented upon such selective deletions from the record as, "not proficient advocacy," but fraud on the Court and a violation of ethical rules warranting professional discipline. *See Sierra Glass & Mirror v. Viking Industries*, 107 Nev. 119, 808 P.2d 512 (1991) (omitting pertinent part of deposition violated SCR 172(1)(a)&(d) and merited referral to Bar for discipline). Given the ongoing problem we have had throughout this case with deletions of exhibits from the copies served on us, fraudulent translations (explained below), and repeated false submissions to the various courts which have touched this case, we believe that this Court should strongly condemn Rod's continuation of such behavior in this appeal.

[21] Rod's specific insertions and deletions from the real document are set out at App. 238-39.

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On October 5, 2001, the Nevada Family Court issued a *Notice of Judgment of Dismissal*, addressing the custody actions that Rod had filed in Nevada. App. 45.

On September 6, 2001, two days after the filing of Rod's *Opposition* and falsified exhibits, the matter was heard in the Federal District Court. The court determined that the last custody order gave Martine primary physical custody of Audrey, that Martine had been exercising custody rights, that Audrey had been living legally in Belgium prior to Rod's retention and was a habitual resident of Belgium, and that Rod's retention of Audrey in the United States was therefore wrongful. *See* R. App. 201-207. The court ordered the child returned to Belgium forthwith. *Id*.

When repeated informal attempts to get Rod to pay child support failed, the North Carolina *Decree* was domesticated in Nevada on December 10, 2001, for the purpose of seeking child support and a division of the property omitted from distribution in the original divorce action. App. 46-55.[22] On February 14, 2002, Martine filed her *Motion for Child Support, Alimony, Division of Assets, and Attorney's Fees*. R. App. 10.

With the Nevada Federal District Court Hague Convention case concluded, the North Carolina court could finally hear and grant Martine's motion to dismiss Rod's custody motion. It did so by *Order* filed March 6, 2002, finding that Belgium was Audrey's home state and habitual residence, and was the appropriate forum to entertain all future custody and visitation matters, and that the North Carolina court lacked any jurisdiction over the parties or the subject matter. App. 265.

After stalling for months,[23] Rod finally filed an *Opposition* to Martine's Nevada *Motion* on May 2, 2002. App. 176. Rod alleged that the only reason there was no alimony or child support ordered in the North Carolina proceedings is that Martine "did not want it." App. 177.[24] He further

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[22] The version of the documents included in Rod's Appendix are both incomplete and internally duplicative. However, the *Decree* of September 9, 1999, was properly domesticated.

[23] The stalling included multiple requests for continuances, no-shows, broken promises of filings, and even a motion to disqualify the trial judge after failing to appear at a hearing. These tactics do not ultimately affect the issues currently under appeal, and the details will be skipped, unless opposing counsel chooses to make an issue of them, but they greatly prolonged proceedings, and significantly increased their expense.

[24] As noted in the *Reply* filed May 14, 2002, Rod's *Opposition* was inconsistent, stating at one point that the reason there was no ***child*** support was that Martine "did not want it," and at other points that there was no ***alimony*** for the same reason. App. 236, 184.

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1 claimed that he paid child support anyway, but he refused to produce any documentation. App. 177,
2 236. Rod claimed that he had "no objection" to paying child support, but denied that any court had
3 authority to make him do so. App. 180.

4 Rod asserted that no child support arrearages could be claimed or ordered, despite his years
5 of non-support, but that if they could be, he demanded an "offset" for amounts he had spent directly
6 on the child during the time he wrongfully retained her. App. 180. He generally asserted that the
7 Nevada courts lacked jurisdiction to order him to do anything, since the North Carolina divorce
8 decree was silent as to all issues, and claimed that he had repaid the debt to Martine's mother, but
9 again refused to provide any documentation in discovery. App. 184, 236-37.

10 While admitting that Martine relied on him to tell her what the divorce papers said and
11 meant, Rod stated that he was a responsible soldier with "twenty three metals [*sic*] and devices [and]
12 four good conduct awards," and that the court should therefore accept his word that Martine "was
13 aware of the terms and participated in forming the agreement [*sic*]," which Rod claimed that he was
14 told was "fine" by his North Carolina divorce lawyer. App. 185-87.

15 Martine's *Reply* was filed on May 14, 2002. App. 234-262. It noted the substantial factual
16 errors in Rod's filings, and Rod's refusal to provide any documentation in discovery, as well as his
17 substantial mis-statement of the Hague Convention proceedings that had been concluded in Federal
18 District Court, and his falsification of evidence in that proceeding. App. 234-39. It noted that in the
19 nearly nine months since Audrey had been recovered and returned to Belgium, Rod had paid nothing
20 in child support, and made a request for support going back to the parties' divorce. App. 241-46.

21 On May 17, 2002, in open court, Rod submitted a "new" *Affidavit of Financial Condition*,
22 containing the same false understatement of his income ($2,890.00) that he had made the prior
23 August, although his monthly income had by that time actually risen to $3,780.70 per month. R.
24 App. 2, 232, 242.

25 When the entire North Carolina divorce file arrived, this office had it filed in the Nevada
26 Family Court to ensure access to all filings and proceedings in the earlier action. App. 263-298. It
27 took some time, due to the necessity of obtaining translation, but an affidavit in English from
28 Martine (who remained in Belgium) was also filed, on May 22, 2002. App. 299.

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As to the specific issues now on appeal, Martine stated:

> At the time Rod and I divorced, Rod assured me that he would see to the legal aspects and watch out for my and Audrey's interests. He specifically assured me that the decree would provide the standard amount of child support for Audrey. I had no input in the filing of the decree, which Rod translated for me, and never spoke with "our" attorney.

App. 303.

Martine's *Affidavit* also stated that Rod had broken his promise to repay the $75,000.00 from Martine's mother, never having repaid any of it, that his claim to have bought a car for Martine was a lie as she had "never driven in the United States," and that Rod's claims regarding Martine's mother's alleged s"wealth" were false. App. 302. It further denied Rod's claim that he had provided a vehicle for Martine's son, and stated that Rod had used the profits from the house sale to buy expensive toys for himself, rather than split the money with Martine or repay Martine's mother. App. 302-303.

Martine further denied ever receiving any child support from Rod, and stated that Rod's tales of alcoholism, physical violence, and police involvement in Martine's Belgian household were "figments of Rod's perverse imagination." Martine asserted that the only interaction she ever had with the police in Belgium was when she swore out the criminal complaint for Rod's wrongful retention of Audrey as part of the Hague Convention case. App. 303. Finally, she noted Rod's falsification of the translation of the police report during the Hague Convention case, and denied that she had (or would) prevent Audrey from speaking with Rod by phone. App. 303-304.

By the summer of 2002, Rod claimed to be a rapidly-promoted career soldier who would be eligible for retirement in the next few years, and whose (unspecified) position called on him to supervise hundreds of other soldiers.[25] App. 186. Discovery received later revealed that he was a Technical Sergeant (E-6) with more than 16 years of accrued active duty service, making about $3,800.00 per month. R. App. 242. Martine is employed for minimum wage for a janitorial service, earning some $700.00 per month. R. App. 23, 224.

[25] As noted above, Rod has resisted discovery in this case, including refusing to show up for deposition, but all motions to enforce discovery have been suspended by Judge Steel during the pendency of this appeal.



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1 Sometime in June, 2002, Rod finally sent Martine a child support payment, in the sum of
2 $300.00; he made a second payment of the same sum in July. Both were credited as if they had been
3 paid on the first day of each respective month. App. 312.

4 The case came on for hearing before Judge Jones of the Family Court on July 16, and was
5 argued and taken under advisement. Judge Jones issued a written *Decision* on July 22, noting that
6 the action previously filed by Rod for custody in Nevada had been dismissed on October 5, 2001,
7 because the Nevada court "has no jurisdiction over the issues of custody and visitation." App. 305.

8 The formal *Order* from that *Decision* was filed September 11, 2002, containing findings that:
9 jurisdiction over custody and visitation issues had been lawfully assumed by Belgium; the court had
10 personal jurisdiction over Rod; Nevada was the appropriate jurisdiction to set and enforce child
11 support; the issue of child support was never addressed or ruled on by any court; there were no child
12 support orders in existence; and NRS 125B.030 therefore permitted an award of up to four years
13 back child support. App. 307-308. The court added that it had "reviewed and is familiar" with the
14 parties' "respective claims for arrearages, and regarding expenses that may have been incurred since
15 the date of divorce." App. 308.

16 The trial court further found that child support should have commenced immediately upon
17 the parties' divorce of September 9, 1999, that Martine's motion seeking child support had been filed
18 on February 14, 2002, and that assets of the parties had been omitted from and not adjudicated in the
19 North Carolina divorce action, including Rod's military retirement (and Survivor's Benefit Plan)
20 benefits, all marital personal property, and the proceeds from the sale of the house in Louisiana.
21 App. 308. The court found that the parties had been married 129 months, during all of which time
22 Rod was in military service, and that alimony had never been referenced or requested, so that
23 Martine was not entitled to raise it during these proceedings. App. 308.

24 The trial court therefore ordered Rod to begin paying $500.00 per month child support as of
25 March, 2002 (the month following the filing of Martine's motion), ordered constructive child support
26 arrears of $300.00 per month from the month following the parties' divorce (October, 1999) until
27 the month in which Martine filed her child support motion (February, 2002), and ordered actual
28 arrearages from the filing of Martine's motion through the hearing date at the rate of $500.00 per

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month. App. 308-309. Interest and penalties were applied only to support arrears accruing after Martine filed her *Motion*. App. 309.

Further, the trial court ruled that Martine was entitled to her time-rule percentage of the military retirement benefits, ordered Rod to provide certain discovery, denied any award of alimony, and set an evidentiary hearing "on the issue of omitted assets and omitted debts," allocation of the Survivor's Benefit Plan benefits, and attorney's fees. App. 309-310.

Rod appealed from that *Order* before the evidentiary hearing could be held. App. 315. The case was transferred to Judge Steel. This office began formal collection proceedings against Rod for the child support arrears. Rod objected, but Judge Steel indefinitely postponed all further court proceedings during the pendency of this appeal.

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# ARGUMENT

## I. PRELIMINARY STATEMENT

The "statement of issues" in the *Opening Brief*, AOB at 1, are conclusory and circular. More precisely framed, the questions presented are: (1) Whether the Nevada Family Court could order the payment of prospective child support;[26] (2) Whether the Nevada Family Court could order payment of arrearages in child support; and (3) Whether the Nevada Family Court could order division of assets accrued during the marriage but not addressed in the divorce proceedings. Throughout his brief, Rod mixes child support and property cases in each argument, although they spring from separate statutory bases, and have completely different lines of controlling authority.

Accordingly, this *Answering Brief* will first address the basic validity of the 1999 North Carolina *Decree*, after which it will address in turn the issues actually posed by Rod's appeal of the *Order* entered below, applying the law relevant to each issue.

