SUPREME COURT OF THE STATE OF NEVADA

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JANIS CARMONA a/k/a JANIS KESTER,

Appellant,

vs.

JUDY CARMONA, as successor representative of Lupe N. Carmona, deceased,

Respondent.

CASE NO: 35851
DC CASE NO: D 181580

RESPONDENT'S ANSWERING BRIEF

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

CASES Pages

FEDERAL CASES

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STATE CASES

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FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

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STATEMENT OF THE CASE[1]

Appeals from post-divorce Orders: refusing to reverse orders holding that Judy Carmona (the widow of Lupe Carmona) is entitled to a stream of survivorship benefit payments, and establishing a constructive trust to facilitate those payments (Case 35851); and holding Janis Carmona (the former wife of Lupe Carmona) in contempt for ignoring repeated court orders, and assessing against her about half of the attorney's fees incurred as a result of her contemptuous acts (Case 36220). Eighth Judicial District Court, Hon. Robert E. Gaston, presiding.

Lupe Carmona was divorced from Janis Carmona on November 4, 1997. App. 1 at 20-25. The *Decree*, approved by both counsel,[2] provided that Lupe was awarded various pensions in his name, including those with I.A.T.S.E.[3] and Hilton Hotel. App. 1 at 21.

On March 25, 1998, over Janis' objection, the trial court ordered that Lupe could ask the pension plans to name Judy as his designated survivor beneficiary, if he wished to do so. App. 1 at 87-89. On November 2, 1998, Lupe requested establishment of a constructive trust by which the survivorship payments would go to Judy as he intended, even if made to Janis. App. 1 at 127-152.

On February 10, 1999, the trial court issued a written ruling that at the time of the divorce, the survivor's benefits were inherently contemplated, that Janis had been fully compensated for her

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[1] 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 Janis' first *Opening Brief* (Case 35851, the "Money OB") is a three-page recital that is largely accurate, but nevertheless contains some references to pages of the Appendix having no connection to the proposition for which they are cited. It references many extraneous proceedings.

The "Statement of the Case" in Janis' second *Opening Brief* (Case 36220, the "Contempt OB") is a nine-page discussion mixing procedural information with a very selective rendition of facts that have nothing to do with the procedural matters leading to this appeal. It also contains references to alleged conversations between counsel outside of the record, and commentary in both text and footnotes as to the alleged motives and intentions of the parties, counsel, and Judge. The facts it does address are substantially mis-stated, including a deliberate reversal of the meaning of an order issued by the trial judge, which that judge has already told opposing counsel is just wrong. *Cf.* Contempt OB at 3, n.3, *with* App. 6 at 2-3 (restating the Court's explanation that he had ***never*** ruled that "only the pension plan administrators could change the designation of the survivor beneficiary," but instead that the Court had ***always*** intended for the survivorship benefits to be under Lupe's exclusive control once the divorce was granted).

Accordingly, Janis' two Statements of the Case are both deficient, and the Court is asked to refer to the recital in this Answering Brief pursuant to NRAP 28(b).

[2] At that time, Lupe was represented by Radford Smith, Esq., and Janis was represented by William Freedman, Esq.

[3] The International Association of Theatrical and Stage Employees, Local 720.

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interest, that they had been awarded to Lupe to do with them as he pleased, and that Janis would be unjustly enriched in violation of the divorce settlement if she received those benefits. App. 1 at 198-201. The Court ordered the plans to change the beneficiary designation from Janis to Judy, and further provided that a constructive trust would be set up to transfer the proceeds from Janis to Judy if for any reason the plans did not or could not honor that order. *Id*. The formal written order was filed April 16, 1999. App. 1 at 204.

On April 28, 1999, Janis filed a motion asking the Court to reverse its order that Judy was to receive the survivorship benefits. App. 2 at 211-290. Her request was effectively refused by the trial court's *Order Establishing Constructive Trust* filed June 22, 1999. App. 2 at 351-52.

On November 4, 1999, Judy filed a motion seeking to have Janis held in contempt for refusing to deposit the survivor's benefits into the constructive trust account as ordered. App. 3 at 461-501. After many delays, that motion was heard on March 13, but was continued at Janis' request. App. 6 at 1131.

On March 14, 2000, the trial court formally denied Janis' motion asking the Court to reverse its Order that Judy was to receive the survivorship benefits. App. 4 at 872-74. Notices of Entry of that order, and the *Order Establishing Constructive Trust* filed June 22, 1999, were filed March 15, 2000. App. 4 at 866, 875. Janis appealed both orders on March 21, 2000. App. 4 at 886.

On May 1, 2000, the contempt proceedings resumed. App. 6 at 1131. Refusing Janis' requests for further stays and continuances, the trial court found Janis in contempt of multiple court orders that had required her to deposit the survivorship payments into the constructive trust account, by a variety of individually contemptuous acts on a number of separate occasions. App. 6 at 1131-1135.

The formal Order was filed on May 31, 2000. *Id*. It provided, in part, for an award to Judy's counsel of $15,000.00 in attorney's fees, about half of what was incurred in the proceedings. App. 6 at 1134. Janis appealed from that order as well, on June 16, 2000. App. 6 at 1136.

This Court consolidated the two appeals by Order entered on December 21, 2001, and this appeal proceeded.

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STATEMENT OF FACTS[4]

Lupe Carmona had a long career, starting in 1969, as a stagehand and eventually in management with the Las Vegas Hilton Hotel. Tr. 8/21/97 at 20.[5] During the many years of his career, he accrued credit in a number of pension plans, and married and divorced several different women. This appeal concerns two of those pension plans – from I.A.T.S.E. and Hilton Hotel. It is between Lupe's eighth wife, Janis, and his ninth wife (and widow), Judy. At issue is the stream of survivorship benefits from those two pension plans to either his ex-wife Janis, or his widow Judy.

Neither Janis nor Judy was married to Lupe at any time while he accrued credits in the I.A.T.S.E. retirement plan. App. 2 at 434. When Lupe married Janis on March 7, 1988, he was reaching the end of his career, but was still in management with the Las Vegas Hilton Hotel and had

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[4] It is respectfully submitted that Janis' two recitations of the facts are inadequate to allow this Court to review the case. In the Money Opening Brief (Case 35851), many "facts" and conclusions are drawn from Janis' own claims (or even her lawyer's memorialized recollection of third party hearsay as to those claims), many of which were neither litigated nor established at trial. There is also, as with the Statement of the Case, inappropriate commentary as to the un-memorialized thoughts of the judges and others involved in the case. Throughout the 11-page statement, there is a recurrent failure to acknowledge matters on which conflicting testimony was submitted, instead offering Janis' testimony (or even her attorney's argument) as "fact," even where contradicted by other evidence. The Contempt Opening Brief (Case 36220) contains a short three-page statement, but the very selective "facts" recited are ***partial*** renditions of the procedural history of the litigation, which obscures better than it explains what happened below.

Worse than what the opening briefs contain is what they omit – the critical bits of procedural and factual information that explain ***why*** the court below ruled that Judy, not Janis, is entitled to the proceeds, and why Janis' large number and variety of contemptuous acts merited the imposition of the sum of attorney's fees now at issue. For example, page nine of the Money Opening Brief omits (from lines 16 to 20) any mention of how Janis' counsel simply sat on the formal court order memorializing the trial court's decision – for months – apparently hoping that Lupe would die just so Janis could create a procedural question she now raises. There is likewise no mention of the efforts to get a variety of other courts to undercut or effectively reverse the district court's decision, while not telling those courts that this very appeal was pending, even though Janis has sought to use those other actions to excuse her behavior in this case.

It is respectfully submitted that the Statements of Fact proffered by Janis are insufficient to allow this Court a fully-informed review of this case. The Court is asked to refer to this recital of the facts, pursuant to NRAP 28(b). There are few actually contested questions of fact involved in this appeal. Because Janis has contested the lower court's award of attorney's fees, however, the procedural history of who did what, and the reasonableness of the actions of both the parties and their counsel, is at issue. Accordingly, this Statement will include a greater number of references to procedural issues than is typical, such as to additional filings apparently made for the purpose of delay and waste of time and money.

[5] Janis has inserted four of the transcripts from the proceedings in this case in volume five of Appellant's Appendix (8/21/97, 1/13/98, 12/14/98, and 7/15/99); she did ***not*** insert five other transcripts (11/3/98, 12/13/99, 2/29/2000, 3/13/2000, and 5/1/2000). *See* NRAP 10(b). The Supreme Court Clerk has verified that the transcripts that are in the appendix were not also separately filed, but there are still two possible references to those transcripts (i.e., as transcript references, or appendix references, or both). To minimize confusion, we have written all transcript references as solely to the transcript pagination, whether or not the transcripts are in the appendix.

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not yet retired. The bulk of ***all*** of Lupe's retirement benefits were accrued long before his marriages to either Janis or Judy.[6]

Both the Hilton and I.A.T.S.E. pension plans contained options for either "straight life annuities" paying the maximum amount of money each month for the lifetime of the worker, or "joint and survivor annuities" paying a lesser amount each month during life, but also paying money to the worker's "surviving spouse" after the worker's death. R. App. I at 15 ; 35.[7] While both plans required workers, at retirement, to elect either the maximum lifetime benefit or a reduced lifetime benefit plus survivorship interest, neither retirement plan had any specific provision contemplating the possibility that a worker's surviving spouse could be anyone other than the person to whom the worker was married at the moment of retirement. In other words, neither plan states whether or not a worker can change the identity of his named "surviving spouse" if he chose the joint and survivor option, retired, and then divorced and remarried.

Lupe's pension benefits with I.A.T.S.E. and Hilton had matured (i.e., reached pay status) only four years after his marriage to Janis. Lupe's health was in decline,[8] and he had to designate a survivor or forever forego any survivor's benefits for anyone, by taking the maximum lifetime benefit. R. App. I at 15-16; 35-36 (survivor benefit description pages).

On September 3, 1992, Lupe signed a benefit election form, electing to receive a "joint and survivor" benefit rather than a "straight life annuity" with no death benefit; the name "Janis Kester" was typed in after the word "spouse" on the form. App. 2 at 257-59. Lupe testified by affidavit that his purpose in doing so was so that he would have benefits to leave to whomever was his spouse at his time of death, and that he only named Janis as his survivor for those benefits because she was his spouse at the moment he had to fill out the form. App. 2 at 434. Lupe retired October 1, 1992.

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[6] From 1969 through 1978 Lupe accrued benefits in the I.A.T.S.E. pension. Lupe's pension with Hilton was accrued from 1978 until his retirement in 1992. *See* App. 4 at 699; App. 2 at 434.

[7] The Hilton plan speaks in terms of the benefit "your spouse would receive after your death." R. App. I at 15. The I.A.T.S.E. plan speaks of benefits to be received by "your spouse" if "still living at the time of your death." R. App. I at 35. That plan also contains language, describing the "period certain life income" option, under which the named beneficiary may be changed from time to time, with or without the beneficiary's consent. R. App. I at 62.

[8] Lupe had asbestosis, leading to a degenerative lung condition. Tr. 8/21/1997 at 31-32.

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The instructions that accompanied the form indicated that the ***type*** of benefit (i.e., ***with*** survivorship, rather than ***without*** survivorship) became irrevocable when Lupe received his first pension payment; it was silent as to whether he could change the name of the beneficiary who would receive those payments. App. 2 at 258-59.

Lupe's marriage to Janis did not fare any better than his prior seven marriages, and he formally filed for divorce on October 27, 1994, requesting among other things all of his various retirement benefits. App. 1 at 1-5.

It took more than three years to get through the divorce process, during which time Lupe was living with and engaged to Judy, and Janis had gone on with her own life. Lupe declared several times his intention to ensure that, as soon as the divorce was concluded, Judy was to be his designated survivor on all of his retirement plans. App. 2 at 435-36; App. 4 at 726. The *Decree* was finally filed on November 4, 1997, after extensive negotiations, litigation of assorted issues, and a settlement conference.[9] App. 1 at 20-25.

During her marriage to Lupe, Janis had worked at Hilton as a stagehand, and accrued pension credits in her own name with I.A.T.S.E. While all of Lupe's I.A.T.S.E. pension, and the bulk of his Hilton Hotel pension, were his premarital separate property, both parties had accrued a modest increase in their separate retirement benefits during their marriage, and the value of the benefits accrued by Lupe during marriage was slightly more than the value of the benefits accrued by Janis; they negotiated an agreement by which each kept his or her own retirement benefits, and Lupe paid Janis $1,500.00 to equalize the values accrued during the marriage. App. 5 at 1075.

The *Decree* memorialized their agreement by reciting that among the assets to be retained by Lupe as his sole and separate property were his pensions with I.A.T.S.E. and the Hilton Hotel,

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[9] As an aside, it is worth mentioning a matter about which Janis has repeatedly misrepresented the record. On page 5 of the Money Opening Brief, she implies that the wrong judge signed off on the orders at issue. In her proceedings in federal court, where she tried to collaterally attack Judge Gaston's rulings, she was more direct, alleging that Judge Gaston overruled "another state court judge" in making the rulings at issue here. *See Opposition to Motion to Dismiss* filed in Case No. CV-S-01-0431-PMP-PAL at 15. As the record below shows, this case was formally transferred from Department B (Judge Sanchez) to Department F (Judge Gaston) on September 27, 1997, and the *Decree of Divorce* was not filed until ***November*** 4, 1997. *See* Blackstone Computer Docket Entry for September 27, 1997, at http://courtgate.coca.co.clark.nv.us:8490/FamilyCourt/asp/CaseActivity.asp?Start=0211. The *Decree* was rendered by Judge Gaston (and says so on its face); as detailed in the argument set out below, it was Judge Gaston's own decree that he interpreted and construed.