## II. THE NORTH CAROLINA DECREE WAS INVALID, BUT THE PARTIES SHOULD STILL BE CONSIDERED DIVORCED AS OF SEPTEMBER 9, 1999

Primarily because Rod makes such a protestation of the "validity" of the underlying North Carolina *Decree*, *see* AOB at 3-6, it is appropriate to note the ways in which it is fatally flawed, although Martine is not seeking any relief beyond that at issue in the action in Family Court.

### A. The Assorted Defects in Substance and Procedure Render the Decree Susceptible to Set Aside or Collateral Attack

As Martine recently discovered, the purpose of Rod's falsification of their period of separation was to file for divorce when he was statutorily ineligible to do so.[27] As noted above,

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[26] It is not possible to conclude from Rod's brief whether or not he concedes the jurisdiction of the Family Court to enter a child support order. While Rod states that he "does not take issue with the entry of a court order requiring him to make current child support payments," he ***also*** claims that the status-and-custody-only North Carolina divorce decree was "res judicata" as to ***any issue*** that might conceivably have been raised at the time, ***including*** child support. AOB at 14, 12. Rod dances around the question of the Nevada Family Court's jurisdiction to impose an order, rather than addressing it directly, so this brief will turn to that question immediately after discussion of the underlying *Decree*.

[27] N.C. GEN. STAT. § 50-6 (1998).

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Martine does not speak English, had no counsel and "no input" into any of the divorce papers. App. 303. The North Carolina court file shows such violations of jurisdictional state law, and procedural due process, that the *Decree* is at least "voidable" upon collateral attack.

For example, the *Complaint* is dated August 23, 1999. App. 296-97. The *Acceptance of Service* (of the *Complaint*) was notarized in North Carolina on August 24. App. 289. The lawyer signed a *Motion for Summary Judgment* submitting the matter to court the same day, however, and "served" Martine by way of regular mail to an address in Belgium. App. 292-93. But the lawyer obviously knew that Martine was not ***in*** Belgium at that time, because his own notary verified Martine's signature in North Carolina.

Additionally, for at least twenty years, it has been considered improper and unethical in North Carolina for the same attorney to prepare both a divorce complaint for a client, and a purported "proper person" answer for an unrepresented spouse.[28] The rule has been repeatedly reaffirmed in North Carolina, indicating that any divorce obtained in violation of that rule is subject to being set aside for fraud.[29]

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[28] *See* CPR 165, North Carolina Ethics Committee, October 29, 1993, noting that prior CPRs 121 and 296 "ruled that it is unethical for a lawyer to furnish consent judgments to unrepresented adverse parties for their consideration and execution," and reiterating that prohibition when the communication is "furnishing a document which appears to represent the position of the adverse party such as an answer." The opinion notes that it is in keeping with the larger prohibition against appearing to advise an opposing party or "imply [that the attorney] is disinterested" under Rule 7.4(b) and (c). Yet Martine was told at all times that the lawyer Rod was dealing with was "our" lawyer, or our "mutual" lawyer, and that Rod would watch out for Martine's and Audrey's interests. App. 303; R. App. 13.

[29] In 2002 Formal Ethics Opinion 6 (January 24, 2003), the North Carolina Ethics Committee issued an Opinion entitled "Providing Pleading to Unrepresented Adverse Party," which stated in part:

> The Ethics Committee has been asked, on a number of occasions, whether a lawyer representing one spouse in an amiable marital dissolution may prepare for the other, unrepresented, spouse simple responsive pleadings that admit the allegations of the complaint. It is argued that, if this practice is allowed, the expense of additional legal counsel will be avoided and the proceedings will be expedited. The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an "acceptance of service and waiver" form waiving the defendant's right to answer the complaint. CPR 121, CPR 125, CPR 296. The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel. See also RPC 165 (lawyer may not prepare a pleading that appears to represent the position of the adverse party).

The prohibited conduct is exactly what Rod claims that his attorney did in this case.

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Rod's failure to provide actual notice of the court date was only one bad act out of several.[30] His course of conduct was the kind of fraud that this Court has repeatedly held justifies vacating, amending, modifying, or correcting a judgment:

> Extrinsic fraud has been held to exist when the unsuccessful party is kept away from the court by a false promise of compromise, or such conduct as prevents a real trial upon the issues involved, or any other act or omission which procures the absence of the unsuccessful party at the trial. Further, it consists of fraud by the other party to the suit which prevents the losing party either from knowing about his rights or defenses, or from having a fair opportunity to present them upon the trial.[31]

Rod's assertion that the North Carolina judgment was made valid because there has been no explicit finding of fraud in Nevada, AOB at 5, is a legal non-sequitur.[32]

As noted above, a foreign decree is only entitled to any recognition in other states when it was entered by a court having proper jurisdiction, and where the defendant was afforded procedural due process.[33] Otherwise, it is entitled to be disregarded in actions elsewhere.[34] As explained in the following section, however, the procedural posture of this case does not require going so far as to set aside the entire *Decree*.

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[30] In addition to his deliberate fraud on the court as to separation, he also coerced Martine by false assurances that the papers called for payment of child support, false promises that he was "watching out" for Martine's and Audrey's interests, and overt threats that if she asked any questions, he would ensure that Martine never saw Audrey again. App. 303; R. App. 13.

[31] *Murphy v. Murphy*, 65 Nev. 264, 271, 193 P.2d 850, 854 (1948). The distinction between intrinsic and extrinsic fraud was eliminated in 1981, and the earlier cases are no longer a valid basis for denying former spouses relief under NRCP 60(b). *Carlson v. Carlson*, 108 Nev. 358, 362 n.6, 832 P.2d 380, 383 n.6 (1992). Rod's argument pretends that the rule amendment, and this Court's explanation of its meaning, never happened. *See* AOB at 10 (insisting that extrinsic fraud must be shown for Martine to obtain any relief, since more than six months has elapsed since entry of the North Carolina *Decree*).

[32] Rod asserts that Martine did not formally plead fraud, and that the Family Court judge did not explicitly find fraud. AOB 5-6. This is true as far as it goes, but only because it was not necessary for the relief requested, which could be and was ordered under the statutory basis for an award of child support, and for the partition of omitted assets. App. 307. There certainly was no finding that Rod had ***not*** acted fraudulently, but the resolution of that question is no more necessary on appeal than it was in the proceedings below, which were resolved on the law recited in the *Order*, and discussed below.

[33] *Williams v. North Carolina*, 317 U.S. 287 (1942); *Estin v. Estin*, 334 U.S. 541 (1948).

[34] *See*, *e.g.*, *Callicoatte v. Callicoatte*, 324 S.W.2d 81 (Tex. Ct. App. 1959) (husband's residence in Nevada for seven weeks, where he made occasional day trips to California, and he left Nevada after filing his complaint but before his decree was issued, was sufficient to rebut the husband's claim of residential intent, despite a Nevada decree to the contrary, and allowed a collateral attack on the validity of the decree in Texas).



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### B. The Concepts of Divisible Divorce and Voidable Decrees Permit this Court to Recognize the Parties as "Divorced" Irrespective of Infirmities in the North Carolina Decree

This Court has held that where a decree is entered with such infirmities that it might be struck down, but is not necessarily void *ab initio*, it is merely "voidable," and not "void."[35] Both parties, however, are willing to be divorced, and Rod has apparently remarried. Further, this Court has held that under the *Estin* doctrine of "divisible divorce," it is possible to set aside some or all property distributions without affecting the status of divorce.[36]

Martine is not asking for the fraud-riddled divorce decree to be set aside in its entirety. Indeed, the *Decree* says nothing other than that the parties are divorced and that Audrey should remain in Martine's care, and neither of those things is objectionable. Martine only seeks in the Nevada proceedings to establish a reasonable child support award for the benefit of the child, and to obtain her portion of the never-adjudicated assets of an 11-year marriage, all of which Rod has taken, leaving Martine destitute.

It is believed that all relief sought by Martine can and should be granted within the framework of the proceedings now in progress in Family Court. Should this Court reach the conclusion that the relief sought could not be granted without setting aside the entire *Decree* as fraudulent, we ask that the matter be remanded for that purpose. It is submitted, however, that such an order is unnecessary to either procedural regularity or to justice, as set out in the individual issue discussions that follow.

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[35] *Vaile v. District Court*, *supra*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, Apr. 11, 2002).

[36] *Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994), noting that this Court will not be placed in the position of entering rulings that attempt to "engage the judicial process in an elevation of greed and an affront to equity." *See also Allen v. Allen*, 112 Nev. 1230, 1234, 925 P.2d 503, 505 (1996) (where husband's post-agreement conduct (filing for bankruptcy) rendered the agreement inequitable, it would be set aside in later proceedings as "inherently unfair," irrespective of whether it constituted "fraud"; "Under no circumstances, bankruptcy or no bankruptcy, should one party to a divorce be allowed to take all of the benefits of the divorce settlement and leave the other party at the disadvantage suffered by the wife in the present case"); *Cook v. Cook*, 112 Nev. 179, 184-85 & n.2, 912 P.2d 264, 267 & n.2 (1996) (husband's violation of fiduciary duty to wife did not require affecting fact of divorce, but required allowance of relief under NRCP 60(b) and remand so that the parties could "litigate the division of their property").

## III. THE NEVADA FAMILY COURT PROPERLY ESTABLISHED AN ORIGINAL ORDER FOR CHILD SUPPORT

### A. The North Carolina Divorce Decree Was Silent as to Child Support

Apparently intending to bolster his property arguments, Rod makes the startling claim that if a court order says nothing about a topic, it ***really*** constitutes a full adjudication of that topic, in favor of whoever happens to benefit. *See* AOB at 4-5, 11-15. Specifically, he asserts that the North Carolina *Decree*, since it says nothing about child support or any property, is "res judicata" as to those issues, so that no court anywhere could ever order a division of the property accrued during marriage, or compel Rod to pay any child support, as a matter of "full faith and credit" to the silence of the earlier order.[37] AOB at 6. He is wrong.

Every state is required under the Full Faith and Credit clause of the United States Constitution to recognize the legitimacy of a decree entered by another state if that other state had personal jurisdiction over one party and afforded notice in accordance with procedural due process to the other party.[38]

The United States Supreme Court tempered and expanded that holding over fifty years ago, however, by adopting the principle of "divisible divorce," whereby jurisdiction to dissolve the marriage does not necessarily convey jurisdiction, or a requirement, to alter every legal incident of marriage.[39] The Court made it clear while the status of divorce can be terminated in one state, the

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[37] Indeed, Rod goes so far as to claim that the matter is one of Constitutional importance, such that any court order requiring him to pay child support would violate the "sanctity" of the silence of the North Carolina *Decree*, and therefore would be an unconstitutional "modification" of that order. AOB at 4, 6, 8.

[38] *Williams v. North Carolina*, *supra*, 317 U.S. 287 (1942); *see also Sherrer v. Sherrer*, 334 U.S. 343 (1947); *Coe v. Coe*, 334 U.S. 378 (1947). As discussed below, since Rod's attorney even failed to give notice in accordance with due process, by failing to serve the *Complaint* on Martine, the entire *Decree* is voidable, although we do not seek to set aside the status of the divorce.

[39] *Estin v. Estin*, *supra*, 334 U.S. 541 (1948). A good deal of the litigation below concerned Rod's outrage that the court might issue child support orders without permitting him to contest child custody. *See* App. 179-182. As detailed above, the Federal District Court, the North Carolina court, and the Nevada Family Court have all held that child custody can only be litigated in the child's habitual residence, Belgium, and those explicit decisions are entitled to full faith and credit. 42 U.S.C. § 11603(g); *Morton v. Morton*, 982 F. Supp. 675 (D. Neb. 1997) (full faith and credit accorded to a federal decision); *Burns v. Burns*, 1996 WL 71124, (E.D. Pa. 1996) (full faith and credit relating to a state decision). Likewise, child support can only be litigated in the court that has jurisdiction over Rod – Nevada. As this Court stated in *Vaile v. District Court*, *supra*: "Simply because a court might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation." 118 Nev. at ___, 44 P.3d at 515. *See also Kulko v. California*, 436

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“incidents” of the marriage could be resolved in other states, either prior or subsequent to the divorce itself.[40] The decree does not prevent a court of another state with jurisdiction over the parties from adjudicating the remaining incidents of the marriage, or from modifying the original order as to matters that can not be made “final” (such as child custody, visitation, and support).[41]

In short, Rod has no “full faith and credit” entitlement to rely on the silence of the North Carolina order as a bar to a court imposing upon him a duty of support for his child. The question is ***not*** – as Rod would have it – whether or not he “has a problem with” paying child support, for him to choose or refuse, at will. *See* App. 177, AOB 4, 14. The question is whether a state with personal jurisdiction over Rod can impose a child support obligation against him in accordance with the law of that state. As set out below, the law requires Rod to support his child.

### B. In the Absence of an Existing Child Support Order, the State with Jurisdiction over the Obligor (i.e., Nevada) is to Establish the Original Child Support Order

The Uniform Interstate Family Support Act (“UIFSA”) has been adopted in ***every*** state. Nevada adopted it in 1997 as NRS Chapter 130; the additional federally-mandated provisions are contained in NRS chapters 31A, 125B, and 425.

Under UIFSA, a “child-support order” is defined as “a support order for a child.”[42] In order to be a “support order,” an order must “provide for monetary support, health care, arrearages or reimbursement.”[43] The Nevada Family Court found as a matter of fact that there was no child support order from anywhere until that court issued one. App. 308. Accordingly, Nevada

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U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a state’s jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts).

[40] *Id.* In *Estin*, a Nevada divorce was held to have no effect on a pre-existing support duty set out in a New York separation order.

[41] *Id.*; *see In re Marriage of Kimura*, 471 N.W.2d 869 (Iowa 1991); *Brown v. Brown*, 269 N.W.2d 918 (Iowa 1978).

[42] NRS 130.10107.

[43] NRS 130.10187.

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established the original child support order in this case, as directed by statute.[44] Under the controlling federal law, a court issuing a child support order retains exclusive modification jurisdiction over its terms so long as that state maintains jurisdiction under its law and remains the residence of a parent or the child.[45]

Rod has sworn that he is a resident of Nevada, App. 11; R. App. 8, and is therefore subject to our child support laws.[46] Even if Rod claimed to be a "non-resident" (despite having sworn otherwise), the Family Court's jurisdiction to order Rod to pay support is clear under UIFSA, because he was served with a child support motion in this state, because he had already "submitted to the jurisdiction of this state" by entering a general appearance and by filing a responsive document seeking relief, because he resided with the child in this state,[47] and because he resided in this state himself.[48]

Rod's position that the ***absence*** of any mention of child support in an order makes it a "child support order" anyway, AOB at 6, just makes no sense, and he offers no authority for that position. Even if there was any basis for asserting that the North Carolina *Decree* (saying nothing about child support) somehow constituted a "child support order," the Nevada court could "modify" it because Rod lived here, and neither Rod, Martine, nor Audrey remained in North Carolina, which lost jurisdiction to enter any child support orders when the child and both parents left that state.[49] Of

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[44] NRS 130.401(1)(a): "If a support order entitled to recognition under this chapter has not been issued, a responding tribunal of this state may issue a support order if . . . the natural person seeking the order resides in another state . . . ."

[45] *See* 28 U.S.C. § 1738B (1994) (Full Faith and Credit for Child Support Orders Act, or "FFCCSOA").

[46] NRS 125B.014(2):

> In addition to any other method authorized by law for obtaining jurisdiction over a person inside or outside of this state, personal jurisdiction may be acquired within the territorial limits of this state by service of process in any manner prescribed by the Nevada Rules of Civil Procedure.

[47] Both during his legitimate visitation time, and during the period he wrongfully retained Audrey until forced to return her under the Hague Convention.

[48] *See* NRS 130.201(1)-(7).

[49] NRS 130.611(3). *See also* NRS 130.610 (permitting modification of order as if the original order had been issued by a tribunal of this state); 28 U.S.C. § 1738B(2)(A)(1994) (originating state loses jurisdiction to modify any support orders once child and contestants leave the state).



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course, since there ***was*** no prior support order, Martine's filings were not characterized as "modifications" of support.[50]

In short, as only the courts of the jurisdiction where Rod was located could exercise jurisdiction over him to impose a child support obligation, the Nevada Family Court was well within its power to do so.

## IV. THE NEVADA FAMILY COURT PROPERLY ORDERED PAYMENT OF CHILD SUPPORT ARREARAGES

### A. The Family Court Properly Awarded Arrearages Accrued Between the Date the *Motion* Was Filed and the Date the *Hearing* Was Held

The measuring point for the effective date of orders establishing child support obligations is the date of the bringing of the motion or action.[51] This Court has specified that, in considering an action regarding modifications of child support, the trial court has discretion to order a change effective as of the date of hearing, rather than the date of filing of the motion.[52]

In this case, Rod stalled the hearing date for several months, and the Family Court found no reason to make the effective date of its support order any later than the first day of the first month following the filing of Martine's *Motion* seeking child support. App. 308-309. Accordingly, the court reduced to judgment support owed and unpaid for the period between the filing of the *Motion* and the date of the hearing, in the sum of $1,900.00 plus interest and penalties. App. 309.

Rod never specifies which sums reduced to judgment by the Family Court he considers to be "arrears" about which he is complaining.[53] It would, of course, be poor public policy to allow a party such as Rod to engage in the sort of stalling and stone-walling he did from February through

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[50] Rod's claim that ordering child support constituted a "modification" of the North Carolina *Decree*, AOB at 4-8, is just nonsense. Clearly, one cannot "modify" something that does not exist. Moreover, NRS 130.611 mandates that a child support order (as defined in UIFSA) be registered in accordance with NRS 130.601 to 130.604. There was no "registration," because there was no prior child support order to register.

[51] *See*, *e.g.*, NRS 125B.140(1)(b); 125B.030; 125B.040(2).

[52] *Anastassatos v. Anastassatos*, 112 Nev. 317, 913 P.2d 652 (1996).

[53] *See* AOB at 14-20.

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July, 2002, and then permit him to complain on appeal about the arrears accrued during the interim. Any such ruling could only serve to encourage such misbehavior by making it potentially profitable.

Accordingly, the remainder of this brief will presume no such challenge to arrears accruing from March through July, 2002, and will focus only on the period from the granting of the divorce in September, 1999, until the filing of Martine's *Motion* in February, 2002. If, in his *Reply Brief*, Rod attempts to complain about the period of time addressed in this section, however, then the award should be specifically affirmed on the basis of the authorities cited above.

**B. The Family Court Properly Awarded Arrearages Accrued Between the Date of Divorce and the Date the *Motion* Was Filed**

Without ever citing a case so holding, and without even examining the legislative history of the provision, Rod asserts that NRS 125B.030 cannot be applied to compel him to pay child support for his daughter because the word "separated" in the statute "necessarily" excludes a period in which the parties are divorced, but no child support order is in place.[54] While Rod cites many cases that are unobjectionable by themselves, they are irrelevant to the proposition for which he cites them or to resolution of the issue.[55]

The statutory purpose to be served by the statutes in chapter 125B is set out in NRS 125B.020: "The parents of a child . . . have a duty to provide the child necessary maintenance, health care, education, and support." The provisions of the chapter are intended to be interpreted broadly,

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[54] AOB at 14-20.

[55] The closest thing Rod cites to relevant authority is *Nicholson v. Nicholson*, 107 Nev. 279, 809 P.2d 1267 (1991). That case, however, addressed a statutory scheme (URESA) that was eliminated in 1997 when it was replaced by UIFSA. It involved a claim for child support that attempted to reach behind a court order that specifically ***made*** a child support ruling, for a period ***prior*** to that court order. The case had nothing to do with full faith and credit (all actions were in Nevada). Its holding – that a URESA court may not modify or nullify a pre-existing duty for support – has only historical, not precedential, interest at this time, and is consistent with the general rule that one cannot seek to re-adjudicate matters occurring before the last court order that actually addressed the subject. *See McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994). As far back as 1994, with the passage of the FFCCSOA (*see* n.42, *supra*), any URESA-based state laws or holdings were overruled as a matter of federal preemption, to the degree they interfered or conflicted with the set of rules established by the FFCCSOA, and ultimately embodied in UIFSA. *See*, *e.g.*, *Butler v. Butler*, 568 N.Y.2d 169 (Sup. Ct. App. Div. 1991).

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to "apply to all parents of all children, whether or not legitimated,"[56] to enforce that duty. It is in that context that the history and purpose of what is now NRS 125B.030 should be examined.

The legislative history of the statute can be traced at least as far back as 1923, where the provision had to do with the support of children born out of wedlock:

> The mother may recover from the father a reasonable share of the necessary support of the child.
> In the absence of a previous demand in writing ..., not more than two years' support furnished prior to the bringing of the action may be recovered from the father.[57]

As part of the general push for gender equality, the language of the act was modified in 1979 to provide that "either parent may recover from the other," a potential obligor was re-designated "the non-supporting parent," and the potential period of recovery was expanded from two to three years of "support furnished before the bringing of the action."[58] The provision remained in the paternity section, however, of what had been re-codified as the Nevada Revised Statutes.

In 1983, however, several changes were put in place that are determinative of the legislative intent at issue in this appeal. The distinction between children born into a marriage or out of wedlock was specifically removed, and the statute was expressly amended to reflect the legislative intent that providing support was a duty of parents that the statutory scheme intended to enforce.[59] The provisions (of what was then chapter 126) were expanded to apply to "all parents of all children,"[60] and the prior "demand for support" language was broken into two parts.

The "written demand" language was expanded to a new section indicating that a demand in writing to a parent who does not have physical custody of a child indefinitely tolls the statute of limitations for bringing an action for child support.[61] The remainder of the old provision was re-cast,

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[56] NRS 125B.010.

[57] Nev. Code L. § 3406 (1923).

[58] S.B. 294, § 31, 1979 Nev. Stat. 1279.

[59] S.B. 472, § 20, 1983 Nev. Stat. 1873.

[60] *Id.*, § 2, 1983 Stat. 1866.