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while Janis was to receive her I.A.T.S.E. pension and "the sum of $1,500.00 as and for an equalization of the values of the marital portion of the pensions divided herein." App. 1 at 21-22. The survivor's benefits were not explicitly mentioned in the *Decree*.

The parties engaged in several rounds of motion practice regarding issues not relevant to this appeal.[10] In one of those motions, Janis requested an order that Lupe be prohibited from changing his survivorship beneficiary to Judy as he intended. App. 1 at 30-31.

At the hearing held January 13, 1998, both sides, and the Court, discussed the survivor benefits and the terms of the Qualified Domestic Relations Order (QDRO) proposed by Mr. Smith (Lupe's attorney), which included a provision reciting that Janis explicitly waived any survivorship interest she ever had. Lupe's argument was that when he retired, he had merely indicated an option selection which included a post-death payment for whoever would be his surviving spouse, and that Janis happened to be the spouse at the time he made the election. Janis' position was that once Lupe had named her as a surviving spouse, whether or not she was married to him when the benefits were earned, or when he died, he made a "gift" to her of the survivorship interest that no one, including Lupe or the divorce court, could take away. Tr. 1/13/98 at 6, 13-16.

Judge Gaston stated that since the benefits belonged to Lupe pursuant to the divorce settlement, Janis' motion to ***prohibit*** Lupe from changing the named beneficiary would be denied; however, since the *Decree* did not contain the phrase Janis that had explicitly ***waived*** any interest she claimed to have, the QDRO should not indicate that the *Decree* contained such a provision. *See* Tr. 1/13/98 at 18-25; App. 5 at 1076-1077.

The formal order, drafted by Janis' counsel and filed March 25, 1998, selectively quoted from the hearing; it directed that, with certain amended language, Janis was required to sign an amended QDRO, which was to alter the retirement from one providing a survivorship in Janis' name to a benefit unreduced by any survivorship benefit,[11] and further that "if allowed by the Plan, the Plan

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[10] Janis' briefs spend some time on those matters, and (by omission and commission) not with full accuracy. Since those matters have nothing to do with the appeal before the court, the irrelevant matters are not discussed here, other than to note that they have not been fully or fairly set out in either opening brief.

[11] I.e., a "full, unreduced pension benefit, restored to a lifetime basis for him under the Plan." App. 1 at 89.

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shall make available the appropriate forms for [Lupe] to elect a new beneficiary to replace [Janis]. . . . if the Plan agrees to change the beneficiary, it can." App. 1 at 87-89.

On November 2, 1998, Lupe filed an opposition to another of Janis' *ex parte* motions (this one centering on the sale of a house in another state), and brought a countermotion for establishment of a constructive trust for payment of the survivor's benefits to Judy, since in the intervening time the pension plans had indicated by informal letter that they did not have any internal mechanism for changing beneficiary designations as the Court had allowed.[12] App. 1 at 127-152.

At the hearing of November 3, 1998, undersigned counsel notified the district court and opposing counsel that Lupe was very ill and believed to be on his deathbed, so that time was of the essence in reaching a determination. App. 5 at 1077; Tr. 11/3/98 at 3, 22. There was a great deal of further procedural wrangling, which fills the record but adds nothing to the legal issues before this Court.[13]

Some of the issues in the cross-motions were settled; the remainder came on for hearing on December 14, 1998. The Court heard argument as to both parties' positions: essentially, Lupe argued that if the Court failed to affirmatively enforce its order awarding him 100% control of his retirement benefits, Janis would receive an unjustifiable windfall; Janis argued that at the moment Lupe first filled out a beneficiary designation (at retirement), he had made an irrevocable gift to her of benefits as her "separate property," which did not have to be recited in the underlying decree to be immune from further consideration or enforcement actions. *See* Tr. 12/14/98 at 4-20, 20-25.

Judge Gaston took the matter under submission, for the purpose of reviewing both the written materials and the tape of the settlement conference that led to the divorce settlement and *Decree*

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[12] At this point, undersigned counsel had substituted in for Mr. Smith. App. 1 at 85. Lupe's countermotion sought an order creating a constructive trust in Lupe's name, with ***Judy*** as his beneficiary, and directing that Janis deposit any money she received from the plans into the trust. App. 1 at 129-130, 140-43. We note in passing that a large number of the documents included in Janis' Appendix are not file-stamped copies of court documents, in violation of NRAP 30(c)(1). *See*, *e.g.*, App. 1 at 85, 127, 169. As this Court has issued no orders concerning this procedural error (or others noted above), we have simply referenced the documents as provided to us by our opponents.

[13] On November 25, 1998, Janis filed her response and a motion to strike Lupe's countermotion for establishment of constructive trust (App. 1 at 158-168); on December 7, 1998, Lupe filed his opposition to Janis' motion to strike. App. 1 at 169-177. Lupe once again requested that the Court order that a constructive trust be established in his name, with Judy designated as the beneficiary, and that Janis ordered to deposit any money she received from the plans into the trust.

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(702) 438-4100

terms. Tr. 12/14/98 at 22-23. On February 8, 1999, the lower court rendered a written ruling which he transmitted by facsimile to both counsel on February 10, setting forth his findings and decision. App. 5 at 1078; App. 1 at 198-201.

The written decision described the divorce settlement conference as "meticulous." App. 1 at 199. After disposing with matters relating to a house, the lower court turned to the retirement benefit survivorship issues and recounted the positions of the parties. App. 1 at 200. The lower court then found:

> There is no question that the parties agreed that they would each maintain their own retirement as their sole and separate property. This means to the court they have the right to modify or adjust their respective plans in any way the plan administrators allow under their own rules. This court so ruled in a previous hearing on this issue. That is, [Lupe] could change the survivor beneficiary if he were allowed to. The issue that has recently arisen is that the administrators will not change the survivor beneficiary unless the court directly orders them to.
>
> The court has to consider now, whether the survivor benefits were an omitted asset or part of the distribution in the Decree of Divorce. Although the survivor benefits were not discussed specifically during the Settlement Conference, it appears that both parties were aware of their existence. Janis was aware and conversant about every detail in Lupe's retirement plans.
>
> During the settlement conference both parties agreed that Lupe would receive the entirety of his plans upon payment to Janis of $1,500. At that time, Janis did not assert at the time her interest as survivor beneficiary must be maintained. It is the court's opinion that she conceded that Lupe would receive every aspect of his retirement just as she received every aspect of hers.
>
> Therefore the court finds that the Survivor Benefits of Lupe's retirement plans are not omitted assets, but were contemplated by the parties inherently in their discussion of their respective plans.
>
> The court further finds that if indeed Janis receives the survivor benefits against Lupe's wishes it would be in violation of the Agreement made by the parties and the Decree of Divorce and that Janis would be unjustly enriched.

App. 1 at 200-201.

Based on those findings, the lower court ordered that the administrators of Lupe's retirement plans with the Hilton Hotel Corporation and I.A.T.S.E. were to change the survivor beneficiary designation according to Lupe's directions. App. 1 at 201. The court further ordered that if the administrators of Lupe's retirement plans could not or otherwise failed to do so, the court would order a Constructive Trust for the benefit of Lupe's designated beneficiary (Judy), into which the survivorship funds, if received by Janis, would be held in trust for Judy.

Within days (on February 15, 1999), a formal order tracking the court's decision line by line was prepared and sent to Janis' attorney. R. App. I at 72. Mr. Freedman did not countersign the

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order, or give any other kind of response, for nearly two months; when this office threatened to submit the order without a countersignature, we received (on April 13, 1999) a lengthy list of proposed changes that did not comport with the court's written decision. R. App. I at 79.

On April 14, having been informed that Lupe was gravely ill and hospitalized, we submitted the Order directly to Judge Gaston without Mr. Freedman's countersignature. R. App. I at 87-89 (letters to Mr. Freedman and Judge Gaston dated April 14, 1999). Without directly accusing Mr. Freedman of stalling entry of the order in order to take legal advantage of Lupe's anticipated death, the cover letter to Judge Gaston noted that the order was being directly submitted "so that there is no further (and perhaps dangerous) delay to implementing this Court's directions and securing Mr. Carmona's legitimate interests." R. App. I at 88.

On April 15, 1999, Lupe passed away in Missouri. App. 2 at 366. Janis' counsel promptly filed a *Suggestion of Death on the Record* on April 16, 1999, minutes before the filing of the formal *Order* memorializing the Court's written decision from February. App. 1 at 202, 204. Notice of Entry of the *Order* was filed April 19, 1999. App. 1 at 209-210.

On April 28, 1999, Janis filed a motion asking the lower court to reverse its order of April 16, 1999, citing NRCP 52(b) and NRCP 59. App. 2 at 211-290. In addition to rearguing the matter that had been resolved by Judge Gaston's decision in February, Janis expressed her belief that Judy had married Lupe for money, on which basis she argued that the court should overturn the existing order (ignoring Lupe's express wishes and the terms of the divorce settlement), and instead and make sure that Janis got the survivorship benefits. App. 2 at 252-53. A hearing was scheduled for June 14, 1999.

On May 17, 1999, Judy filed a motion to stay briefing schedule and oral argument on Janis' motion, so that Judy could formally enter the case as a party.[14] App. 2 at 297. Janis opposed the request, stating that as Lupe's widow, Judy should not be entitled to anything, and for the first time

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[14] A decision to make this request was made after a preliminary discussion with probate counsel, who suggested that until a successor representative had been substituted in, counsel could not file a brief in opposition or argue against Janis' motion. Unfortunately, the associate who drafted the motion inaccurately requested that Janis be "ordered to establish a constructive trust" instead of more properly asking that Janis be ordered to pay any funds she received ***into*** the constructive trust already "established" by the Court's February 10th decision and *Order* of April 16, 1999. App.1 at 199-201, 204, 297.

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asserting that Lupe had not adequately ***tried*** to change his named survivor beneficiary. App. 2 at 310, 323-25.

On June 22, 1999, the lower court again directed Janis to deposit any sums of survivor's benefits she received into the Constructive Trust account, for Judy's benefit, as ordered the prior February. App. 2 at 351-352. On July 1, Janis asked the court to rescind that order, arguing that no one could prevent her from taking the survivorship money since Lupe was deceased and no one had yet been named as successor representative with authority to request any such order. App. 2 at 358-365.

On July 8, 1999, Judy formally requested substitution into the case, noting that the lawsuit had not been "extinguished" since Janis was engaged in active litigation trying to unwind the lower court's prior orders in the case. App. 2 at 371-381. That filing opposed Janis' efforts to rescind the orders establishing and ordering the funding of the constructive trust with the money that Janis was receiving (and keeping). App. 2 at 388-416; 417-436. It documented warnings to Janis that if she continued pocketing the monthly flow of survivorship money despite the court orders to hold those funds in trust, contempt sanctions would be sought, and memorialized Mr. Freedman's promise that he was holding the money. App. 2 at 396; Tr. 7/15/99 at 14-17.

All the various motions and applications came before Judge Gaston on July 15, 1999. Tr. 7/15/99 at 9-11. At the hearing, Janis' counsel denied having ever promised to safeguard the funds in trust, claiming that he had only promised to ***ask*** his client to do so, and that subsequently she had refused. Tr. 7/15/99 at 17-20. Addressing Janis, the judge responded:

> It's very, very sad. You know, I'm going to sit and listen to this argument, but it's very, very sad to me that we have people that are picking the bones of a dead person and that's exactly what's happening here and you ought to be ashamed of yourself.

Tr. 7/15/99 at 21. Janis immediately sought to dispute that comment with the trial court, but the court refused to enter into an argument since she was represented by counsel, stating that while he would entertain full legal argument, "It just reeks. It stinks to me in my estimation, what's going on. But I'll hear –" *Id*.

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After a lengthy discussion of proper procedure, and upon the ***insistence*** of Janis' counsel that there could be no further proceedings until Judy was appointed the representative of Lupe's estate,[15] Judge Gaston stayed all further proceedings until Judy was appointed as the Executrix of Lupe's estate, and ordered that any money received was to be impounded and held inviolate in an interest-bearing trust account under the joint signatures of the attorneys, pending further proceedings. Tr. 7/15/99 at 12-14, 25.

Janis' counsel immediately assailed the authority of the court to make any such order. Tr. 7/15/99 at 26-28. After impugning the integrity of Judy's counsel and again complaining that the lower court was in error, Janis' counsel was given the opportunity of skipping the stay pending the round trip through probate court, by stipulating to Judy's appointment as successor representative. *Id.* at 35. He refused the proffered stipulation, at which time the lower court repeated the order staying further proceedings, and ordering impounding of all the money at issue until the matter could be heard on its merits. *Id*. at 35-37.

Later that same day, Judy filed a petition for probate of will and issuance of letters testamentary in the probate court as Janis' counsel had demanded. App. 2 at 437.

On July 19 (without copies or notice of any kind to Judy or Judy's counsel), Janis filed papers seeking the disqualification of Judge Gaston; she asserted among other things that since she "knew" she was "entitled" to the money, the trial court's rulings impounding the money until a hearing could be had on the merits proved a conspiracy between the judge and undersigned counsel. App. 4 at 740-45. Judge Gaston supplied the required responsive affidavit on July 21, verifying that there was no conspiracy, no ex parte communication, and no other misbehavior on his part, and noting that Janis

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[15] MR. FREEDMAN: Your Honor, if I could be heard on this I think that Mr. Willick and the information that he received from Ishi Kunin is completely wrong. I've done many of these cases before, wrongful death lawsuits and things of that sort. . . . The proper procedure is for the will to be admitted to probate here in the State of Nevada. And then . . . Judy . . . has to [file] with this Court to have Judy substituted in as the representative of the estate. The problem that I think we have here is the fact that too many people believe that probate is only for the distribution of the estate. It is not. . . .

THE COURT: Why would the estate be probated here?

MR. FREEDMAN: Because the cause of action that . . . actually has survived Lupe's death is this claim for the survivor benefits. We maintain and it's in our brief --

THE COURT: Doesn't the probate occur at the place where he is deceased?

MR. FREEDMAN: Right. And then you have the ancillary proceedings here.

Tr. 7/15/99 at 11-12.

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only became dissatisfied with the court when – two years into the case – he issued a ruling against her.[16] App. 4 at 746-49. A hearing was set for July 28.

The order from the family court hearing of July 15 was filed July 27, 1999. App. 2 at 448-451. It included a provision requiring

> that any and all monies received, to date or prospectively, by either Janis Carmona or Judy Carmona regarding Lupe Carmona, or the estate of Lupe Carmona, to expressly include any and all monies received from I.A.T.S.E. or the Hilton Hotel Corporation as and for retirement benefits or survivor benefits attributable to the pension plans of Lupe Carmona with I.A.T.S.E. or the Hilton Hotel Corporation shall be placed forthwith in an interest-bearing blocked account to be promptly set up by counsel, and that said account shall require the signature of both Marshal S. Willick, Esq. and William E. Freedman, Esq., for any withdrawal of funds.

App. 2 at 450. The next paragraph mandated that the deposits were to continue until the court could determine who was entitled to the money, and that no funds were to be released until further court order. App. 2 at 451.

On July 28, Janis' proceeding seeking the disqualification of Judge Gaston was heard by Chief Judge Lee Gates; after rejecting the request by Janis' counsel to exclude Judy and undersigned counsel from the courtroom, he found that Janis had "failed to demonstrate any actual bias or prejudice against her, or any other party to this action . . . either in open-Court or in his rulings." App. 4 at 750-51, 703 & n.17.

That effort having failed, Mr. Freedman promised in writing on August 5, 1999, that he would personally deposit the retirement fund checks to the named trust account pursuant to the family court order of July 27. App. 3 at 486. Counsel opened a blocked, interest-bearing account with an initial deposit of $485.12 on August 6, 1999. A second deposit was made on August 13, 1999.[17]

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[16] The judge's affidavit also noted one act of what was to become pervasive unethical conduct by Janis and her counsel: "Further, [Janis] makes unsubstantiated allegations that I have had exparte communication with Mr. Willick. I believe such a statement is not only irresponsible by the litigant, but her attorney has violated ethical conduct by allowing such a statement to be made from his office with nothing supporting it. It appears that [Janis] and her attorney believe that such far reaching innuendoes are appropriate if they do not prevail in court." App. 4 at 748.

[17] A total of $970.24 deposited to this account reflected survivor benefits Janis received from I.A.T.S.E. for the months of May, June, and July, and $291 represented a one-time payment Judy received from the Construction Industry and Carpenters Pension Trust. Later, it was discovered that Janis had directed the withholding of taxes from the deposits to fund her personal end-of-year taxes.

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On August 12, 1999, Janis filed a Petition for a Writ of Prohibition or Mandamus in this Court (Case No. 34656), challenging the family court's authority to impose a constructive trust, under the same ERISA preemption grounds she has asserted in this appeal.

As predicted during the July family court hearing, the process of having Judy named as Lupe's successor representative took about six months. On September 17, 1999, the probate matter was presented by co-counsel Israel Kunin in probate court, in Case No. P41996. App. 3 at 566-67. Mr. Freedman appeared with Janis; neither voiced any objection to Judy's appointment, and Judy was appointed Executrix of Lupe's estate. App. 2 at 460, App. 3 at 566-67.

Janis filed a "creditor's claim" in that probate action on October 21, 1999, seeking $20,153.37 from Lupe's estate to pay for all the attorney's fees she had incurred filing motions during the preceding year and a half in family court. App. 4 at 756. She did not tell the probate court that she had never actually been awarded any attorney's fees in the family court case.

Judy filed a motion to have Janis held in contempt on November 4, 1999, for failing to deposit the money into the blocked account as ordered.[18] App. 3 at 461-500. Since Janis' counsel had refused to admit that his assorted statements and accusations during the July 15 hearing had been in error, proof in the form of documentation and transcripts of phone messages was supplied to the court. App. 3 at 475-78. Janis then again began making some deposits of the money she was receiving, starting November 8, 1999.

On November 15, 1999, Janis filed her opposition to the motion to hold her in contempt. App. 3 at 502. Mr. Freedman stated that his promise to deposit the checks only meant that he would deposit the checks ***if*** his client happened to deliver the checks to him, and that he was under no obligation to report that they were not being deposited as ordered. *Id*. at 503-504. His attached correspondence stated that since his client was only keeping a few hundred dollars per month that

[18] Janis never complied with the June 22, 1999, order to provide the plan administrators with a direct deposit authorization for the survivorship proceeds, and despite her attorney's repeated promise in writing to personally deposit all sums received by Janis into the blocked trust account, no deposits were made from the payments she received after August, through November, 1999. On appeal, she admits that her actions were in contempt of court. Contempt OB at 12.

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she had been ordered to deposit into the trust account, the filing of an order to show cause was "ill-advised and mean spirited." App. 3 at 515.

On November 16, Janis opposed Judy's substitution as Lupe's successor representative. App. 3 at 522. Judy filed her *Reply* to that opposition on December 9. App. 3 at 525-530. The *Reply* noted that Janis had reversed positions by first demanding the probate proceedings by which Judy was to be named successor representative, and making no protest to that appointment in probate court, but then protesting that appointment in family court. App. 3 at 527, n.5; 567. The same day, Judy filed her *Reply* on the other motion (to hold Janis in contempt), pointing out numerous specific contemptuous acts and attempted fraud by Janis and her counsel. App. 3 at 531-562.

On December 10, 1999, this Court denied Janis' petition for a writ, and further denied her request for a stay of the ongoing family court proceedings. App. 3 at 581.

On December 13, 1999, the trial court convened the evidentiary hearing to determine whether Janis should be held in contempt for not depositing the funds into the blocked account as ordered. Janis' counsel immediately attempted to derail the contempt hearing by filing a second disqualification demand against the judge (this time termed a "peremptory challenge"), and asserting that the contempt motion was procedurally deficient. App. 3 at 572; Tr. 12/13/99 at 2-16.

Since all present agreed that the motion regarding Judy's substitution as successor representative could go forward at that time, it was heard and Judy was appointed successor representative. App. 5 at 1081; Tr. 12/13/99 at 16-30.[19]

The hearing then turned to the contempt and "peremptory challenge" issues, but the Court ruled, out of respect for Mr. Freedman's many years at the Bar, that he would defer any ruling and review the authorities and arguments proffered by Mr. Freedman at the beginning of the hearing, along with further documents requested by the court. Tr. 12/13/99 at 30-40. By agreement of all present, the motions were to stand submitted on the papers. *Id*. at 32-34. The trial court re-emphasized that until the merits were reached and ruled upon, all of the contested money was to be

[19] Mr. Freedman attempted to argue that the records on file in the probate action were incorrect on the basis of a post-hearing, *ex parte* conversation he claimed to have had with the Probate Commissioner; Judge Gaston noted that any such *ex parte* conversation would be improper in any event, and Mr. Freedman never presented any evidence that any such conversation had occurred, or any rulings apart from those of record had been made. Tr. 12/13/99 at 23-25.

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deposited in the blocked account and preserved. *Id*. at 40. The formal order from the December 13 hearing was filed January 6, 2000. App. 3 at 624-27.

On December 16 and 17, 1999, undersigned counsel filed the further documents requested by Judge Gaston on December 13, 1999. App. 3 at 574-581, 582-593. Janis filed a reply (titled "Response") on December 27. App. 3 at 594.

On January 18, 2000, Janis filed a motion to reverse the order of January 6, which reargued the points previously submitted. App. 3 at 634-687. Janis' attorney also reneged on his agreement to have the matters stand on the papers, and insisted on another hearing date.[20] App. 3 at 647; *see* App. 4 at 706 nn.25-26. On January 19, 2000, Janis renoticed her motions to reverse the orders of April 16 and June 22, 1999, establishing and funding the constructive trust. App. 3 at 630.

Since Judy had finally been substituted as Lupe's successor representative, she could and did oppose Janis' motions to reverse the existing orders. On January 28, Judy filed her *Opposition* to Janis' motion seeking reversal of the order of January 6; this filing protested that Janis and her counsel were at least doubling the amount of litigation (and its cost) by filing a new motion to reverse every order issued by the court, and rearguing every matter after it was decided. App. 3 at 689-696. Judy requested an award of fees in light of Janis' increasing of the litigation.

The same day, Judy filed a formal *Opposition* to Janis' motion to reverse the order of April 16, 1999. App. 4 at 697-758. This filing recounted the entire procedural history up to that point, and put the family court on notice of the fraudulent "creditor's claim" filed by Janice in the probate action. App. 4 at 704. Since Janis had added to the argument her purported belief upon divorce that she would receive the survivorship money as "a matter of course," an affidavit was supplied by Lupe's divorce counsel, Radford Smith, stating that Lupe and his attorney were under the opposite impression at all times – that, once Lupe was awarded "the entirety" of the retirement benefits, he could name whoever he wanted as his survivor beneficiary. App. 4 at 717-18, 723-26.

Judge Gaston, who had taken the matter under advisement on December 13, issued an order on February 3, 2000. App. 4 at 760. The order recounted the procedural history of the court's orders

[20] When pressed on the point, Mr. Freedman claimed that he had "inadvertently" said "yes" when asked whether the questions would be submitted on the papers. App. 3 at 647.

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requiring that the disputed funds be held pending final resolution, noting Janis' expressed intention to file the appeal that is now before this Court. *Id*. at 761.

The trial court disposed of Mr. Freedman's second disqualification attempt (termed a "peremptory challenge"), noting that the statute involved, NRS 22.030, had been amended in 1999 in such a way that family court judges are required to hear contempt matters such as the one concerning Janis, that all necessary affidavits had been filed, and that Mr. Freedman's claimed reliance on certain cases was "misplaced." *Id*. at 761-63.

Finally, the trial court found that, as a matter of constitutional due process, the court was required to hold an evidentiary hearing (no matter ***what*** the parties had stipulated to in open court), and so set an evidentiary hearing date for March 13, 2000. *Id*. at 763-64.

On February 17, Janis filed her reply (labeled "*Response*") to the opposition Judy had filed on January 28, 2000 (relating to Janis' motion to reverse the January 6 court order), claiming that she "had no choice" but to file the spurious "creditor's claim" in the probate action because of the delays and errors she alleged had been made by Judy and undersigned counsel. App. 4 at 767-773.

On February 23, 2000, Janis filed a lengthy reply to Judy's opposition to her motion to reverse the order of April 16, 1999. App. 4 at 775-834. It once again reargued all of the points Janis had submitted since 1998, claimed that the cases cited by Judy "really" supported Janis' position, and claimed that the trial court's order back in March, 1998, precluded the trial court's later orders because it concerned the "identical" issue, even if the trial court had said four times that the issues were different. *Id*. Janis and her attorney again submitted affidavits in which their recollection of the settlement discussions varied from that of Mr. Smith, recounting the understanding of Lupe and his attorney. App. 4 at 794-98.

Judy filed her *Reply* relating to her January 28 request for fees on February 24, 2000, noting that Janis attempted to foist the blame for the massive delays and costs Janis' actions had caused onto others, including undersigned counsel. App. 4 at 835-55.

Janis' three motions to reverse the orders that required the establishment of the constructive trust, and placing the survivorship money in it on February 29, 2000. Tr. 2/29/00 at 2-19, 19-37.

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The trial court denied Janis' motions to "rescind" the constructive trust, and set the contempt matter for an evidentiary hearing. *Id*. at 37-43.

On March 9, 2000, Janis filed an "ex parte motion for nunc pro tunc notice of entry of order," relating to the constructive trust order of June 22, 1999, which her counsel acknowledged receiving on June 25, but as to which he claimed he never received a formal notice of entry. App. 4 at 857. Mr. Freedman's motion was never granted, but undersigned counsel supplied a formal notice of entry as to the June 22, 1999, order, which was filed March 15, 2000. App. 4 at 866.

On March 10, undersigned counsel filed a *Memorandum of Fees and Costs* pursuant to Judge Gaston's directions on December 13, 1999, detailing what fees were incurred in resisting Janis' three motions, and which were incurred in other aspects of the litigation. R. App. I at 90.

The trial court convened the contempt hearing on March 13, 2000; Mr. Freedman immediately requested a continuance. Tr. 3/13/2000 at 3-5. After an extended colloquy, Mr. Freedman was given the ability to respond in writing to the statement of fees and costs filed by undersigned counsel, and the hearing proceeded. *Id*. at 12-16.

Mr. Freedman then attempted to categorize the proceedings as criminal in nature. *Id*. at 15. After another extended colloquy, the trial court stated that it was not going to impose a criminal sanction, but that if it found that Janis' violations of the court's orders had caused Judy to incur fees and costs, it could order that both be reimbursed to her. *Id*. at 16-19.

The trial court asked undersigned counsel to begin the hearing, at which time Mr. Freedman again interrupted, demanding that undersigned counsel take the stand and testify as "the prosecuting witness." *Id*. at 20. After yet another discussion, this demand was refused. *Id*. at 19-22.

In colloquy with the judge, Mr. Freedman conceded that Janis did not follow the court's orders, based on the "feeling" she and her attorney had that the trial court's orders "violated the United States Constitution," although Mr. Freedman conceded that he had received no stay or writ or other order authorizing either him or his client to ignore the trial court's orders. Tr. 3/13/2000 at 22-28.