[61] *Id.*, § 5, 1983 Stat. 1867. Of course, this was earlier in time than the Nevada Legislature's abolishment of the statute of limitations on child support. *See* NRS 125B.050(3). In 1987, the statute was harmonized to state that if there is no court order for support, any demand in writing indefinitely tolls the statute of limitations, and once there ***is***

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eliminating the 1979 language in favor of the exact words making up what is now known as NRS 125B.030:

> Where the parents of a child are separated, the physical custodian of the child may recover from the parent without physical custody a reasonable portion of the cost, care, support, education and maintenance provided by the physical custodian. In the absence of a court order, the parent who has physical custody may recover not more than 4 years' support furnished before the bringing of the action.

Rod goes on a lengthy expedition in search of whether the statute is ambiguous, or not, speculating at length as to his opinions of what should be inferred for legislative intent.[62] None of that is necessary; the words are quite clear on their face, and any possible doubt was readily resolved by those who presented the legislation.

Specifically, "separated" has its regular and ordinary meaning of "not together"[63] – it is a factual precondition to making a claim that the parties not be living together, because it would obviously be inappropriate for either parent to be able to assert, in a divorce or paternity action, that the other parent had not been adequately providing for the children while the family was still cohabiting in the same household.[64] This meaning is in keeping with normal family law practice; where parties separate and reconcile, in whatever order, and before or after divorce, only the period that they lived "separately," irrespective of marital status, is considered a period for which one party might be liable to pay support to the other.[65]

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a court order providing for support, there is no limitation on the time in which an action can be commenced to seek arrearages. There is no statute of limitations issue in this appeal – the period of arrears at issue is from September, 1999, to March, 2002.

[62] *See* AOB at 14-20.

[63] Webster's New World Dictionary (pocket ed. 1982) at 543.

[64] This is, in fact, how all district court judges known to this office have always interpreted these words, which interpretation is fully consistent with the remainder of divorce law practice. *See*, *e.g.*, *Putterman v. Putterman*, 113 Nev. 606, 939 P.2d 1047 (1997) (ability of court to punish a spouse for financial misconduct does not permit an argument that a spouse has been "undercontributing or overconsuming" community assets during the marriage, because such behavior cannot "entitle the other party to a retrospective accounting of expenditures made during the marriage . . .").

[65] Reconciliation between the parties to a property settlement agreement abrogates, by operation of law, the executory provisions of a separation agreement: "Generally, a reconciliation nullifies the executory provisions of the agreement, e.g., periodic support arrangements or arrangements for property transfers to be made at a later date." 1 Lindey and Parley, LINDEY AND PARLEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 68.30 at 68-9 (1998). *Accord* Morgan & Turner, ATTACKING AND DEFENDING MARITAL AGREEMENTS § 4.074; Annotation, *Reconciliation as Affecting Separation Agreement or Decree*, 35 A.L.R. 2d 707, 746 (1954 & Later Cases Service 1989



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The parties appear to agree that "words in a statute should be given their plain meaning unless this violates the spirit of the act."[66] This Court has also repeatedly stressed, however, that:

> When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable. . . . The words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.[67]

It is not necessary to go beyond the presentation that led to the adoption of the words in question to know "the policy and spirit of the law."[68]

The drafters testified that the over-riding purpose of the legislation was to "establish[] clearly that all parents have the responsibility to support their children."[69] It was for that reason that the provisions were made applicable, not just to paternity cases, but "applied generally to all cases involving support or custody of children, specifically including divorce cases."[70] Ms. Angres' attached written comments clarified that the legislative changes were specifically intended to include cases in which there was already a decree, because "[c]ourts are now awarding joint legal custody – this picks up on that by stating parent with Physical custody is the custodial parent" [who can bring an action for four years' back child support].[71]

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& Supp. 2002).

[66] *See Matter of Parental Rights as to N.J.*, 116 Nev. 790, 799, 8 P.3d 126 (2000); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000).

[67] *Desert Valley Water Co. v. State Engineer*, 104 Nev. 718, 766 P.2d 886 (1988).

[68] This Court often references the legislative history of statutes and amendments to statutes, to verify the intended objects and goals of legislation, and often makes reference to the proposed objective of statutory amendments, and the comments of those proposing the changes, to ensure that the interpretation of statutes is consistent with legislative intent. *See*, *e.g.*, *Steward v. Steward*, 111 Nev. 295, 890 P.2d 777 (1995) (exploring bill draft and quoting committee minutes at length to ensure that the Court's interpretation was "consistent with the intent of the legislature" in enacting the provision); *Joseph F. Sanson Investment v. 286 Limited*, 106 Nev. 429, 795 P.2d 493 (1990) (noting that committee minutes would be reviewed to discern legislative intent and purpose if such minutes existed); *Wheeler v. Upton-Wheeler*, 113 Nev. 1185, 946 P.2d 200 (1997) (same); *McKellar v. McKellar*, 110 Nev. 200, 871 P.2d 296 (1994) (reviewing 1987 amendment to child support statute for legislative intent).

[69] Minutes of the Assembly Committee on Judiciary on S.B. 472, 62nd Leg. (May 19, 1983), at 2 (testimony of Ms. Nancy Angres).

[70] *Id*.

[71] *Id*., Exhibit B, at 2 (emphasis in original).

This was highlighted in the statements and questions at the hearing. Ms. Angres detailed the rationale for the expansion of the time period from three to four years: "Previously, it was never established by statute that a parent has to support his child, hence they are using the 4 year statute here. . . they are asking a 4 year statute be set for child support."[72] When asked if the matter had anything to do with arrearages, Ms. Angres responded that it did indeed, relate to "arrearages," which she explained as meaning that "if you do not have a court order, you can go back for 4 years to establish what the arrearage would be."[73] Of course, that is exactly what was asked by Martine's *Motion*, and exactly what the Family Court ordered. R. App. 19-20; App. 307-310.

There is ***nothing*** in the legislative history to suggest that the provision was intended to be any less applicable where there had been a divorce without a child support order than in any other case, and the state of the law in 1983 would make it unreasonable to imply any such intent. Specifically, there was no provision ***requiring*** an award of child support in all cases regarding custody of children until 1987.[74] Thus, situations in which custody, but not support, had been ordered were relatively common in 1983, and part of the problem that the legislation was intended to correct. This served the purpose of having parents satisfy their ***duty*** of support of their children.

The entire legislative history is concerned with expanding the mechanisms by which parents could be compelled to provide support for their children. In the language of *Desert Valley Water Co.*, it would produce a truly absurd result to so construe a provision intended to require parental support in such a way that the duty of support is "implied" out of existence. No aspect of the stated purpose of the statutory scheme could be served by the interpretation Rod urges this Court to find a way to imply.

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[72] Minutes of the Assembly Committee on Judiciary on S.B. 472, 62nd Leg. (May 19, 1983), at 2 (testimony of Ms. Nancy Angres).

[73] *Id*. The proposal was adopted by the Nevada Legislature unanimously.

[74] *See* NRS 125.450(1). Nevada was required to enact state statutes containing guidelines for the setting and collection of support in order for the state to receive the authorized federal funding under Title IV, Part D(IV-D) of the Social Security Act, 42 U.S.C. §§ 601 *et seq*. *See* 42 C.F.R. §§ 300 *et seq*. The history is explained in the Nevada Family Law Practice Manual, 2003 Edition §§ 1.115-1.118; *see also* Report of the Nevada State Bar Child Support Statute Review Committee (State Bar of Nevada, August 1, 1992) at 7-11.



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1 In short, it makes no difference whether this Court perceives any possible ambiguity of the
2 language. The law is clear on its face, and applies to Rod, who has lied to several courts by swearing
3 that he "has always supported" Audrey, while the facts show that he financially abandoned her upon
4 divorce and contributed nothing for his child until we dragged him into court.[75] If there was any
5 question as to the "policy and spirit" of the law, it is readily resolved by a brief review of the
6 legislative history, which shows that it was intended to obtain back child support from parents who
7 abandoned their families and happened to end up in Nevada.

8 In passing, Rod's stated concern (in mixed metaphor) about "opening the floodgates for
9 forum shopping," AOB at 15, deserves quick mention. Martine only filed a motion in Nevada
10 because this is where Rod moved (and wrongfully retained their daughter). She lives in Belgium,
11 and it would be far more convenient for her, if possible, to litigate in that country. But ***Rod*** chose
12 to come here, and to swear his residency and domicile in this State. Rod chose the forum, and if
13 anyone has been "shopping," it is him.

14 Rod's overstated concern for offense to North Carolina public policy, AOB at 14-15, 19, is
15 equally without merit. There has been no "retroactive modification" of anything, including an order
16 that was silent as to the subject matter in question. For virtually the entire period for which the
17 Nevada statute permitted the imposition of back child support, Rod was living ***in Nevada***,[76] a
18 situation specifically contemplated by the drafters of the provision as a problem that they intended
19 to address,[77] and certainly an appropriate subject for Nevada public policy.

20 Nevada law has always provided that, whether or not there is a "reservation to modify"
21 provision in a previously-entered decree, it may be modified at any time to allow the entry of orders
22 relating to children.[78] We believe that this issue is entirely one of Nevada law – seeking support
23
24
25 [75] *Compare* App. 20; R. App. 165, *with* App. 309, 312.

26 [76] Rod left North Carolina shortly after the divorce in September, 1999, and relocated to California; he was there through July, 2000, when he relocated to Las Vegas, and has remained here ever since. App. 21, R. App. 8.

27 [77] Minutes of the Assembly Committee on Judiciary on S.B. 472, 62nd Leg. (May 19, 1983), Exhibit B, at 1-2 (written testimony of Ms. Nancy Angres).

28 [78] NRS 125.510(1)(a).

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against a deadbeat parent in Nevada under the terms of a Nevada statute. The deference Rod claims that this Court must accord to a foreign order that says nothing about this subject (*see* AOB at 4-8), however, invites a discussion of North Carolina law. Precisely the same result would be reached under the law of that state.[79]

As such, the District Court did not abuse its discretion in reducing to judgment arrears accrued between the parties' divorce in September, 1999, and the filing of Martine's *Motion* in February, 2002.[80]

## V. THE DISTRICT COURT PROPERLY AWARDED MARTINE HER PORTION OF THE OMITTED MILITARY RETIREMENT BENEFITS

Military retirement benefits are the single largest asset of a military marriage.[81] Much of Rod's brief – even much of the discussion supposedly addressing child support matters – is actually intended to get this Court to somehow overturn the award to Martine of her share of those benefits, which Rod hoped to keep entirely for himself simply by saying nothing about them in the one-sided divorce he pushed through while living briefly in North Carolina. *See* AOB at 4-13. While Rod's

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[79] Child support may be awarded, post-decree, for any period in which the parties were separated but there was no order for child support; in North Carolina, this is termed "retroactive support." *See*, *e.g.*, *Hicks v. Hicks*, 237 S.E.2d 307 (N.C. Ct. App. 1977); *Stanley v. Stanley*, 275 S.E.2d 546 (N.C. Ct. App. 1981); *Wood v. Wood*, 298 S.E.2d 422 (N.C. Ct. App. 1982); *Warner v. Latimer*, 314 S.E.2d 789 (N.C. Ct. App. 1984); *Buff v. Carter*, 331 S.E.2d 705 (N.C. Ct. App. 1985); *Rawls v. Rawls*, 381 S.E.2d 179 (N.C. Ct. App. 1989). This is the majority rule in the United States – most states hold that where a divorce decree grants the custody of a minor child to the mother but makes no provision for child support, the father remains liable to the mother for the support provided subsequent to the decree. *See* Annotation, *Father's Liability for Support of Child Furnished After Divorce Decree Which Awarded Custody to Mother But Made No Provision For Support*, 91 A.L.R. 3d 530 (1979 & Supp. 1999). We note that Rod does not cite even a single case from the State of North Carolina implying that any other result could or would be reached.