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Janis was called as the first witness; Mr. Freedman immediately objected to her answering any questions, claiming a constitutional right against self-incrimination, despite the trial court's repeated ruling that the hearing was not a criminal proceeding. *Id*. at 32-34.

Eventually, Janis admitted that she had not provided the irrevocable authorization for deposit to either I.A.T.S.E. or Hilton as ordered, that she had never provided the requested accounting of funds received to avoid formal discovery proceedings, that she had established and then increased the withholding of about 20% of the survivorship funds to pay her own taxes, and that she had not deposited all funds paid by I.A.T.S.E. or Hilton into the trust account. *Id*. at 38-76. As the allotted time ended, Mr. Freedman again declared his intent to call undersigned counsel to the stand, despite the trial court's caution that he was deliberately confusing civil and criminal law; the court continued the matter until May 1. *Id*. at 103-104.

The following day, March 14, 2000, the trial court entered the order from the hearing of February 29, 2000, denying Janis' motions to reverse the orders of April 16, 1999, June 22, 1999, and January 6, 2000. App. 4 at 877-79. The same order formally granted the request for an evidentiary hearing relating to Janis' contempt (the first part of which had already been held), and reiterated the trial court's directive that all survivorship funds be held in the trust account at least until the contempt hearing was held. *Id*. at 878.

Part of the March 14 formal order was specifically directed at the probate action Janis had insisted upon, stating that Janis was not entitled to attorney's fees for any portion of the litigation in the family court case. *Id*. Ms. Kunin (Judy's probate counsel) therefore filed the March 14 *Order* in the probate action, to head off Janis' spurious "creditor's claim." App. 4 at 882-85.

As to fees, the trial court indicated that Judy had prevailed as to all issues presented on February 29, but that any ruling relating to fees was deferred until after the court reviewed detailed billing time sheets from undersigned counsel, to be separately filed. *Id*. at 878-79. Notice of entry was filed the next day, March 15. App. 4 at 870.

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On March 21, 2000, Janis filed her *Notice of Appeal* from the *Orders* entered on March 14, 2000, and June 22, 1999.[21] App. 4 at 886.

On April 7, 2000, Janis filed in state district court a *Motion for Stay* of the orders of April 16, and June 22, 1999, and January 6, 2000, again rearguing the positions relating to ERISA that had already been twice rejected by the family court. App. 6 at 1085. An *Opposition* was filed on April 19, complaining of unfair litigation tactics by Janis, such as her failure to serve the *Motion for Stay* for over a week, in apparent hopes that it would be granted before Judy's counsel found out it had been filed. App. 6 at 1092, 1093. The *Opposition* requested an award of fees as sanctions for Janis' litigation misconduct. App. 6 at 1094. Janis filed a lengthy *Reply* on April 26. App. 6 at 1097.

The stay motion was heard on May 1, at the beginning of the resumption of the contempt proceedings from March 13. The stay was denied on the ground that the contempt proceedings concerned enforcement of a final order, which is permissible in the district court whether or not that order has been appealed. App. 6 at 1122-23; Tr. 5/1/2000 at 19-20.

Mr. Freedman demanded a formal statement of reasons for denial of his request for stay, and the lower court's explanation, stating that the intent of the divorce decree was clear, goes to the heart of this case, and the merits of this appeal:

> As to *res judicata*, the Court clarified any ambiguity in its prior Orders by stating that the Court had, from the beginning of these proceedings, and as intended in the Decree of Divorce, ruled that LUPE had, as his sole and separate property, his entire retirement, including all attributes and all the benefits connected with that retirement; everything that had to do with that retirement was LUPE's. Likewise, everything that had to do with JANIS' retirement belonged to Janis, to do with as she pleased. That arrangement was agreed upon by the parties, and was ordered by this Court. It was only ***after*** that agreement and order, that Janis came back and said "I want my part of Lupe's retirement (the survivorship benefits)," and the Court's response was that because of the fact that Lupe had already started being paid by the pension plan, the Court did not see any way in which to make the plan change, even though that was the intent of the Decree. It was later still explained to the Court that there was a way in which the court could legally enforce its previous order by the establishment of constructive trust, which the Court ordered.
>
> In other words, the Court **FINDS** no basis in application of the doctrine of *res judicata* to stay these proceedings, because this Court has not changed its position that the retirement was Lupe's and still is Lupe's. In other cases, parties have not provided this Court with a means for bringing its orders into effect once a beneficiary had started receiving the benefit; in this case, counsel did so, and this mechanism allowed Lupe to

[21] Nevada Supreme Court Case No. 35851 (Appeal of Order Establishing Trust). She has also filed Nevada Supreme Court Case No. 36220 (Appeal of Order issued from Evidentiary Hearing).

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> receive what the Court had already said was his. Further, that it was never an intent of this Court for anyone but Lupe or those intended through his estate to get the money.

App. 6 at 1123-24 (emphasis in original); Tr. 5/1/2000 at 11-16.

The contempt proceedings were then continued, and concluded. Tr. 5/1/2000 at 22-58. Mr. Freedman again tried to call undersigned counsel as a "witness"; when the Court refused to permit him to do so, both sides rested. *Id*. at 55-61.

The Court found that Janis knew perfectly well what the orders were, and deliberately chose to disobey them, committing a number of specific contemptuous acts. *Id*. at 61-66. The Court predicted that she would continue violating court orders at will, whenever she believed she could justify it in her own mind, and cautioned her that for every month she violated a court order, a new act of contempt was committed for which she could be held accountable. *Id*. at 62-63, 85. Before the proceedings could be concluded, Janis refused, on the record, to comply with the direct deposit portion of the order. *Id*. at 83-85. The Court ordered Janis to pay $15,000.00 in attorney's fees as the reasonable sum "at this point." *Id*. at 85.

The formal court order from the hearing of February 29, 2000, was filed on May 16, 2000; it identified the specific contemptuous acts that had been identified during the hearings, and specified that the attorney's fees ordered paid were for both Judy's costs of defense against Janis' unsuccessful motions to overturn the constructive trust, and for the contempt proceedings. App. 6 at 1124-25. It reiterated the Court's direction that all funds relating to the benefits at issue were to be deposited to the trust account. *Id*. at 1125. Notice of entry was made May 18, and Janis filed a notice of appeal on May 26; a "nunc pro tunc" order was entered to correct a few typographical errors, and Janis filed an amended notice of appeal on June 16, 2000. App. 6 at 1119, 1127, 1131, 1136.

On May 30, Janis filed another motion in family court, seeking a stay of the May 16 order, this time premised on Judy's attempts to execute on the $15,000.00 attorney's fee award. R. App. I at 147. Janis enlisted attorney Mark Jenkin to assist Mr. Freedman on June 1, 2000. R. App. I at 170.

Judy opposed the second request for a stay on June 8, and requested a further fee award for having to repeat litigation relating to a stay. R. App. I at 172. Janis filed a lengthy *Reply*, again

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rearguing all prior matters. R. App. I at 179. On June 16, Judge Gaston denied the second request for a stay, and awarded a further $300.00 in attorney's fees to Judy. R. App. I at 208. The formal order was filed August 10, 2000. *Id*.

Janis expanded this litigation into a fourth forum[22] by filing for bankruptcy through Mr. Jenkin on June 19, 2000. R. App. I at 212.

On July 12, 2000, this Court denied Janis' earlier-filed motions for a stay. On September 20 and October 5, however, this Court stayed all proceedings in these appeals in light of Janis' bankruptcy filing.

On September 21, 2000, Janis filed a motion to "set aside" the order of August 10, 2000, in family court through Mr. Jenkin, asserting that her June 19 bankruptcy filing prevented the district court from filing the order from the hearing of June 16. R. App. I at 212, 217. On September 28, 2000, Janis had Mr. Jenkin move to dismiss the probate action that she had previously had Mr. Freedman insist upon. R. App. I at 225.

Judy opposed Janis' family court motion on October 6, 2000, R. App. I at 243, requesting a finding of bad faith, and noting that Mr. Jenkin "has essentially admitted an intent to waste as much of the time and money of everyone involved as he can, and should be formally admonished for doing so." *Id*. at 244. The motion and countermotion were never heard; after this Court issued its order of October 5, 2000, staying proceedings due to Janis' bankruptcy, the lower court took all motions off calendar until this Court issues a decision on these appeals.

Judy opposed Janis' probate court motion on October 16, 2000, on the ground that it was mere subterfuge, attempting to eliminate Judy as a party in an effort to disrupt her status as a party in these appeals. R. App. I at 233. Janis filed a Reply, and initiated "discovery" requiring Judy to file motions for protective orders to resist the taking of interstate depositions in the probate action. R. App. II at 254.

[22] Family court, probate court, and this Court were the first three.

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Also on October 16, the bankruptcy court held a hearing at which it stayed Judy's collection efforts against Janis, but ruled that no bankruptcy stay prevented these appeals from proceeding in this Court. R. App. II at 270.

On December 6, 2000, Judge Gates heard the cross-motions in the probate action. He stayed all further actions pending this Court's resolution of these appeals, denied Mr. Jenkin's request for certification, and vacated all other hearing dates in probate. R. App. II at 273, 285-86.

The formal order of the bankruptcy court from the October 16 hearing was filed on December 11, 2000, stating that "there is no automatic stay which prevents [Janis] from continuing her appeal to the Nevada Supreme Court, and said appeal may proceed fully on the merits of the case." R. App. II at 271.

Unsatisfied with this state of affairs, Janis (again through Mr. Jenkin) initiated a ***fifth*** court action, this time in federal district court,[23] entitled *Civil Complaint to Recover Survivor Benefits, Enforce Federal Rights, Declaratory Relief Under 29 USC 1132, and Civil Damages in Excess of $75,000.00.* Named as defendants were Judge Gaston personally, Judy, undersigned counsel and this law firm, and both retirement plans. R. App. II at 287.

Janis' federal complaint reasserted all of the allegations raised in each of the other court actions, and accused Judge Gaston and counsel of "conspiring" to deprive her of "her rights," but did not inform the federal district court that these appeals were pending in this Court. She asked the federal court to hold Judge Gaston personally liable for ordering the constructive trust.

On May 7, 2001, the Nevada Attorney General's Office, through Bridget Branigan, Esq., filed Judge Gaston's *Motion to Dismiss*. R. App. II at 305. Undersigned counsel filed a *Motion to Dismiss* on behalf of counsel, this law office, and Judy. R. App. II at 311. The *Motions to Dismiss* listed a number of doctrines, statutes, and holdings which made it clear that the Federal Court did not have jurisdiction to hear the *Complaint* filed by Janis, including judicial immunity, the Rooker-

[23] No. CV-S-01-0431-PMP-PAL.

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Feldman doctrine,[24] abstention,[25] res judicata, attorney-client privilege, and failure to join necessary parties.

Our dismissal motion also noted the personal animus underlying Mr. Jenkin's actions, and recounted an assortment of ethical breaches he had already committed during his time on the case. *Id*. at 11 & nn.20-22. Those misdeeds continued – he went so far as to use the caption in the federal case to send a "Notice of Revocation of Marshal S. Willick, Prof. Corp." to the Nevada Secretary of State, for the sole purpose of personally harassing undersigned counsel.[26] R. App. II at 440. We eventually learned of still more ethical improprieties, including an effort by Mr. Jenkin to extort a change in Judge Gaston's rulings in this case "in exchange" for dismissing the judge from the federal lawsuit.

Janis again tried to force the waste of time and money under the rubric of "discovery," which the federal court struck *sua sponte*. R. App. II at 362.

On May 21, 2001, Janis filed an *Opposition*, abusive and harassing on its face, consisting of 20 pages of argument, 23 pages of Janis' Affidavit, and over 1000 pages of completely irrelevant exhibits bearing no relationship to the arguments made, apparently attached just to increase the size of the filing. R. App. II at 366.[27]

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[24] The Rooker-Feldman doctrine holds that federal district courts lack jurisdiction to review state court judgments. Where a constitutional issue could have been reviewed on direct appeal by the state appellate courts or is inextricably intertwined with a state court judgment, a litigant ***may not*** seek to reverse or modify the state court judgment in federal court.

[25] Essentially, the federal courts' doctrine of deliberate refusal to become involved in domestic relations matters unless absolutely necessary by specific statutory prescription. *See Barber v. Barber*, 62 U.S. 582, 21 HOW 582, 584, 16 L. Ed. 226 (1859) (dicta in which the Court stated that federal courts have no jurisdiction over suits for divorce or the allowance of alimony). The federal courts have been consistently resistant to becoming involved in divorce matters under the guise of alleged peril to some federally-protected interest. *See*, *e.g.*, *Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988) (upholding dismissal of action by member seeking to strike down unappealed state court division of disability retired pay).

[26] Mr. Jenkin, apparently fixated on trying to find some way to injure undersigned counsel, somehow discovered that the license renewal notices for "Marshal S. Willick, P.C." went to an old address and had not been filed. Of course, the damage was immediately repaired by reinstating the corporation.

[27] We have not included the four-plus inches of irrelevant attachments in the interest of conserving space in Respondent's Appendix, and because Mr. Jenkin's improper flooding of the federal court with irrelevancies is tangential to the outcome of these appeals, on all issues except that relating to fees, which is discussed below. We will, of course, supply all of that paper if this Court has any desire to review it, as part of an inquiry into Mr. Jenkin's misbehavior, or for any other reason.

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On June 28, 2001, this Court lifted the bankruptcy stay, permitting litigation of these appeals to resume.