[80] We note that the Family Court took into account all of Rod's protestations about having fed and clothed the child during the period he wrongfully retained her, by reducing the child support owed from 1999 to 2002 from the $500.00 figure easily supported by Rod's income, down to $300.00 per month. App. 308-309.

[81] *See*, *e.g.*, MARSHAL WILLICK, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) ("*Military Retirement*") at xix-xx; Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R. 3d 176. So that the magnitude is clear, the Department of Defense Office of the Actuary estimates that the present value of the retirement benefits for a Technical Sergeant, retiring after 20 years, is some $362,000.00. *See Retired Military Almanac* (Uniformed Services Almanac, Inc., 2003 ed.) at 245. The value will, of course, increase significantly if Rod receives any further promotions prior to retirement, as he should.

contentions are somewhat scatter-gunned, this brief will attempt to address the issues actually presented in an orderly fashion.

### A. State Law Applies

Partition of omitted assets and debts is a matter of state law. The federal statute governing military retirement benefits states that an enforceable court order can be a decree of divorce or a court order of property settlement "incident to such a decree," including a court order supplementing or changing the terms of an earlier final decree.[82] An order granting partition of military retirement benefits is specifically contemplated by the federal statute, and will be honored so long as the divorce decree from which the retirement benefits were omitted was issued after June 25, 1981.[83]

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[82] 10 U.S.C. § 1408(a)(2) (the Uniformed Services Former Spouses Protection Act, or "USFSPA") provides:

> The term "court order" means a final decree of divorce, dissolution, annulment, or legal separation issued by a court, or a court ordered, ratified, or approved property settlement incident to such a decree (including a final decree modifying the terms of a previously issued decree of divorce, dissolution, annulment, or legal separation, or a court ordered, ratified, or approved property settlement incident to such previously issued decree), or a support order, as defined in section 453(p) of the Social Security Act [42 U.S.C. § 653(p)], which--
> (A) is issued in accordance with the laws of the jurisdiction of that court;
> (B) provides for--
> (i) payment of child support (as defined in section 459(i)(2) of the Social Security Act [42 U.S.C. § 659(i)(2)]);
> (ii) payment of alimony (as defined in section 459(i)(3) of the Social Security Act [42 U.S.C. § 659(i)(3)]); or
> (iii) division of property (including a division of community property); and
> (C) in the case of a division of property, specifically provides for the payment of an amount, expressed in dollars or as a percentage of disposable retired pay, from the disposable retired pay of a member to the spouse or former spouse of that member.

[83] 10 U.S.C. § 1408(c):

> Authority for court to treat retired pay as property of the member and spouse.
> (1) Subject to the limitations of this section, ***a court may treat disposable retired pay*** payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or ***as property of the member and his spouse in accordance with the law of the jurisdiction of such court***. ***A court may not*** treat retired pay as property in any proceeding to divide or ***partition*** any amount of ***retired pay*** of a member ***as the property of the member and the member's*** spouse or ***former spouse if a final decree of divorce***, dissolution, annulment, or legal separation (including a court ordered, ratified, or approved property settlement incident to such decree) affecting the member and the member's spouse or former spouse (A) ***was issued before June 25, 1981***, and (B) did not treat (or reserve jurisdiction to treat) any amount of retired pay of the member as property of the member and the member's spouse or former spouse.

(Emphasis added.) The Congressional decision to permit partition of retirement benefits for divorces after June 25, 1981, but not those before that date, was reached as part of the 1990 amendments to the USFSPA. Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (1990). The history of that compromise is detailed in *Military Retirement* at 19-21.



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The federal courts have specifically validated and approved the remedy of partition, but have stressed that the matter is one of state law to allow or not allow,[84] and require that the court dividing the military retirement benefits have personal jurisdiction over the member by reason of the member's residence, domicile, or consent (including making a general appearance in litigation).[85]

Thus, the Nevada Family Court is the only court in which Martine can litigate the matter of her entitlement to a portion of the military retirement benefits. As this Court has noted, "[t]he United States Congress has authorized state courts to treat federal military pension benefits as separate or community property in accordance with the laws of the jurisdiction in which the court sits."[86] The time for the jurisdictional test is "now" – the time of the current action.

On point is the California Court of Appeal decision in *Fransen v. Fransen*,[87] in which the parties separated in Oregon and the husband moved to Idaho, where he filed for divorce, but in which he said nothing about the military retirement benefits or almost any other property, or about alimony, and made no request for an order regarding those matters. Subsequently, the husband moved to California, and the wife (who had also moved to California) sued for her portion of the military retirement benefits, alimony, and attorney's fees. The husband opposed the suit, claiming (as Rod does here) that the prior divorce decree that was silent on those questions actually "settled all issues in the matter."[88]

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[84] *See Fern v. United States*, 15 Cl. Ct. 580, 589 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990) (partition remedy allowed by USFSPA is precisely the sort of "economic adjustments to promote the common good" that legislatures properly perform); *Kirby v. Mellenger*, 830 F.2d 176 (11th Cir. 1987) (affirming division of retirement benefits in a partition suit as "incident to" a decree of divorce entered elsewhere); *Brown v. Harms*, 863 F. Supp. 278 (E.D. Va. 1994) (disallowing access to federal court for partition for lack of federal subject matter jurisdiction, stating that partition must be sought in state court).

[85] 10 U.S.C. § 1408(c)(4); *In re Akins*, 932 P.2d 863 (Colo. Ct. App. 1997) (question is whether domicile or residence can be established, or whether "consent" exists by way of "affirmative conduct demonstrating express or implied consent to general in personam jurisdiction"). In this case, as discussed at length above, Rod has sworn that he is a resident and domiciliary of Nevada, and has made a general appearance in the courts of this state. App. 11. *See also Kulko v. California*, *supra*, 436 U.S. 84, 91-92, 56 L. Ed. 2d 132, 98 S. Ct. 1690 (1978) (where a defendant is subject to a state's jurisdiction, his rights in the matters ancillary to divorce may be determined by its courts).

[86] *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988).

[87] *Fransen v. Fransen*, 142 Cal. App. 3d 419, 190 Cal. Rptr. 885 (Ct. App. 1983).

[88] *Id.*, 142 Cal. App. 3d at 423, 190 Cal. Rptr. at 887.

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The court rejected the husband's position, acknowledging that the prior decree dissolved the parties' marriage, but noting that "other than the Ford pickup truck, the Idaho decree did not divide, allocate or mention any of the other property of the parties," and concluding that the wife had therefore "not waived her claims to spousal support or [the husband's] pension rights."[89]

The appellate court rejected the claim that Rod makes here,[90] which sought to limit the distribution of retirement benefits to those that had accrued in California, instead holding that the inquiry was the degree to which the retirement benefits had accrued during ***the marriage***.[91] The court therefore remanded with instructions to divide the military retirement benefits, which had not been previously addressed by any court or in any order, in accordance with the degree to which they had accrued during the parties' marriage.[92]

That is the course this Court has taken in other recent appeals,[93] and what the Family Court has already ordered in this case. App. 308. That order should be affirmed, for the reasons detailed below.

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[89] *Id.*; *see also Garcia v. Barnes*, 743 P.2d 915, 917, 240 Cal. Rptr. 855, 857-58 (Ct. App. 1987).

[90] *See* AOB at 3.

[91] 142 Cal. App. 3d at 427-431, 190 Cal. Rptr. at 890-92. The decision includes a lengthy discussion as to whether the court could resort to a simple quasi-community property analysis for the period of military service overlapping the marriage, or would be required to do a state-by-state analysis of the divisibility of benefits according to where the parties had been stationed, under *In re Marriage of Roesch*, 83 Cal. App. 3d 96, 147 Cal. Rptr. 586 (1978); the court ultimately decided that all the benefits could simply be divided as quasi-community property. While Nevada does not have a quasi-community property statute, the prior decisions of this Court require this Court to make a similar choice; as discussed in the next section, however, both the short and long analyses lead to the same result.

[92] *Id.*, 142 Cal. App. 3d at 431, 190 Cal. Rptr. at 892. Martine did not file a cross-appeal as to the Family Court's denial of alimony, which claim is therefore relinquished unless this Court finds the ruling on that point to be plain error under the reasoning of *Fransen*. *See Wallace v. Wallace*, 112 Nev. 1015, 922 P.2d 541 (1996) (Supreme Court can address plain error whether or not raised by a party or preserved for appeal).

[93] *See Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) (validating post-divorce independent action in Nevada to divide asset erroneously omitted from out-of-state divorce decree failing to address the property).

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## B. The Law of All States in Which These Parties Lived During Marriage Calls for Division of Military Retired Pay As Property

In *Braddock v. Braddock*,[94] this Court specified that Nevada follows the "pure borrowed law" approach, under which our courts determine the divisibility of assets according to the law of the state in which those assets accrued. This Court has also repeatedly held, however, that arguments or doctrines not raised below are considered waived on appeal.[95] Further, this Court has affirmed the division of retirement benefits earned in other states in accordance with Nevada's community property law, where the *Braddock* argument was not raised.[96]

Since Rod made no demand for a state-by-state review of divisibility of retirement benefits based on where the parties lived during marriage, the order below could be affirmed without review of the subject, based on his waiver. However, if the Court elects to perform the *Braddock* review anyway, the result is the same.

As detailed above, during marriage the parties lived in New Hampshire for about a year and a half, and then moved to Louisiana, where they lived for about eight years. They then moved to North Carolina, where they spent about a year before the divorce in September, 1999. App. 20; R. App. 153.

New Hampshire explicitly divides all retirement benefits accrued during marriage, including military retirement benefits.[97] Louisiana, where the parties lived during the great majority of their marriage, is a community property state that explicitly requires division of all accrued retirement

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[94] *Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975).

[95] *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 623 P.2d 981 (1981).

[96] *See*, *e.g.*, *Heim v. Heim*, 104 Nev. 605 n.1, 763 P.2d 678 n.1 (1988) (noting without comment the equal division of a Michigan state retirement fund in a Nevada divorce court).

[97] N.H. REV. STAT. ANN. § 458:16-a (1987) ("Property shall include all tangible and intangible property and assets . . . belonging to either or both parties, whether title to the property is held in the name of either or both parties. Intangible property includes . . . employment benefits, [and] vested and non-vested pensions or other retirement plans . . ."; *Blanchard v. Blanchard*, 578 A.2d 339 (N.H. 1990).



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benefits, including military retirement benefits,[98] as does the marital property law of North Carolina.[99]

All states in which these parties had a marital domicile use the "time rule" for apportioning a spousal share of accrued retirement benefits.[100] Rod and Martine were married for eleven years (approximately 129 months). App. at 59. In about four years, when Rod is eligible for retirement (after 240 months of service), Martine should receive some 27% of the military retirement benefits.[101]

### C. No Other State Has Any Interest in this Litigation

Without ever suggesting a coherent reason for such a ruling, Rod insists, repeatedly, that Nevada must give "deference" to the non-litigation and non-decision of the military retirement benefits issue in North Carolina by refusing to entertain this action. *See* AOB at 4-6, 8-11. All of the cases he cites, however, concern cases in which courts in prior foreign divorce decrees ***did*** address property and debt issues, and stated that they were adjudicating them, making the question one of full faith and credit.[102]

In this case, the North Carolina pleadings, and resulting *Decree*, were silent as to the existence, attribution, ownership, or distribution of any property, or any question of spousal or child support. In the language of the *Fransen* decision, the prior decree did not "divide, allocate, or

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[98] *Swope v. Mitchell*, 324 So. 2d 461 (La. 1975); *Little v. Little*, 513 So. 2d 464 (La. Ct. App. 1987) (nonvested and unmatured military retired pay is marital property).

[99] N.C. GEN. STAT. § 50-20(b) (1998); *Milam v. Milam*, 373 S.E.2d 459 (N.C. App. 1988). Note that the previous requirement in North Carolina for retirement benefits to be vested before they were divisible was repealed and made identical to the rule in Nevada and Louisiana by 1997. *See generally* Major Janet Fenton, Practice Note, *North Carolina Changes Vesting Requirements for Division of Pension*, ARMY LAW., Feb. 1998, at 31.

[100] Of course, that is the same rule as in Nevada. *See Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995); *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

[101] 129 ÷ 240 = .5375 ÷ 2 = .26875.

[102] *See Wicker v. Wicker*, 85 Nev. 141, 451 P.2d 715 (1969); *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986). *Tomlinson*, however, is problematic as inconsistent with other case law, and is addressed separately below.

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mention" any of those matters.[103] North Carolina has ruled that it has no jurisdiction over the subject matter or any party to this case. App. 265. Martine is a citizen of a foreign country, and the only connection any party has with ***any*** state is Rod's connection to Nevada, where he has sworn to be a resident and domiciliary. App. 11.

This court has adopted the substantial relationship test to resolve any possible conflict of law questions in domestic relations.[104] Under the test, the state whose law is applied must have a substantial relationship with the transaction; and the transaction must not violate a strong public policy of Nevada.[105] Nevada has a strong public policy in favor of resolution of cases on the merits, which policy is heightened in domestic relations matters.[106]

Here, no other state has any connection with, or interest in, this litigation. North Carolina was merely the home – briefly – of one of the parties, and has declared itself to have no further contact with either of them or the divorce case, which never even purported to address the questions of property, debts, or support. The bulk of the parties' marriage actually occurred in Louisiana, but neither party has had any contact with that state (or New Hampshire, for that matter) in years, and the federal law referenced above states that only Nevada can now enter an enforceable order.

The only state with any connection to this litigation or these parties is Nevada.[107] As scholars have noted, the request by a party in one state for the use of another state's law, when that second

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[103] *See* 142 Cal. App. 3d at 423, 190 Cal. Rptr. at 887.

[104] *Hermanson v. Hermanson*, 110 Nev. 1400, 1403, 887 P.2d 1241, 1244 (1994), *citing Sievers v. Diversified Mtg. Investors*, 95 Nev. 811, 603 P.2d 270 (1979).

[105] *Id.*; *see also Motenko v. MGM Dist., Inc.*, 112 Nev. 1038, 921 P.2d 933 (1996) (tort case, explaining that under significant relations test in conflict of laws, the substantive and procedural law of the forum – i.e., Nevada – will apply to a suit unless it is demonstrated that "another state has an overwhelming interest" in it). As this Court approvingly quoted there, "When the Court has jurisdiction of the parties its primary responsibility is to follow its own substantive law. The basic law is the law of the forum which should not be displaced without valid reasons." 112 Nev. at 1042, 921 P.2d at 935, *quoting Foster v. Leggett*, 484 S.W.2d 827, 829 (Ky. 1972).

[106] *Lesley v. Lesley*, 113 Nev. 727, 941 P.2d 451 (1997); *Hotel Last Frontier v. Frontier Prop.*, 79 Nev. 150, 380 P.2d 293 (1963); *Price v. Dunn*, 106 Nev. 100, 787 P.2d 785 (1990).

[107] As noted above in regard to child support, Rod's accusations regarding "forum shopping" make no sense; the ***only*** reason Martine has gone to court here is because Rod is here.

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state has not purported to adjudicate the question, and has no contact with any of the parties at the time of the action, is the assertion of a "false conflict" entitled to no weight.[108]

As demonstrated above, the benefits in question were and are ***substantively*** divisible in every state in which these parties lived while married – New Hampshire, Louisiana, and North Carolina all would have divided the benefits if an action seeking that relief had been filed while the parties lived there. Rod raises the specter of North Carolina only to try to assert ***procedural*** defenses that he claims could shield him from justice if this action was being tried there now – an argument which would fail in either jurisdiction. *See Harroff v. Harroff*, *supra*.[109] As the court there observed:

> If . . . [wife] did not file a claim for equitable distribution before the entry of the divorce judgment . . . because of misrepresentations made by [husband], the trial court is not barred from making an equitable distribution. If . . . [husband's] misrepresentation caused [wife] to forego pleading for equitable distribution prior to divorce, [husband] shall be equitably estopped from pleading N.C. Gen. Stat. § 50-11(e) as a bar to [wife's] claim for an equitable distribution of the marital property.[110]

In fact, ***just*** Rod's failure to advise Martine of his intent to retain the retirement benefits, ***or*** his assurance to "watch out for her interest," ***or*** his threat to keep Audrey from her if she questioned him, would be sufficient to permit Martine to bring an action for equitable distribution and spousal support at any time.[111]

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[108] *See generally* CRAMTON, *ET AL.*, CONFLICT OF LAWS (3d ed., West pub. 1981) at 215-219. The court should employ the law of the forum wherever possible; when asked by a party to apply the law of some other state, it should "inquire into the policies expressed in the respective laws, and into the circumstances in which it is reasonable for the respective states to assert an interest in the application of those policies . . . if the court finds that one state has an interest . . . and the other has none, it should apply the law of the only interested state." *Id* at 217.

[109] *See Harroff v. Harroff*, *supra*, 398 S.E.2d 340 (N.C. Ct. App. 1990) (equitable distribution claim can be made at any time where a party has violated the duty of full disclosure and fiduciary duty to the other party).

[110] *Id*., 398 S.E.2d at 344. Perhaps the most offensive claim Rod makes is that the Family Court "abused its discretion" by ***not*** making a finding of "judicial estoppel" to bar Martine's motion. AOB at 12. First, Rod does not establish that any such request was ever made below. Second, his factual assertion that Martine "admitted . . . that there were no marital assets" is false. Third, as Justices Maupin, Young, and Shearing observed in similar circumstances in *Vaile* (the authority Rod cites) – "She was the victim, not the wrongdoer." *See Vaile v. District Court*, 118 Nev. ___, 44 P.3d 506 (Adv. Opn. No. 27, Apr. 11, 2002) (dissenting opinion of Justices Young and Shearing).

[111] *Sidden v. Mailman*, 529 S.E.2d 266, (N.C. Ct. App. 2000) (husband breached fiduciary duty by not specifically inform wife of valuable retirement account he intended to keep). The duty for one party to make specific disclosures to the other arises from the fiduciary relationship of husband and wife itself, or when one party conceals material facts from, manipulates, or is intentionally unfair to the other. *Id*. Here, only Rod had counsel, he told Martine what he thought she needed to know, and she did not speak English. All three grounds were present, and Rod violated his duty to make full and fair disclosure.

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Similarly, Rod's failure to disclose, alone, constituted "procedural unconscionability" justifying a later equitable distribution claim, even if it did not amount to "fraud."[112] For that matter, just the "procedural irregularities" detailed above would ordinarily be enough to be fatal to a purported "separation agreement."[113]

Under North Carolina law, for an agreement relating to property to be free from later collateral attack, it "must be untainted by fraud, must be in all respects fair, reasonable and just, and must have been entered into without coercion or the exercise of undue influence, and with full knowledge of all the circumstances, conditions, and rights of the contracting parties."[114] Here, Rod's fraudulent acts and omissions, and his false promises and threats, were all part of a plan to accomplish entry of a decree from which he hoped to keep everything of value accumulated during more than a decade of marriage. App. 303; R. App. 13. His words and actions would be both "fraud" and "duress" in ***any*** jurisdiction.[115]

In short, Rod's assertion that the military retirement "was not an omitted asset" (AOB at 8, 13) from litigation where it was never raised, discussed, or adjudicated, is falderal. This action should proceed in Nevada, using Nevada law. The only remaining question is the application of the Nevada law of omitted property.

### D. Nevada Law Allows Partition of Unmentioned Property; Resolution of Conflict in Case Authority

Rod commits the unfortunately common mistake of confusing different lines of authority, including those in which NRCP 60(b) motions are filed within six months to correct the distribution

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[112] *Daughtry v. Daughtry*, 497 S.E.2d 105 (N.C. Ct. App. 1998); *Tiryakian v. Tiryakian*, 370 S.E.2d 852 (N.C. Ct. App. 1988); *Lee v. Lee*, 378 S.E.2d 554 (N.C. Ct. App. 1989).

[113] *DeJaager v. DeJaager*, 267 S.E.2d 399 (N.C. 1980).

[114] *Eubanks v. Eubanks*, 159 S.E.2d 562, 567 (N.C. 1968).

[115] The North Carolina courts have opined that unconscionability is a conclusion to be drawn from procedural elements of "bargaining naughtiness" including fraud, coercion, undue influence, misrepresentation, and inadequate disclosure, as well as substantive unconscionability in the form of inequality so manifest as to shock the judgment of a person of common sense. *See*, *e.g.*, *King v. King*, 442 S.E.2d 154 (N.C. Ct. App. 1994). The facts of this case certainly satisfy both elements. *Cf. Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Murphy v. Murphy*, 103 Nev. 185, 734 P.2d 738 (1987) (both discussed below).

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of property that ***had*** been disclosed in the divorce,[116] with cases involving the eventual disclosure, litigation, and distribution of property that was ***never*** disclosed in the original divorce,[117] and even with non-60(b) cases involving rescission of agreements based on contract law principles of misrepresentation by omission.[118] *See* AOB at 6-12.

While all of these are interesting cases, and useful in understanding the "big picture" of Nevada's treatment of the finality of property adjudications and partition actions, review of the entire evolution of such cases is beyond the scope of this brief, and has been better and more completely recited in recent academic publications than it can be here.[119] A few points out of that history are relevant to the outcome of this appeal, and to the request made below for this Court to rectify a contradiction in the published cases.