On June 26, 2001, Judy's *Reply* was filed in the federal action, including a list over twelve pages long of the material and apparently deliberate misstatements of fact and law set out in Janis' *Opposition*. R. App. II at 410, 412-424. Sanctions were requested on the basis of Janis' multiple violations of ethical rules, obvious abuse of court processes, and deliberate attempts to mislead the court. *Id*.

On August 16, 2001, without hearing, the federal district court granted both *Motions to Dismiss*, which dismissed Janis' claims against counsel, this office, Judge Gaston, and Judy Carmona. R. App. II at 442. Later, the remaining defendants were dismissed and the federal case was closed.

The August 16 order of dismissal discussed the request for imposition of Rule 11 sanctions against Mr. Jenkin for his abusive, duplicative litigation and ethical violations, but while Judge Pro stated that "this Court understands Defendants' frustration with the continuing litigation," he found that the federal court was required to decline our request, stating:

> Fed. R. Civ. P. 11 sanctions "are only available with regard to papers filed with the court, not attorney misconduct." [Citation omitted.] Kester [Mr. Jenkin's client] has not filed much more than a Complaint and an Opposition before this Court. Any actions taken by Kester and her attorney before the Eighth Judicial District of Clark County, the Nevada Supreme Court and the Federal Bankruptcy Court cannot be the basis for this Court to issue Fed. R. Civ. P. 11 sanctions.

R. App. II at 446-447.

Since that time, litigation has proceeded intermittently in the bankruptcy court,[28] and as of this filing Mr. Jenkin has initiated another round of motion filings in the probate action,[29] but

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[28] Janis has proceeded through Mr. Jenkin in multiple efforts to undo Judge Gaston's orders regarding contempt, sanctions for that contempt, and even as to the holding of the disputed funds in a trust account. The ultimate outcome of those efforts, as of this writing, are uncertain.

[29] On, and despite Judge Gates' instructions that all matters were stayed pending the ruling of this Court, Mr. Jenkin filed a *"Motion For Rehearing For The December 6, 2002 Hearing, determination By this Court that This Court Has No Jurisdiction To Continue The Probate And For Other, Related Relief"* on June 21, 2002. It is set for hearing in early July.

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otherwise all of Janis' extraneous litigation has either been dismissed or suspended pending completion of these appeals. Her filings in this Court, and this *Answering Brief*, followed.

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ARGUMENT

I. PRELIMINARY STATEMENT

Boiled down to its essence, this case concerns whether there is something that forbids the district court from doing what is fair, just, and equitable, and therefore ***requires*** this Court to force a result that would be ***un***fair, ***un***just, and ***in***equitable. We submit that this Court is ***not*** required to commit an injustice in order to serve the law, and that these appeals should, accordingly, be dismissed.

The underlying retirement benefits were earned by Lupe either entirely, or almost entirely, when he was single or while he was married to others of his nine wives. Neither Janis nor Judy has any "natural" or "community property" based claim to any part of the benefits. The question raised in this case is what rights he had to direct the flow of those benefits to Judy, either on his own or stemming from his *Divorce Decree* from Janis, and whether the lower court could enforce the bargain that was made and the resulting orders that were entered.

Judy's position is that the Lupe intended to designate Judy as his survivor, and that Lupe's November 4, 1997, *Decree of Divorce* from Janis included an award of his pensions to Lupe as his ***sole and separate property*** for the specific purpose of effectuating that intent. The lower court has reviewed its intent in entering the *Decree*, and held several times that the parties explicitly bargained to allow Lupe to do exactly that. The district court was permitted – if not required – to effectuate and enforce its orders, and as a court of equity was empowered to impose an equitable remedy to prevent Janis from violating its orders, and when Janis continued to refuse to obey those orders, the court properly held her in contempt and awarded Judy's counsel some part of the fees expended as a result of Janis' contemptuous conduct.

Janis' position, in a nutshell, is that the coincidence of Janis being married to Lupe at the moment of his retirement trumps the parties' bargain in the divorce, the fact that the benefits did not even accrue during her marriage to Lupe, the wishes of the decedent, and the district court's order that Lupe was awarded the entirety of the benefits to do with as he saw fit. In fact, she goes further, and asserts that this Court should embrace such an expansive, technicality-based view of ERISA that

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equity is irrelevant, and that she is immune from contempt sanction regardless of her conduct, regardless of court orders, and regardless of whether she has openly defied those orders.

While Janis and her attorneys have done their best to twist this case beyond recognition, in part by dragging it through multiple additional courts, it is our hope that this Court will cut through their obfuscation and affirm the divorce court's equitable enforcement of its judgment permitting Lupe to direct actual receipt of the monthly flow of survivorship benefits to his widow, Judy, for which right he bargained in his divorce from his previous spouse, Janis.

II. THESE APPEALS SHOULD BE DISMISSED ON PROCEDURAL GROUNDS

The orders that Janis attacks in these appeals all stem from the *Order* filed April 16, 1999, which ordered that Judy was to receive the survivorship benefits, and that if for any reason the plans did not send Judy the money directly, a constructive trust would be funded as a remedy for the misdirected payments. App. 1 at 204.

Janis did not appeal that order; instead, she filed a motion asking the district court to reverse it and change its mind, and titled that motion as being brought under NRCP 52 and NRCP 59. App. 2 at 211-290. Ever since April 16, 1999, all subsequent orders, and the appeals taken from those orders, have dealt with the lower court's refusal to reverse its rulings, not the original, substantive ruling itself.

NRCP 59(a)[30] provides the bases on which relief can be sought under that rule, which include irregularity, accident, misconduct, newly discovered evidence, excessive damages, or an error of law. A party filing such a motion is required to not just repeat a prior argument, but show some new basis

[30] *Grounds.* - A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds materially affecting the substantial rights of an aggrieved party: (1) Irregularity in the proceedings of the court, jury, master, or adverse party, or any order of the court, or master, or abuse of discretion by which either party was prevented from having a fair trial; (2) Misconduct of the jury or prevailing party; (3) Accident or surprise which ordinary prudence could not have guarded against; (4) Newly discovered evidence material for the party making the motion which he could not, with reasonable diligence, have discovered and produced at the trial; (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive damages appearing to have been given under the influence of passion or prejudice; or (7) Error in law occurring at the trial and objected to by the party making the motion. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

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by which the order is defective. *See*, *e.g.*, *Southern Pac. Transp. Co. v. Fitzgerald*, 94 Nev. 241, 577 P.2d 1234 (1978).

There was no new evidence, etc., and Janis' "*Motions to Amend*"did not purport to identify any. Instead, she merely asked the family court judge to reconsider and reverse his ruling, on the basis of the same arguments that had already been heard and rejected. At best, Janis' motions were properly considered motions for reconsideration under EDCR 2.24, filed as a stalling tactic for the purpose of extending the time during which Janis could put off honoring the orders of the court below.[31]

The actual ***facts*** underlying the rulings in this case were almost entirely undisputed, even at the contempt hearing; no new "findings of fact" were ever even discussed. Janis sought reconsideration and reversal as a matter of law, not amended findings, and NRCP 52 was therefore not relevant. *See Flangas v. Herrmann*, 100 Nev. 1, 677 P.2d 594, *reh'g denied*, 100 Nev. 149, 679 P.2d 246 (1984) (rule is inappropriate vehicle for seeking rehearing). The proof is in Janis' own motion, where she submitted a "proposed amended order" containing no new factual findings, but only a reversal of the conclusion reached by the trial judge. App. 4 at 829-834.

Therefore, of all the possible bases Janis had for filing NRCP 59 motions, the only ***potentially*** legitimate ground was "error of law," and in doing so, a party is ***not*** permitted to simply re-present prior filings, or to reargue matters already presented. It is for that reason that such a motion "must state the grounds with particularity," rather than merely asserting that there was some error in the result. *United Pac. Ins. Co. v. St. Denis*, 81 Nev. 103, 399 P.2d 135 (1965). Janis' motions for "new trial" did not add anything that had not been previously addressed by the Court to establish that any possible error of law could have been made, but only asked the lower court to reach a different conclusion based on the same facts and law.

This Court explained the distinction in *Alvis v. State, Gaming Control Bd.*, 99 Nev. 184, 660 P.2d 980 (1983): "A review of the motion . . . reveals that Alvis merely sought reconsideration of

[31] As noted in the statement of facts above, Janis neither honored, nor appealed, ***any*** of the substantive orders made below; instead, every time the court below issued an order she did not like, she simply filed a new motion asking the court to reverse its order, and continued to ignore the order pending further hearings.

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the district court's earlier order . . . . It cannot reasonably be construed as a motion to alter or amend the judgment pursuant to NRCP 59(e)." 99 Nev. at 186, n.1. It is true that Janis, unlike the movant in *Alvis*, ***labeled*** her motions as being under NRCP 59(e), but to hinge the matter on the label would be a triumph of form over substance. As this Court has so succinctly put it, "Calling a duck a horse does not change the fact that it is still a duck." *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

The importance of the distinction here is that identifying Janis' motions as merely the requests for reconsideration that they were means that they were not tolling motions, that her appeal time was not stayed, and that it passed long before she filed a notice of appeal. *Alvis*, *supra*; *Nardozzi v. Clark Co. School Dist.*, 108 Nev. 7, 823 P.2d 285 (1992).

Counsel is, of course, familiar with this Court's policy of resolving domestic relations cases on their merits. *See Kahn v. Orme*, 108 Nev. 510, 835 P.2d 790 (1992). This Court has also expressed policies, however, condemning abuse of the litigation process for improper purposes, particularly in pursuit of inequitable "relief." *See Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998); *Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994).

The extent to which Janis and her counsel abused the litigation process, and the courts, by continual relitigation of identical points, over and over, stalled the orderly consideration of this appeal by a matter of ***years***. Those tactics merit imposition of some penalty. Under the facts and circumstances of this case, Janis' repeated substantive and procedural misbehavior justifies identification of her original motion as procedurally defective, and a finding that her substantive appeal was therefore untimely.

III. JUDY SHOULD GET THE MONTHLY SURVIVORSHIP BENEFITS

If this Court chooses to address the substantive merits of the appeal, it is submitted that the same conclusion is ultimately reached; the analysis, however, is much longer.

A. The Standard of Review is Abuse of Discretion

The issue is whether the lower court correctly construed, and then enforced, its prior decree. The question for this Court, in reviewing the lower court's construction of its own prior orders, is

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whether no reasonable judge could have reached the conclusion arrived at below, in which case the lower court could be considered to have abused its discretion in construing its decree. *See Franklin v. Bartsas Realty, Inc.*, 95 Nev. 559, 598 P.2d 1147 (1979); *Delno v. Market Street Railway*, 124 F.2d 965, 967 (9th Cir. 1942). A court does ***not*** abuse its discretion when it reaches a result which could be found by a reasonable judge. *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951).

There are no hard and fast rules, but some of the factors for consideration in determining whether there has been an abuse of discretion may include: jeopardizing the fairness of the proceeding as a whole; if the error has a substantial impact upon the outcome; if the court failed to undertake a factual inquiry or ignored a deficiency in the record; the exercise of discretion the court does not have; a decision supported by improper reasons, no record, or contravening policies of the court, etc. *Johnson v. United States*, 398 A.2d 354, 366-67 (D.C. App. 1979).

In the field of family law, this Court has repeatedly reiterated its intent to give substantial deference to the discretionary decisions of district court judges, even where this Court might have reached a different result.[32] *See Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Kantor v. Kantor*, 116 Nev. ___, 8 P.3d 825 (Adv. Opn. No. 96, Sept. 15, 2000); *Hamlett v. Reynolds*, 114 Nev. 863, 963 P.2d 457 (1998).

In this case, Judge Gaston was presented with directly contradictory interpretations of the silence of the *Divorce Decree* as to whether Lupe's survivorship benefits were intended to go to Judy, or to Janis. He reviewed the tape of the settlement hearing over which he presided, his own notes and records, and the affidavits of the attorneys who had appeared in that hearing, and ruled that when the parties agreed (and he ordered) that Lupe would have the entirety of his retirement benefits as his "sole and separate property," that was meant to include every incident of those benefits, including the right to determine who, if anyone, would receive the survivorship benefits attached to those retirement benefits after Lupe died. It could not have been an abuse of discretion for the judge

[32] Simply making an error is ***not*** an abuse of discretion. Even if this Court might conclude a matter differently than the court below did, where it made a decision involving judicial discretion, the trial court has a "right to be wrong without incurring reversal." *Johnson*, *supra*, citing Rosenberg, *Judicial Discretion*, at 637.

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to indicate what he had intended in issuing his prior *Decree* and orders. The specific questions involved are addressed below.

B. The District Court and Parties Intended to Allow Lupe to Name Judy, or No Survivor, as he Chose

1. The District Court could and did Construe its own Orders

In Nevada, a trial court has the "inherent" authority to interpret its own decrees of divorce. *Grenz v. Grenz*, 78 Nev. 394, 274 P.2d 891 (1962) ("it is the province of the trial court to construe its judgments and decrees"); *Murphy v. Murphy*, 64 Nev. 440, 183 P.2d 632 (1947); *Lindsay v. Lindsay,* 52 Nev. 26, 280 P. 95 (1929). In this case, the question posed to the trial court was whether the bargain by which Lupe obtained full control of his retirement benefits, and Janis obtained full control of hers, was intended to include the power to designate who, if anyone, would receive the survivor's payments from those retirement benefits.

Janis cites but a single authority from pages 18 to 22 of her Money Opening Brief, in which pages she asserts that the lower court should not have construed the *Decree* at all because it was "not ambiguous" and therefore required no construction. Money OB at 21, *citing Adams v. Adams*, 85 Nev. 50, 450 P.2d 146 (1969).

First, it is illogical to claim that a court cannot interpret a matter as to which the underlying decree is ***silent***. In *Adams*, this Court found the decree "unambiguous" because it explicitly found the subject property to be community property, which was automatically converted by entry of the decree to tenants in common property. Here, the *Decree* says nothing as to what was to become of the flow of survivorship benefits flowing from the pensions awarded to Lupe – that is why the parties were fighting about it.[33]

[33] Janis has essentially admitted believing that the survivorship benefits had value at the time of divorce, and that by excluding them from mention in the decree, she would ultimately obtain those benefits without giving anything of value in exchange for them. Her original argument – now abandoned – was that Lupe had intended to make a "gift" of the benefits. Tr. 1/13/98 at 6, 13-16. It was necessary for her to rationalize that position because ***all*** of the I.A.T.S.E. benefits, and nearly all of the Hilton benefits, were the product of Lupe's ***pre-marital separate property labor***, and Janis thus had, and has, no legitimate claim to any portion of their value.

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Second, Janis was the party who ***asked*** the lower court to construe the decree, when on December 18, 1997, she asked for an order (which was denied to her) ***prohibiting*** Lupe from naming Judy as his survivor. App. 1 at 30-31. She is not free on appeal to claim that the *Decree* was "unambiguous" and did not require the construction that she requested, just because the judge reached a result that she does not like. *See Tore, Ltd. v. Rothschild Management Corp.*, 106 Nev. 359, 793 P.2d 1316 (1990) (party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below); *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989) (party may not raise a new theory for the first time on appeal, which is inconsistent with or different from the one raised below); *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (1972).

In short, the *Decree* said nothing directly about who should receive the survivorship benefits. Janis asked Judge Gaston to construe the decree in such a way that she was the intended beneficiary. He reviewed the *Decree* as she requested, but found that Lupe could name Judy as beneficiary, and Janis may not be heard to complain now that the lower court should not have construed the *Decree* at all.

2. The Original Court Order Gave Lupe Control of his Designation of Survivor

Periodically throughout her forays in the various court systems into which she has dragged this case, Janis has claimed that she was somehow "awarded" the survivorship benefits at some point, so that the orders specifying that Judy was to receive those benefits somehow constituted a "change" in some existing court order. Janis raises that specter again on appeal, hinting that this Court should override the lower court's interpretation of the *Decree*. *See* Money OB at 18-25.

A review of the orders does not bear out Janis' position that she was ***ever*** intended to receive any portion of the survivorship benefits. The original *Decree* awarded to Lupe as his "sole and separate property" various pensions in his name, including those with I.A.T.S.E. and Hilton Hotel, which are at issue here. App. 1 at 21. The term "survivor's benefits" does not appear in the *Decree*.

The first court order interpreting that *Decree*, on March 25, 1998, specified (over Janis' objection) that Lupe was free to ask the plans to eliminate any survivorship award ***at all***, because the

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retirement plans were his to do with as he wished, and that if he did not or could not eliminate the survivorship interest, he was free to request that Judy be named as his designated survivor beneficiary. App. 1 at 87-89. The trial court specifically denied Janis her requested order prohibiting Lupe from requesting the change in named beneficiary. *Id*.

In the next court order interpreting the *Decree*, on February 10, 1999, the trial court issued a written ruling that at the time of the divorce, the survivor's benefits were inherently contemplated, that Janis had been fully compensated for her interest in Lupe's pensions, that the survivor benefits had been awarded to Lupe to do with as he pleased, and that Janis would be unjustly enriched in violation of the divorce settlement if she received those benefits. App. 1 at 198-201. The Court ordered the plans to change the beneficiary designation from Janis to Judy, and further provided that a constructive trust would be set up to transfer the proceeds from Janis to Judy if for any reason the plans did not or could not honor that order. *Id*. The formal written order was filed April 16, 1999. App. 1 at 204.

Since that time, the lower court has steadfastly repeated that "if indeed Janis receives the survivor benefits against Lupe's wishes it would be in violation of the Agreement made by the parties and the *Decree of Divorce* and that Janis would be unjustly enriched." App. 1 at 200-201. The lower court has repeatedly stated that it had ***always*** been its intention, and that of the parties as reflected in the *Decree*, that the survivorship benefits should be paid to Judy if there was any way to effectuate that result. App. 6 at 1123-24; Tr. 5/1/2000 at 11-15.

Accordingly, the entire discussion on pages 18-25 of the Money Opening Brief is based on a false premise – that Judge Gaston had somehow altered a ruling that Janis should receive the survivorship benefits. No such ruling was ever made.

Janis' attempts to introduce evidence relating to settlement negotiations occurring months ***prior*** to the divorce as evidence of what the parties intended in the final *Decree* is both irrelevant and improper. *See* NRS 48.105 (settlement discussions are inadmissible). Even if it was proper to consider it, Janis has several times put the same information in front of Judge Gaston in attempts to get the judge to change his mind about what was intended in the rendering of the *Decree*, and as indicated in the above quotes, was unsuccessful every time. Her overly selective quotations from

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transcripts from which such an inference could be made (if the direct quotations of the judge's conclusions, set out at length above, did not exist) are disingenuous.

The *Decree* awarded Lupe the entirety of his pensions and all benefits thereunder; the *Order* of March 25, 1998, clarified that Lupe was awarded the "full unreduced pension benefit, restored to a lifetime basis for him under the plan," and permission to name a new beneficiary (Judy) if there was any way under the terms of the plan to do so. App. 1 at 88-89. When one of the plans indicated it would ***not*** do so, the lower court ruled that any portion of that money paid to anyone ***except*** Lupe or his intended beneficiary was to be held for, and paid to, Judy. App. 1 at 204-208.

It is not possible to read that series of orders as stating that Janis was awarded anything whatsoever out of Lupe's retirement benefits. Janis' argument that there was some kind of "res judicata" effect to negotiation letters written by her lawyer as to what he ***wanted*** to get is a legal nonsequitur. *See* Money OB at 18-25. The Court should note that Janis does not – and cannot – identify any term of any order that should be given "res judicata" effect; there simply never ***was*** any order stating that Janis was to receive the survivorship benefits.[34] Her refusal to believe that fact, despite the multiple times she was so informed by the (very patient) trial court judge, does not alter the existence of the fact.

Apparently deliberately, Janis attempts to confuse the concept of "res judicata" with the ***remedy*** of constructive trusts, and argues that the court below was somehow precluded from applying that remedy because it was not applied at the time of divorce – before Lupe died, before any survivorship benefits were paid, and before the unjust enrichment that gave rise to the need for the remedy. Money OB at 22-25.

The illogic of Janis' position is apparent on its face, but for purposes of this appeal it should suffice to note that she has cited no authority of any kind indicating that a constructive trust may not

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[34] The doctrine of "re judicata" is intended to prevent relitigation a cause of issues which have been finally determined by the court. The test, as set out in *Executive Management, Ltd. v. Ticor Ins. Co.*, 114 Nev. 823, 835, 963 P.2d 465 (1998), is that issue preclusion will apply when three elements are present:

> (1) the issue decided in the prior litigation must be identical to the issue presented in the current action; (2) the initial ruling must have been on the merits and have become final; and (3) the party against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation.

LAW OFFICE OF
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be imposed once a court is informed that a decree is not being followed, and that unjust enrichment is occurring. *See* NRAP 28(a)(4); *State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority); *Smith v. Timm*, 96 Nev. 197, 606 P.2d 530 (1980) (inadequate "discharge of the appellant's obligation to cite legal authority"); *Carson v. Sheriff*, 87 Nev. 357, 487 P.2d 334 (1971) (contentions not supported by relevant authority need not be considered).

During the proceedings below, Janis made the admission that she knew that the March 25 order was a ruling against her, but she decided not to appeal it because even though she "did not agree" with the March 25 Order, she "was confident that any QDRO that was prepared . . . would not be honored by the pension plans" and that if she "thought for a moment that the pension plans would have honored the QDRO, [she] would have immediately filed a notice of appeal." App. 2 at 220, 250.

In other words, Janis admitted that the only reason she did not appeal Judge Gaston's order of March 25, 1998, was that she believed she could steal the property in question no matter what the court ordered; her filings below (and now in this Court) are all premised on the theory that it is somehow "unfair" that she has been deprived of her opportunity to complete that theft in defiance of the lower court's order. She now claims that the order in which she lost, but thought she could evade, should somehow be given "res judicata" effect to prevent the lower court from ***enforcing*** its order.

There is neither logic, nor law, nor moral merit, to Janis' position. The subject matter of the April 16, 1999, *Order*, was not the ownership of the retirement benefits or of the survivor benefit – that had been resolved in Lupe's favor in the *Order* of March 25, 1998. Rather, the issue was how to enforce the lower court's direction that Lupe be able to control the recipient of the survivorship benefits. A constructive trust was imposed to effect that enforcement.

Since it is the province of the divorce court to construe and interpret its own *Decree*, the *Decree* was silent as to the matter at issue, and the lower court has construed the *Decree* in keeping with the original intent of the parties and the Court, it is simply improper for Janis to ask this Court

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to order that the trial court meant something opposite of what it has repeatedly ***said*** that it meant in rendering that *Decree*.

C. A Constructive Trust was an Appropriate Remedy Under Nevada Law

The survivor's benefits were the result of Lupe's separate property labor. The trial court found that Lupe specifically bargained in his divorce from Janis to be able to do with those benefits what he pleased, and that his request was granted. The question faced by the district court was how to effectuate that intent, given the apparent technical inability of at least one of the plans[35] to alter the identity of the survivor payee after Lupe retired.[36]

Several times this Court has been called upon to determine whether a constructive trust could be imposed to prevent an injustice growing out of a divorce, because of which the party who should have received property was deprived of it, and in each of those cases, it found the remedy proper in the service of equity.

In *Cummings v. Tinkle*, 91 Nev. 548, 539 P.2d 1213 (1975), this Court reviewed a case in which a former wife had performed all the labor in exchange for which property had been deeded by its owners. The owners had deeded it to the former husband alone, however, and the parties had divorced before the former husband died, although they apparently continued living together. Rejecting the "highly stultified discussion" of trusts made by the husband's estate, which sought to retain the property, this Court had "no difficulty in finding a remedy" so as to affirm transfer of the property to the wife who should have received it. 91 Nev. at 550.

The Court explained that "constructive and resulting trusts are similar in that their basic objectives are the recognition and protection of property rights that have arisen in an innocent party. The vital tenet is one of equity." *Id.* Since the circumstances negated the possibility that the person

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[35] As explained below, it is uncertain whether Hilton will honor the QDRO that we will ask this Court to direct the court below to issue; I.A.T.S.E. has already indicated (by informal letter) that its plan language does not contemplate a divorce following retirement and thus a change of beneficiary, and that it is unable to honor such an order directly, although they have not yet been faced with approving or disapproving a QDRO formally deeming Judy the named beneficiary.

[36] This section deals with matters of state law; Janis' objections premised on her "preemption" claims under federal law are addressed separately below.

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with title was the intended recipient of a gift of the property at issue, "equity will intervene to protect the rights of the first party." *Id.*, *citing Werner v. Mormon*, 85 Nev. 662, 462 P.2d 42 (1969); *Schmidt v. Merriweather*, 82 Nev. 372, 418 P.2d 991 (1966); *White v. Sheldon*, 4 Nev. 280, 287-288 (1868).

In this case, Lupe swore out an affidavit stating that he had no intention of making the survivorship benefits any kind of gift to Janis. App. 2 at 434-36. The district court found that Lupe and Janis, in a fair and arm's length transaction upon divorce, had agreed that Lupe was to have full control over the disposition of those survivorship benefits, and that if Janis ended up with those benefits it would be an inequitable violation of the parties' agreement and their *Decree of Divorce.* App. 1 at 204-208.

Similarly, in *McKissick v. McKissick*, 93 Nev. 139, 560 P.2d 1366 (1977), this Court imposed a constructive trust on life insurance benefits payable to a second wife, where the decedent's decree of divorce from his first wife had promised her beneficiary status, but the husband had violated the agreement and decree by designating the second wife as beneficiary. The court found that the second wife, who was not supposed to receive the benefits, held the proceeds in a constructive trust for the first wife.

The Court's thinking on this subject coalesced in its decision in *Locken v. Locken*, 98 Nev. 369, 372, 650 P.2d 803, 804-05 (1982), which provided the definition and test for use of constructive trusts used in all such cases thereafter: "A constructive trust is a remedial device by which the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it."

Most recently, in *Bemis v. Estate of Bemis*, 114 Nev. 1021, 967 P.2d 437 (1998), this Court reversed the dismissal of a claim brought twenty years after a divorce by two sons of a decedent, who were supposed to have received certain property under the terms of the divorce decree but did not get it. The Court reaffirmed its 23-year-old holding in *Cummings v. Tinkle*, *supra*, quoted above. 114 Nev. at 1027.

The Court went on to hold that constructive trusts are properly imposed, not just in fraud cases, but in those cases in which unjust enrichment would otherwise occur:

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> "The constructive trust is no longer limited to [fraud and] misconduct cases; it redresses unjust enrichment, not wrongdoing." Dan B. Dobbs, Law of Remedies § 4.3(2) (2d ed. 1993). See also *DeLee v. Roggen*, 111 Nev. 1453, 1457, 907 P.2d 168, 170 (1995) (quoting *Locken v. Locken*, [*supra*].

Id.; *see also Danning v. Lum's, Inc.*, 86 Nev. 868, 871, 478 P.2d 166 (1970). The *Bemis* decision applied the criteria under *Locken* and, finding them satisfied, applied a constructive trust upon the father's estate so that funds were distributed as intended in the divorce decree.

In this case, the lower court has already held that if Janis ends up with the survivor's benefits, against Lupe's wishes, she would be unjustly enriched. App. 1 at 207. This case comes squarely within the scope of inequities that constructive trusts are imposed to correct.