The Nevada law stating that when property is not disclosed in a decree of divorce, it remains for future adjudication and partition – the parties being tenants in common of the property until that

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[116] Such as *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (it is irrelevant whether unequal division of property was caused by fraud or mistake; in either event, it is to be corrected by property equalization when discovered). Rod gets the holding of the case precisely backward, asserting that it only permits relief upon proof of fraud. *See* AOB at 9.

[117] *See Williams v. Waldman*, *supra*.

[118] *See Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992).

[119] A fairly comprehensive recitation was published by the State Bar in the recent Nevada Family Law Practice Manual, 2003 Edition §§ 1.236-1.268, which should be in the Supreme Court library. *See also* Marshal Willick & Fred Page, *Everything You Wanted to Know About Retirement Benefits But Were Afraid to Ask* (Nevada submission, 15th Annual Symposium of the Family Law Council of Community Property States at Coeur d'Alene, Idaho (State Bar of Idaho, 2003) (as this was published in Idaho and may not be readily available, a copy is attached as an Exhibit to this *Answering Brief*).

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time – goes back for nearly 100 years.[120] For the past 13 years, in an unbroken line of consistent authority, this Court has repeated that holding. Several prior holdings merit mention here.

It is true that, absent a reservation of jurisdiction over property rights, a property distribution actually made in a decree is generally considered final after six months.[121] However, the six-month limitation will not bar a motion to set aside the property distribution where fraud was committed upon the court,[122] or where property "was left unadjudicated and was not disposed of in the divorce."[123] The distinction between intrinsic and extrinsic fraud was eliminated in 1981, rendering earlier cases denying relief to spouses on that ground "not applicable."[124]

In *Smith v. Smith*,[125] as in this case, the wife had signed a proper person answer but later filed a motion seeking to set aside the property distribution in the decree. This Court noted that the husband did not deny beating the wife and that, while he claimed that the wife's numbers as to community property were inaccurate, he did not supply any figures that he claimed were more

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[120] *Johnson v. Garner*, 233 F. 756 (D. Nev. 1916) ("The divorce terminated the community . . . . Thereafter the interest of the former husband and wife in the property was that of tenants in common"); *Bank v. Wolff*, 66 Nev. 51, 55-56, 202 P.2d 878, 880-81 (1949):

> ***it is fundamental that where property rights are not in issue in a divorce action, a decree which is limited to granting a divorce in no way prejudices such rights.*** Upon the entry of such a decree the former separate property of the husband and wife is his or her individual property, and the property formerly held by the community is held by the parties at tenants in common.
>
> From the necessities of the case the right of either party after a divorce has been granted, to enforce his or her rights to such property in a separate action brought for that purpose cannot be doubted.

(Emphasis added; citations deleted.)

[121] *Kramer v. Kramer*, 96 Nev. 759, 762, 616 P.2d 395, 397 (1980).

[122] *See Murphy v. Murphy*, 103 Nev. 185, 186, 734 P.2d 738, 739 (1987). "Fraud upon the court" consists of "such conduct as prevents a real trial upon the issues involved." *Kramer*, *supra*, 96 Nev. at 762, 616 P.2d at 397.

[123] *Williams v. Waldman*, 108 Nev. 466, 474, 836 P.2d 614 (1992). The Family Court made this finding. App. 308.

[124] *Carlson v. Carlson*, 108 Nev. 358, 362 n.6, 832 P.2d 380, 383 n.6 (1992). For this reason (among others), Rod's reliance on the 1980 decision in *McCarroll v. McCarroll*, 96 Nev. 455, 611 P.2d 205 (1980) (intrinsic fraud insufficient to permit redivision of assets) is misplaced. *See* AOB at 11.

[125] *Smith v. Smith*, 102 Nev. 110, 716 P.2d 229 (1986).

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correct, and so remanded "so that the extent of the parties' community property may be ascertained and divided justly and equitably pursuant to NRS 125.150."[126]

In the 1987 *Murphy* case[127] this Court issued several holdings applicable here. The Court reiterated the 1948 holding that court intervention is appropriate when a party's "conduct . . . prevents a real trial upon the issues involved," but re-titled such conduct as constituting "fraud upon the court" rather than "extrinsic fraud." On that basis, the Court distinguished "certain older decisions holding that threats . . . were not a proper basis for relief," at least where the threatened party did not have independent counsel at the time of divorce.[128]

Further, this Court specified that when such fraudulent conduct by the husband is the basis of the wife's request for relief, the wife can "proceed by motion rather than independent action," irrespective of how much time has passed since entry of the decree.[129] The same year, in a non-family law case, the Court extended the availability of relief by way of such a *Murphy* motion to "unjust enrichment" resulting from mutual mistake as well as from fraud. The Court specified that such an equitable action is not barred by the doctrine of *res judicata*: the "salutary purpose of Rule 60(b) is to redress any injustices that may have resulted because of excusable neglect or the wrongs of an opposing party. Rule 60 should be liberally construed to effectuate that purpose."[130]

Rod claims that this Court must disregard its holding in *Blanchard v. Blanchard*[131] because that Opinion requires "filing a rescission claim in a civil court." AOB at 9. But the holding of

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[126] *Id.*, 102 Nev. at 112, 716 P.2d at 231.

[127] *Murphy v. Murphy*, *supra*, 103 Nev. 185, 734 P.2d 738 (1987). The parties were unrelated to those in the ***1948*** *Murphy* case, *supra*, which defined extrinsic fraud.

[128] *Id.*, 103 Nev. at 186, 734 P.2d at 739; *see also Cook v. Cook*, 112 Nev. 179, 912 P.2d 264 (1996), in which the husband's much milder threats (that he would lose his license, be bankrupted, and have to leave the country) to the unrepresented wife were considered ample "coercion" to justify relief under NRCP 60(b). As detailed above, Martine had no contact with counsel at all.

[129] *Id.*

[130] *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360, 364, 741 P.2d 802, 805 (1987). This Court has repeatedly held that the same relief under NRCP 60(b) is available to the short-changed party whether the cause of the unjust enrichment is deliberate fraud by the other party, ***or*** mutual mistake. *Carlson v. Carlson*, *supra*.

[131] *Blanchard v. Blanchard*, 108 Nev. 908, 839 P.2d 1320 (1992).

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*Blanchard* was not procedural, it was substantive: an injured party is entitled to relief if the other party made a false representation, with knowledge or belief of falseness, and intended to induce the injured party to act or refrain, if that party justifiably relied, and was damaged; further, "misrepresentation" may consist of suppressing or concealing information.[132] Rod's conduct in this case, where he told Martine what "the effect" of the decree would be, but never mentioned that he intended to keep all of the military retirement benefits, certainly qualifies. Further, as a procedural matter, the claim was appropriately filed in Family Court[133]; there is no reason for this Court to turn a blind eye toward its holding in *Blanchard*.

The most important cases to this analysis, however, are *Amie v. Amie*[134] and *Williams v. Waldman*.[135] Rod gives short shrift to the former,[136] and entirely ignores the existence of the latter.

*Amie* re-validated the remedy of partition of omitted assets in Nevada, embracing the 1949 holding from *Bank v. Wolff*, *supra*. The Court verified that the remedy was available not only when one party had defrauded the other, but in cases where an asset was not disposed of in the parties' divorce decree because of mistake, because it was intended to allow correction of unjust enrichment,

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[132] *Id.*, 108 Nev. at 910-11, 839 P.2d at 1322.

[133] There is some variation from department to department, but the Nevada Legislature's amendment to NRS 3.025(3), along with EDCR 5.42 (the "one family, one judge" rule), and this Court's holdings in *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997), and *Murphy*, *supra*, have been read collectively as permitting matters that are ancillary to core family court disputes to be raised in the same action, by motion, rather than by separate action (which would then be consolidated with the Family Court action anyway). Here, of course, Martine's *Motion* sought prospective and retrospective child support, alimony, and partition of omitted assets – all core family law matters. *See* Nevada Family Law Practice Manual, 2003 Edition § 1.267 & n.38.

[134] *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990).

[135] *Williams v. Waldman*, *supra*, 108 Nev. 466, 836 P.2d 614 (1992).

[136] Rod's entire discussion of *Amie* is the incorrect trio of assertions that: it only applies to assets that have not "come to fruition" until after the decree is entered; it requires the filing of an independent action; or that it requires a formal finding of fraud or mutual mistake to justify relief. AOB at 9, 10, 13. The latter two assertions are dealt with in detail below. As to the first – that the case only applies to assets that have not "come to fruition" – we note that Rod's military retirement benefits are still unmatured, and will only achieve maturity (pay status) when he has completed 20 years of creditable service, in about four years.

no matter the cause of that unjust enrichment.[137] As the Court noted, "the policies furthered by granting relief from the judgment outweigh the purposes of res judicata."

The Court noted that the partition of assets that had not previously been litigated did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*."[138] The Court distinguished *McCarroll*, *supra*, on the basis that *Amie* involved property "omitted from the divorce controversy. There was no dispute as to the nature of the property, and neither party claimed exclusive entitlement to this property."[139]

*Williams v. Waldman*,[140] addressed a claim brought seven years after a divorce by the former wife of a lawyer, seeking her share of the value of his law practice. Like Rod did here, the husband in that case prevented the wife from obtaining independent counsel by promising to look after her interests, and the wife did not have independent counsel at the time of divorce.[141] The valuable asset was silently omitted from the decree.

This Court held that when the husband advised the wife as to the effect of the decree, he had a fiduciary duty to make full and fair disclosure, and to be honest.[142] Rod relies heavily on *Applebaum v. Applebaum*,[143] claiming that Martine should have known not to trust him to tell her the truth about what he was doing. AOB at 11. This Court distinguished *Applebaum* in *Waldman*,

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[137] *Amie*, 106 Nev. at 542-43, 796 P.2d at 234-35, *quoting from Nevada Industrial Dev. v. Benedetti*, *supra*, 103 Nev. 360, 741 P.2d 802 (1987).

[138] 106 Nev. at 543, 796 P.2d at 235. The court summed up by holding that since the proceeds suit were left unadjudicated and were not disposed of in the divorce, they were held by the parties as tenants in common, and the property was "subject to partition by either party in a separate independent action in equity." *Id*.

[139] 106 Nev. at 542, 796 P.2d at 234. In this case, under the law of all the states in which the parties lived while married, the retirement benefits belonged to both of them; there can be neither a dispute as to the nature of the property, nor any legitimate claim of exclusive entitlement.

[140] *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992).

[141] The husband in *Waldman* told the wife "I will take care of you" and "I will be fair to you and the children"; while in this case Rod promised Martine that he would "watch out for my and Audrey's interests." App. 303.

[142] Rod is not a lawyer. But he acted as "translator" and advisor, and purported to make Martine "aware of the terms." App. 187. The same fiduciary duty applies, for the same reasons as in *Waldman*.

[143] *Applebaum v. Applebaum*, 93 Nev. 382, 566 P.2d 85 (1977).

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however, stating that the comment Rod relies upon was only dictum, that "the issue of whether a confidential relationship survives an announcement of an intention to seek a divorce necessarily depends on the circumstances of each case," and that adequate grounds for distinction were found in a long-term marriage with children.[144]

The Court found the wife's disclaimer of all interest in the law practice in *Waldman* to have been not "sufficiently informed"; here, there was no "disclaimer of an interest" at ***all***, because Rod never told Martine that her property interests would be affected in any way.