In *Locken*, *supra*, this Court had set out three criteria for when "the holder of legal title to property is held to be a trustee of that property for the benefit of another who in good conscience is entitled to it," stating that a constructive trust will arise and affect property acquisitions under circumstances where: (1) a confidential relationship exists between the parties; (2) retention of legal title by the holder thereof against another would be inequitable; and (3) the existence of such a trust is essential to the effectuation of justice. *Id*., *citing Schmidt v. Merriweather*, 82 Nev. 372, 375, 418 P.2d 991 (1966).

Here, each of the elements are met. First, a confidential relationship existed between Janis and Lupe; indeed, it was only because of that relationship that Janis was ever named, however briefly, as a designated survivor beneficiary. *See Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969) (contract requiring payment of alimony between spouses does not violate public policy so long as there is no abuse of the confidential relations between them); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992); *Perry v. Jordan*, 111 Nev. 943, 900 P.2d 335 (1995) (a confidential relationship "is particularly likely to exist when there is a family relationship or one of friendship," *citing Kudokas v. Balkus*, 26 Cal. App. 3d 744, 103 Cal. Rptr. 318, 321 (Ct. App. 1972)).[37] Lupe's

[37] It is expected that Janis may deny the existence of a confidential relationship, based on the parties' divorce; however, the point has to do with the confidential relationship that existed at the moment during marriage that Lupe named "my wife" as his intended survivor beneficiary, not just the period during the divorce that Janis betrayed his confidence by planning to retain his separate property benefits without providing any compensation for them.

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interest has been succeeded by his estate, his intended beneficiary, and his successor representative, Judy.

Next, retention of legal title to the monthly benefits by Janis against Judy would be inequitable, as the district court has held repeatedly, in violation of both the parties' agreement upon divorce, and the Court's *Order*.

And finally, the creation of the constructive trust is essential to the effectuation of justice. Because of the lack of a procedural mechanism, in at least one of the plans, formal transfer of benefits from Janis to Judy as agreed and ordered may not otherwise be accomplished.[38]

Janis has repeatedly demonstrated that she has no intention of complying with the divorce agreement or decree voluntarily. Direction of the benefits through the constructive trust account for Judy's benefit is necessary, in the words of the *Locken* holding, "to the prevention of a continuing injustice" – Janis' wrongful retention of a monthly flow of survivor's benefits that were intended, agreed, and ordered to be paid to Judy. Since unjust enrichment will occur in the absence of a constructive trust, such a trust is appropriate.

D. There was no "Federal Preemption" Prohibition of the District Court's Enforcement of the Decree by Constructive Trust

1. The Court Below Could Enforce the Parties' Mutual Benefit Waivers

The heart of this case is the lower court's determination that in negotiating their divorce, Janis and Lupe made a bargain by which Lupe was to be able to control who would receive his survivorship benefits, and Janis was to be able to control who would receive hers. The court below

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[38] The California courts have, similarly, faced situations in which one party was intended to receive benefits based on a state court divorce decree, but another party was the named recipient of those benefits under a federal law that supposedly pre-empted application of the state law. *See In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1092-1093 (Ct. App. 1986), in which the court held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law (in that case, a military member's disability pay award), the member would receive any sums that had been awarded to the spouse as a resulting trustee of her funds, and must pay them over to her. The Court expressed its confidence that the federal courts would approve of that procedure:

> So far as we are aware the federal courts recognize the resulting trust doctrine in appropriate circumstances, and we are confident they would find it appropriate here to further the congressional intent to protect spouses . . . . We are confident federal law would not be interpreted to permit one spouse at his or her election to defeat the other spouse' s fully recognized rights any more than California law does.

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has found that Janis and Lupe each relinquished any right they might have had to beneficiary designation of the others' survivorship, and that either's receipt of such benefits would constitute unjust enrichment. App. 1 at 198-204.

Many courts, over the years, have examined such circumstances, and have found that they should enforce such waivers and relinquishments. The question presented in such cases is whether the parties clearly enough intended to modify the survivor beneficiary interest of the retirement plan. In several cases, courts have held that the intent to alter the survivor beneficiary ***was*** clearly specified, and enforced that intention. *See Fox Valley and Vicinity Constr. Wkrs. Pension Fund v. Brown*, 684 F. Supp. 185, 188 (N.D. Ill. 1988), *aff'd*, 897 F.2d 275 (7th Cir. 1990); *Keeton v. Cherry*, 728 S.W.2d 694, 697 (Mo. Ct. App. 1987). Other courts have held that while a divorcing spouse's beneficiary interest ***can*** be divested, that interest was not clearly enough relinquished under the facts of the case before the court. *See*, *e.g.*, *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989). *See also Prudential Ins. Co. of America v. Cooper*, 666 F. Supp. 190 (D. Idaho 1987), *aff'd*, 859 F.2d 154 (9th Cir. 1988); *Lincoln National Life Ins. Co. v. Blight*, 399 F. Supp. 513 (E. D. Pa. 1975), *aff'd*, 538 F.2d 319 (3rd Cir. 1976); *Haley v. Schleis*, 642 P.2d 164 (N.M. 1982).

Of course, the intent of the parties is the very question that was presented to, and resolved by, Judge Gaston in the proceedings below, when after a careful review of the settlement entered into by Lupe and Janis, with assistance of counsel, he found that the survivorship benefits had been considered by both parties "inherently," and each had surrendered control of the survivorship benefits to the party in whose name the retirement benefits themselves were issued. App. 1 at 198-201. In hearing after hearing, stretching over a year and a half, the court below consistently found that the parties gave up their respective interest in each other's retirement plans in the divorce, and that – specifically – Janis intentionally relinquished any right she might otherwise have had in any aspect of Lupe's retirement plans, including the survivor benefits of those plans.

ERISA does not explicitly address the change of beneficiary issue presented in this case – the possibility that a retiree could divorce, his spouse could relinquish her status as beneficiary, the retiree then remarried, and sought to have those benefits paid to the intended later spouse (and widow). The matter is thus governed by what courts refer to as "federal common law," a body of

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case law developed where ERISA itself does not expressly address the issue before the court and courts are called upon to construct a common law that effectuates the policies underlying ERISA. *Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645 (7th Cir. 1993). In so doing, courts may use ***state*** common law as a basis for federal common law, to the extent that state law is not inconsistent with congressional policy concerns. *Id.*; *see also Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994) (facts showed sufficient performance of acts indicating intention to name successor beneficiary, despite technical absence of formal change of beneficiary; such substantial compliance with technical requirements was sufficient).

The California Court of Appeals very recently reviewed similar circumstances in an unpublished opinion; that court's logic and reasoning are useful here, because it is the closest analogy to the procedural facts of this case that counsel has discovered.[39] *Araiza-Klier v. Teachers Insurance and Annuity Association*, 2001 Cal. App. LEXIS 2794 (Ct. App. No. D034967, Nov. 29, 2001). The case involved a decedent who had participated in an ERISA-governed retirement plan, who at the time of death had a beneficiary designation of record in the plan naming his ex-wife as beneficiary, but who had been divorced from that wife by means of a decree that included an award to the husband as his sole and separate property of "all pension and retirement benefits . . . through his employment," which the court noted was "almost indistinguishable from the waiver" in *Fox Valley*, *supra* (and is virtually identical to the award at issue in this case. App. 1 at 21).

The court found that, as in *Fox Valley,* use of the language in question supported a finding that the first wife had waived any right to the retirement benefits in question, ***including*** the death benefits under that retirement plan. The *Ariaza-Klier* appeal, like this one, was heard ***after*** the decision of the United States Supreme Court in *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S. Ct. 1322,

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[39] The opinion contains the notation that it was not be published, and that under California Court Rule 977(a), is not binding precedent in California. This Court has apparently never commented on what reference can or should be made to opinions elsewhere that are "unpublished" under the rules of those courts, although this Court has noted that even its own "unpublished" opinions may be cited in some circumstances. *See In re Discipline of Joe M. Laub*, No. 36322 (Jan. 9, 2002), at 19-20; *cf.* SCR 123. Since it is only the reasoning and logic of that opinion which is utilized here, and since opinions of other state courts are only persuasive authority in any event, it is believed that this citation to the case is permissible, at least as long as it is accompanied by this notation. *See* Lauren Robel, *The Practice of Precedent: Anastasoff, Noncitation Rules, and the Meaning of Precedent in an Interpretive Community*, 35 Ind. L. R. 399 (2002) (noting common practice of citation by courts of unpublished opinions from other states, and that federal courts rely upon unpublished orders "promiscuously").

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149 L. Ed. 2d 264 (2001) (discussed in detail below), and with an eye clearly on any limitations imposed on state courts by that decision. The court, nevertheless, had no problem relying on the cases cited above in this section of this brief, including *Fox Valley*, in finding that

> As a matter of federal common law under ERISA the principle has developed in the majority of federal circuits that notwithstanding the formal beneficiary designation procedures a benefits provider such as Teachers may require of plan members who wish to change a beneficiary designation may also effectively waive or relinquish their right to plan benefits in the course of marital dissolution proceedings. Benefit administrators may be required to honor such waivers. [Citations omitted]. The waiver and relinquishment of rights in a manner not contemplated by the precise terms of a benefit plan has been permitted on the theory that enforcing such waivers will not unduly burden plan administrators. This conclusion in turn is based on the fact that ERISA expressly requires that plan administrators honor the terms of what the act calls a "qualified domestic relations order" (QDRO) (29 U.S.C. § 1056(d)(3)(A)) and by which state domestic relations courts may require a pension plan to pay nonmember spouses a portion of plan benefits. In requiring administrators to recognize a former spouse's waiver of death benefits, no additional burdens are imposed "because, under the ERISA statutory scheme, a plan administrator must investigate the marital history of a participant and determine whether any domestic relations orders exist that could affect the distribution of benefits. . . . Our decision only requires plan administrators to continue their current practice of thoroughly investigating the marital status of a participant."

2001 Cal. App. LEXIS 2794 at 20-21.

The court then noted that in finding that the named beneficiary had effectively waived receipt of the survivorship benefits at issue, it was accepting "what appears to be the majority federal rule," stating policy grounds that seem equally applicable to the facts of this case:

> From our perspective it has two important advantages. First and perhaps foremost it avoids the potential for injustice that would result if a former spouse who had in fact voluntarily and for substantial consideration given up any claim to death benefits were nonetheless permitted to recover them. Secondly it is the majority rule. Without some persuasive reason for doing so we are loathe to create any greater disharmony in the disposition and administration of plan benefits covered by ERISA. (See *Mutual Life Ins. Co. of New York v. Yampol (7th Cir. 1988) 840 F.2d 421, 425* [fundamental purpose behind ERISA is establishment of uniform remedies].) Moreover, like the courts which have adopted the rule, we do not believe it creates any substantial additional burden on plan administrators. When, as here, there is a dispute as to whether a waiver occurred, the plan must, as is the case when there is a dispute over the effect of a QDRO, obtain definitive resolution of the dispute from a court of competent jurisdiction.[40]

2001 Cal. App. LEXIS 2794 at 22-23.

[40] In passing, both the district court and this Court are "of competent jurisdiction": Under 29 U.S.C. §§ 1132(e)(1) & 1132(a)(1)(B), the state and federal courts have concurrent subject matter jurisdiction over claims to ERISA benefits. *See In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997).

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The court deciding *Ariaza-Klier* did not reject any of the existing case law. It explicitly acknowledged and considered the ERISA pre-emption cases relied upon by Janis in this appeal. The court acknowledged the expansive reading often given to ERISA, but found that as a matter of both logic and law, "the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminancy,' or else 'for all practical purposes preemption would never run its course.' *Id*. at 15 [citations omitted].

That is precisely what has happened, and what should happen, in this case. The court below has already detailed the injustice that would occur here if Janis was permitted to be unjustly enriched by receiving the benefits that she waived and Lupe specifically bargained to be able to leave to Judy; the result reached below (recognizing Janis' waiver of the survivorship benefits) is compatible with the "majority rule" of the federal courts (including the rule announced in the Ninth Circuit Court of Appeals). The "two important advantages" of permitting a just result to stand should be realized in this case.

The state law regarding constructive trusts imposed in such circumstances is set out above. The basis for enforcing a spousal waiver of benefits (such as the one by Janis), against that spouse's later efforts to renege and grab a windfall at another's expense, is a basic matter of equity. As the detailed facts set out above made clear, Janis was only briefly the named survivor beneficiary, by the happenstance of not yet having been divorced from Lupe at the moment he retired and elected a form of benefit which included survivor's benefits payable to his spouse. Shortly thereafter, she ceased to be his spouse. Janis had no underlying interest in the pension itself, as her separate property, as community property, or otherwise.[41]

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[41] Janis asserts that the moment Lupe made out the initial survivorship designation form, he turned a portion of his separate property retirement into "her" separate property survivorship benefits. Money OB at 16. As explained below, we do not think this position is legally defensible, but even if it was, the asset was still before the divorce court. *See McCall v. McCall*, 70 Nev. 287, 266 P.2d 1016 (1954) (the court in granting a divorce is given extensive discretionary power to deal not only with community property but with the separate property of a spouse as well). If there had been an uncompensated transfer of Lupe's property to Janis, the lower court would have been obligated to balance the equities upon divorce. *See Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Schulman v. Schulman*, 92 Nev. 707, 558 P.2d 525 (1976) (the court in making a disposition of community property shall divide the property in a just and equitable manner). To prevent an injustice, the lower court could set apart the separate property of one party to the other – including property "converted" against the wishes of its owner into the separate property of the other spouse. *See Baker v. Baker*, 76 Nev. 127, 350 P.2d 140 (1960) (an award of alimony as well as the setting aside of a portion of the husband's separate property are both matters within the discretion of the trial court).