Rod asserts that the *Order* below is defective, because it does not explicitly find either that he committed fraud, or that the parties were mutually mistaken. AOB at 13. *Waldman* addressed that too. While distinguishing *McCarroll*, and finding that the wife, since she was unrepresented, "did not have a fair opportunity to present this issue to the original divorce court," the Court expressly specified the burden of proof in a partition suit: the wife is not required to prove fraudulent omission, "but simply that the community property at issue was left unadjudicated and was not disposed of in the divorce."[145] In this case, the Family Court has already made that finding, and Martine's burden of proof has been satisfied. App. 308.

While it would be convenient to end the analysis here, and ask for dismissal of Rod's appeal on the basis that the Family Court *Order* complied with the dictates of *Amie* and *Waldman*, intellectual honesty requires pointing out to the Court that there is a line of contradictory authority that, while impliedly overruled by those two cases, has not been expressly mentioned in any of the later cases, and so theoretically remains as authority.

Rod cites and relies upon *Tomlinson v. Tomlinson*.[146] AOB at 8. Oddly, he does not mention *Taylor v. Taylor*,[147] which arguably contains even stronger language in favor of the position he espouses (that the remedy of partition of omitted assets should not be permitted in Nevada).

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[144] 108 Nev. at 472 n.4, 836 P.2d at 618 n.4. Here, the parties were married for 11 years, and had a young child, and Martine did not speak English, relying entirely on Rod's promises to protect her interests. App. 303.

[145] *Id.*, 108 Nev. at 474.

[146] *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986).

[147] *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989).

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The 17-year old holding in *Tomlinson* has been theoretically troublesome since its issuance. Its actual impetus was the concern that the 1971 Michigan divorce decree (which explicitly provided for distribution of property and debts) was issued years before Michigan law provided for the division of retirement benefits between spouses, which concern was addressed and resolved by Congress in the 1990 amendments to the USFSPA.[148]

The ***language*** of the opinion, however, was couched in terms of "res judicata,"[149] which was problematic because the original decree was silent on the subject of retirement benefits, and because the holding is therefore directly contradictory to the later holdings in *Amie* and *Waldman*. *Tomlinson* is phrased ***so*** broadly that the Department of Defense, in a recent review of the law of all 50 states, expressed doubt that retirement benefits were divisible in Nevada at all.[150]

In practice, the *Tomlinson* opinion has caused a great deal of mischief – it is repeatedly cited by parties who urge district courts to disregard this Court's holdings over the past 13 years, from *Amie* through *Waldman*, *Cook*, and *Gramanz*, to rule that the law of Nevada is that where a decree is silent, whoever happens to obtain possession of an asset is legally entitled to keep it. Rod tried exactly that argument in this case. *See* App. 209. Lawyers cite *Tomlinson* and *Taylor* for the proposition that this Court condones the practice of concealing, disguising, and mischaracterizing assets prior to and at the time of divorce, and does not permit partition of assets omitted from decrees of divorce, no matter how egregiously that omission was achieved, and irrespective of the impact on the former spouse. *See* App. 208-212.

The fact that this Court did not expressly limit or formally reverse *Tomlinson* and *Taylor* in *Amie*, or in any case issued ***since*** *Amie*, has been the source of adverse commentary and considerable

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[148] *See* n.82, *supra*.

[149] Actually, the concept stated in the opinion actually springs from an interpretation of collateral estoppel. *See* M. Willick, *Res judicata in Nevada Divorce Law: An Invitation to Fraud*, 4 Nev. Fam. L. Rep. No. 2, Spr., 1989, at 1.

[150] *See A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Common Armed Services of the House of Representatives) at Appendix C-8 (Department of Defense, Sept. 4, 2001) (http://www.dod.mil/prhome/docs/finalc.pdf). Obviously, retirement benefits ***are*** divisible in Nevada, whether or not vested, and whether or not matured. *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983); the point is the confusion that the *Tomlinson* holding has caused.

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confusion for many years.[151] It is respectfully submitted that this Court should address head-on this outright contradiction in the case law, which has long bedeviled district court judges and been the source of considerable unnecessary litigation, and so bring uniformity to Nevada law on this subject for the benefit of the Bench and Bar.

*Amie* aligned its result and holding with both the earlier (1949) Nevada decision in *Wolff* and the seminal California case of *Henn v. Henn*.[152] The *Henn* decision is ***universally*** followed in the other community property states,[153] and it has been approvingly cited by this Court in three separate opinions, including *Amie*.[154]

The *Henn* decision was itself concerned with exactly the question presented in this case – the partition of military retirement benefits omitted from a prior decree of divorce. It expressly held that military retirement benefits omitted from a decree of divorce are subject to partition in a later

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[151] *See Everything You Wanted to Know* (attached as Exhibit 1) at 9-24; M. Willick, *Partition of Omitted Assets After Amie: Nevada Comes (Almost) Full Circle*, 7 Nev. Fam. L. Rep. No. 1, Spr. 1992; Nevada Family Law Practice Manual, 2003 Edition §§ 1.255-1.268.

[152] *Henn v. Henn*, 605 P.2d 10 (Cal. 1980).

[153] *Casas v. Thompson*, 720 P.2d 921, (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987) ("*Henn* implicitly holds . . . that the policy favoring equitable division of marital property outweighs that of stability and finality in the limited context of omitted assets"); *Bumgardner v. Bumgardner*, 521 So. 2d 668 (La. Ct. App. 1988) (court retained continuing jurisdiction to partition military retired pay after the divorce); *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987); *Kovacich v. Kovacich*, 705 S.W.2d 281 (Tex. App. 1986) (parties to decree that silently omits military retirement benefits remain tenants in common, although in this case no personal jurisdiction over the member); *Norris v. Saueressig*, 717 P.2d 52 (N.M. 1986) (unaddressed and undistributed military retirement benefits to be paid to former spouse once claim was made in partition); *Sparks v. Caldwell*, 723 P.2d 244 (N.M. 1986) (partition of omitted military retirement benefits is permitted, but only if court has personal jurisdiction over member at time of suit); *Flynn v. Rogers*, 834 P.2d 148 (Ariz. 1992); *Cooper v. Cooper*, 808 P.2d 1234 (Ariz. Ct. App. 1990); *In re Marriage of Parks*, 737 P.2d 1316 (Wash. Ct. App. 1987); *Molvick v. Molvick*, 639 P.2d 238 (Wash. Ct. App. 1982); *Pike v. Pike*, ___ P.3d ___, 2003 Ida. App. LEXIS 121 (Idaho Ct. App. No. 29278, Nov. 10, 2003) (court order stating that personal property was "divided prior to this action" did not shield undivided military, Civil Service, and other retirement accounts from partition).

[154] *Haws v. Haws*, 96 Nev. 727, 615 P.2d 978 (1980); *Amie v. Amie*, *supra* (for the core holding, that partition of all unadjudicated assets is allowed); *Gramanz v. Gramanz*, *supra* (again, for the core holding). It is worth noting that Rod misrepresents the holding of *Haws*, which involved competing decrees entered in two states, and the unobjectionable holding that the earlier decision, fully addressing property, debt, and support issues, was entitled to full faith and credit. *Cf.* AOB at 6.

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1 independent action by the nonmilitary spouse.[155] This holding is in keeping with this Court's
2 expressions of public policy.[156]

3 It is clear that *Wolff*, *Henn*, *Amie*, and *Waldman*, on the one hand, and *Tomlinson* and *Taylor*,
4 on the other, are directly contradictory, and that both lines of authority cannot be indefinitely
5 maintained as valid authority. As noted in the Nevada Family Law Practice Manual:

6 > It is impossible to reconcile *Amie* with *Tomlinson* and *Taylor*. Factually, *Tomlinson* was nearly identical to *Henn*, *supra*, which was relied upon as authority in *Amie*, but not
7 > even acknowledged to exist in *Taylor*. The California Supreme Court had followed and explained *Henn* in *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S.
8 > 1012 (1987), just months before the Nevada court decided *Tomlinson*.

9 While it appears that today Nevada has returned to alignment with the uniform law of the
10 other community property states permitting former spouses to partition assets (including military
11 retirement benefits) not disposed of in the original divorce proceeding, the fact that the later cases
12 have not overruled the earlier ones with which they are inconsistent has left some doubt. It is
13 respectfully submitted that the later rule is the wiser one.[157]

14 The Practice Manual notes that in the more recent cases, this Court "has indicated that it is
15 more willing to affirm a district court ruling attempting to achieve equity than it is to approve an
16 order which would have the result of preserving an inequitable result."[158] We urge the Court to
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20 [155] This is ***opposite*** of the holding reached only a few months before *Amie* was issued, in *Taylor*. No legal distinction as to the character of the asset to be partitioned can be drawn, since both the omitted wages in *Amie* and the
21 omitted pensions in *Taylor* are clearly community property. The *Taylor* court's requirement of finding "extrinsic fraud" before allowing partition was nowhere to be seen in the *Amie* decision a few months later, which did not cite or
22 acknowledge the existence of *Taylor* at all.

23 [156] That a commercial case involving the sale of property could and was corrected outside the six-month scope of NRCP 60(b) by way of an independent action alleging "mutual mistake" resulting in "unjust enrichment," *Nevada Industrial Dev. v. Benedetti*, 103 Nev. 360,741 P.2d 802 (1987), makes it even more reasonable for the courts to entertain
24 similar motions or actions in family law matters, as to which this Court has stated that public policy concerns are "heightened" and courts are urged to resolve cases "on their merits." *Lesley v. Lesley*, *supra*. There seems no legitimate
25 policy reason to hold commercial land sale mistakes to be any easier to correct than division of assets between spouses; rather the opposite seems reasonable, and demonstrable errors in the distributions of property upon divorce should have
26 the ***least*** stringent standards for correction by way of post-divorce actions.

27 [157] "Since the parties omitted to include this property in . . . the divorce suit, . . . the property never came within the field of the prior divorce litigation." 106 Nev. at 542, 796 P.2d at 234.
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[158] Nevada Family Law Practice Manual, 2003 Edition, § 1.265.

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continue that trend, and expressly overrule *Tomlinson* and *Taylor*, at least to the extent that they contradict *Amie* and *Waldman*, in the interest of justice.

## VI. CONCLUSION

It is respectfully submitted that this Court should affirm the Family Court orders relating to child support, both prospectively and as to arrears, and affirm the order as to partition of military retirement benefits omitted from the underlying decree of divorce, preferably in the form of a written opinion resolving the contradiction in the existing case law.

Respectfully submitted,

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______________________________

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. 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 ____ day of ____________________, 2003.

______________________________________
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# CERTIFICATE OF SERVICE

I hereby certify that service of the foregoing was made on the _____ day of _____________, 2003, by U.S. Mail addressed as follows:

Mario Valencia, Esq.
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Attorney for Appellant

That there is regular communication between the place of mailing and the place so addressed.

_______________________________________
An Employee of the LAW OFFICE OF MARSHAL S. WILLICK, P. C.

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