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The only reason there was a legal problem to be solved is that the particular pension plans at issue here do not happen to contain provisions explicitly permitting them to change the named beneficiary when there has been a divorce and a new designated survivor beneficiary is intended by the retiree. ERISA, meantime, contains the basic prohibition that a court may not order a plan to provide any benefit not explicitly permitted by its plan documents. Janis now requests that this Court interpret the ***absence*** of a technical mechanism in the plan documents for instituting the parties' agreement and the court's order as some kind of affirmative ***prohibition*** of enforcing the parties' agreement, and the court's order, at ***all***.[42]

Janis' proposed rule of construction would turn on their head the policies this Court has repeatedly expressed it will follow, by causing the unjust enrichment the lower court has tried to cure. The expressed policy of this Court is that the parties are to be positioned so as to avoid unjust enrichment, because any other course would "engage the judicial process in an elevation of greed and an affront to equity." *Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994).

Janis states that there was no formal beneficiary designation change form submitted to the plans after divorce, because the plan documents do not expressly permit someone in Lupe's position to file such a form, even where (as here) the bargain to permit that change was expressly made, and the intent to change beneficiaries is completely clear. *See* App. 2 at 435-36. As in *Milender*, "equity considers as done that which ought to be done." This Court should consider, in all ways, that Lupe successfully changed his named beneficiary, as intended, to Judy; the only question remaining is the mechanism to enforce that change.

That brings us back to what will happen if, as we request, this Court confirms the lower court's directions that the survivorship funds be deposited in the constructive trust account, and that the funds deposited be released to the intended recipient – Judy – pursuant to the agreement and

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[42] We note that the Plans ***could have*** specifically allowed for post-divorce changes of named beneficiaries. There is no legal prohibition. It is just that this possibility was not expressly contemplated on the face of the plan documents. As noted above, Janis' entire legal argument is based on trying to turn this un-thought happenstance of silence into some kind of policy statement. Her argument is disingenuous; in the entire litigation of this case, she has never proffered a single piece of paper indicating any ***intention*** by the plan drafters, or anyone else, to make a divorced ex-wife the recipient of windfall survivor's benefits against the will of the worker earning the benefits, and the deal reached in the divorce. We do not believe that such an intention ever existed by anyone (except of course, Janis, whose entire case is based on trying to get something for nothing).

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decree entered into between Janis and Lupe. The money in that account came almost entirely from the I.A.T.S.E. retirement plan, because the Hilton retirement plan has been holding the payments, waiting for a final word from this Court as to whether it should pay the sums it is holding to Judy, or to Janis. It is believed that Hilton will directly honor whatever ruling this Court makes.[43]

The I.A.T.S.E. plan does not happen to have such a "suspension of payments pending resolution" clause, and so has been distributing the funds pursuant to the old beneficiary designation naming Janis; those are the bulk of funds that have been redirected by court order into the constructive trust account. Plan employees have indicated that the plan will not be able to directly honor either the constructive trust order or the QDRO requiring payment of the sums at issue to Judy that we will seek to have issued once this case is remanded.[44]

Of course, that is not a problem so long as Janis is required to obey the constructive trust order, by directing both Hilton and I.A.T.S.E. to send any money their plans consider payable to Janis to the constructive trust account for Judy's benefit pursuant to the order below. Accordingly, this brief next turns to Janis' complaint that the court below was prevented, by federal preemption, from carrying into effect the parties' agreement and the mandate of the *Decree*, and its enforcement orders, that money intended to be paid to Judy is actually paid to Judy.

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[43] Under the Hilton Plan,

> If the Committee is notified of the existence of a conflict regarding payment of a benefit, the Committee may direct that benefit payments be suspended until the conflict has been resolved by:
> - agreement between the claimants, or
> - **a final judicial determination as to who is entitled to the benefits,** or
> - any other procedure which the Committee determines will protect the Plan from paying benefits more than once.

Hilton Hotels Corporation Retirement Plan, R. App. I at 18. Suspending payments is exactly what the plan has done, and paying out to the party deemed to be the correct recipient is presumably what the plan will do.

[44] The two lawyers for the parties at the time of divorce stated that they were told opposite things by plan employees. *See* Affidavit of Radford Smith, App. 4 at 723. Of course, neither what the lawyers were told, nor any letters to or from the plans, have any legal meaning. The questions are what was intended upon divorce, whether the plans will directly honor an order reflecting that intent, and whether a constructive trust can and should be imposed to carry the divorce decree's intention into effect, to the degree that the plans cannot directly honor such an order. As detailed in this brief, the parties agreed that Lupe could direct the benefits to Judy. It is uncertain whether one, the other, or both plans will honor the QDRO yet to be issued so stating; to the degree they do not, the constructive trust already ordered should be fully enforced to carry the parties' and divorce court's intention into effect.

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2. A Constructive Trust is a Perfectly Permissible Enforcement Mechanism

Preliminarily, we note that Janis' entire appeal is backward. Instead of showing what the court below ruled upon divorce, and then what it did to enforce it, and then whether there are any conflicting federal laws that prevent the Nevada courts from doing what has been judged just and fair, Janis spends the first eight pages of the Money Opening Brief – and the ***entire*** argument section of her Contempt Opening Brief – positing her case for "ERISA preemption," on the basis of which she seeks to set aside every ruling made below, from the divorce to the contempt sanctions filed against her.

Janis' approach reflects a fundamental misunderstanding regarding the nature of federal pre-emption of state law. The United States Supreme Court has consistently held for a century that "domestic relations are preeminently matters of state law," and there is no federal preemption absent evidence that such a result is "positively required by direct enactment." *See Mansell v. Mansell*, 490 U.S. 581, at 587, 109 S.Ct. 2023, at 2028, 104 L.Ed.2d 675 (1989), *quoting Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (*quoting Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172, 176, 49 L. Ed. 390 (1904)).

In other words, and as this Court has held, ***before*** a court can consider a claim of federal preemption, the court must specifically determine what state action was taken, and then identify some "direct enactment" by Congress, and ***then*** determine whether pre-empting the state court action is "positively required" in light of that federal enactment. *See Marcoz v. Summa Corporation*, 106 Nev. 737, 741, 801 P.2d 1346 (1990) ("the question of whether particular state action is preempted by federal law involves interpreting the language of the statute in accordance with congressional intent"). Simply raising the "preemption boogeyman" is not a sufficient analysis.

It is for this reason that Janis' reliance on *Boggs, Egelhoff, Guidry*, and *Hopkins* (discussed in the following section), as well as her casual and general references to ERISA itself, are misplaced. The Ninth Circuit Court of Appeals explained the policy inquiry that is to be made in cases such as this in its decision of *Emard v. Hughes Aircraft Company*, 153 F.3d 949 (9th Cir. 1998), *cert. denied*, ___ U.S. ___ (1999), in which the court approved a constructive trust in favor of a widower against

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a decedent's former husband, who remained the designated beneficiary on the plan documents. The California law concerning constructive trusts[45] is essentially identical to that of Nevada.

The court began with the acknowledgment that any state court order or law would be pre-empted by ERISA if it "related to" or was "connected with" an ERISA plan.[46] However, the court found no prohibition of the trial court's power to establish the constructive trust, funded by the proceeds from a life insurance policy provided as part of an ERISA benefits package, over the former husband's claim that the constructive trust was barred by ERISA preemption.[47] The court noted that a preemption inquiry requires the reviewing court to figure out exactly what action is sought to be "pre-empted":

> The use of a federal statute to forbid state regulation in "areas where ERISA has nothing to say" would unjustly restrain the legitimate exercise of the states' historic police powers without achieving the objectives sought by Congress.

The court concluded that the establishment of a constructive trust altering who ultimately received the proceeds affects only the parties to the state case, not the pension plan itself, so ERISA does not preclude a court from entering an order directing the establishment of a constructive trust

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[45] As recited by the *Emard* court at 954: "'A constructive trust is an equitable remedy imposed where the defendant holds title or some interest in certain property which it is inequitable for him to enjoy as against the plaintiff.' *Kraus v. Willow Park Public Golf Course, 73 Cal. App. 3d 354, 140 Cal. Rptr. 744, 756 (Ct. App. 1977); see also* Cal. Civ. Code § 2224." The California courts have used resulting trusts in disputes between surviving spouses and former spouses, where only one of the two was eligible to actually be the beneficiary of survivorship benefits, but both had an equitable claim to a share of the proceeds. *See In re Marriage of Becker*, 161 Cal. App. 3d 65, 207 Cal. Rptr. 392 (Ct. App. 1984).

[46] "By its terms, ERISA 'supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by the statute. *29 U.S.C. § 1144*(a). 'The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law . . . .' Id. § 1144(c)(1)." *Emard*, *supra*, 153 F.3d at 953.

[47] Life insurance policies qualify as welfare plans, and "thus an employee benefit plan" under ERISA. An employee benefit plan is defined as a "welfare or pension benefit plan." *Metropolitan Life Ins. v. Pettit*, 164 F.3d 857, 860-861 (4th Cir. 1998); 29 U.S.C. § 1002. While that decision addressed an ERISA-governed life insurance policy, the same constructive trust principle applies to receipt of pension fund benefits.

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to be funded by the proceeds from the plans after they have been distributed to the beneficiary.[48] *Id*. at 954-955.

ERISA was created to effect certain purposes, and the Court analyzed the intent of Congress in enacting the statute,[49] concluding that it is "designed to ensure that benefits are paid out," and "lacks any provision prohibiting garnishment or attachment of benefits after they have been received by the beneficiary. . . . The absence of such language from ERISA indicates that Congress did not intend such a prohibition." *Id*. at 955.

Because ERISA "is silent as to the disposition of those funds after their receipt by the beneficiary" the Court found that ERISA simply does not preempt California law permitting the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary." *Id*. The court acknowledged that a plan administrator, having been informed of such a constructive trust, would have to

> take certain steps to answer the complaint and either disburse the disputed funds to the prevailing claimant or deposit the funds with the court. But this burden on the administrator is too slight to overcome the presumption against preemption of state family and family property law. See *Boggs, 117 S. Ct. at 1760; Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 59 L. Ed. 2d 1, 99 S. Ct. 802 (1979);* see also *De Buono v. NYSA-ILA Medical and Clinical Svcs. Fund, 520 U.S. 806, 117 S. Ct. 1747, 1752, 138 L. Ed. 2d 21 (1997)* (ERISA does not preempt generally applicable state laws "that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute") (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995),* and *Dillingham, 117 S. Ct. at 841-42); District of Columbia v. Greater Washington Board of Trade, 506 U.S.*

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[48] The majority found no barriers in ERISA to interception of the benefits and payment to the intended beneficiary either before ***or*** after they had been distributed to the beneficiary. The dissenting justice in *Emard* concurred that a constructive trust could be imposed on any benefits payable to a beneficiary who would be a wrongful recipient under state law, but disagreed as to whether state community property law generally would be pre-empted. Here, of course, there is no community property issue; the benefits were created by Lupe's premarital separate property labor, and neither party is claiming that there is any community property claim to the survivorship benefits. The plans are not parties to this action, and whether they could or would honor the order of constructive trust themselves is not before this Court.

[49] "In enacting ERISA, Congress intended to occupy the field of regulation of employee welfare and pension benefit plans. See *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).* This occupation is complete, however, only as to regulation of ERISA plans as plans. See *Fort Halifax, 482 U.S. at 11* (noting that 'Congress pre-empted state laws relating to *plans*, rather than simply to benefits') (emphasis in original). As applied in this case, California's law of community property has no effect on the Hughes plan as such: it does not affect the duties of the employer or the plan entity, nor does it alter the rights of participants and beneficiaries as against the other plan entities. Because California's community property law does not regulate ERISA plans as such, its application is not barred by field preemption." 153 F.3d at 961.

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> *125, 130 n.1, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992)* (state law is not preempted if it "has only a 'tenuous, remote, or peripheral' connection with covered plans") (citations omitted).

153 F.3d at 959. In this case, the plans have not been made parties to the action, because the only dispute has to do with the identity of the ultimate recipient of the proceeds, as between Janis and Judy. The "burden on the administrator" is not just "slight," it is non-existent – no regulation of the plan administrators' actions is being requested ***at all***.[50]

Emard places the burden on the party arguing for preemption to show, as a matter of law, that it was the clear and manifest purpose of Congress to supersede the type of claim before the Court. Here, Janis, arguing for preemption, has not shown that any of the court orders at issue are an attempt to supersede the purpose of ERISA. The order entered in this case, like that in *Emard*, does not affect the "administration of the employee plan"; instead, it affects merely the ultimate ownership of benefits that are going to be distributed either way.

Janis argues that affecting the choice of beneficiary somehow constitutes a "regulation of the plan."[51] The court in *Emard* specifically rejected any such interpretation of ERISA, stating that it saw "no indication the Congress intended to safeguard an individual beneficiary's rights to the proceeds of an ERISA insurance plan as against another person claiming superior rights, under state law, to those proceeds." *Emard*, 153 F.3d at 956-57.

As part of its discussion, the Ninth Circuit discussed the evolution over time of ERISA preemption thinking. Commenting on how the extent of what was considered "preempted" has been shrinking steadily over the years, the court cautioned against reliance on older authorities containing language about "expansive pre-emption," and held that under the more modern view, application of

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[50] When this appeal is concluded, a QDRO in normal course is the only direction that will go to the plans. Only if, under their internal plan documents, the plans do not or cannot send the money directly to Judy, does the constructive trust require Janis to turn the money over to her. The lack of any impact on the pension plan administrators by the constructive trust at issue in this case is part of why Janis' reliance on *Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) is misplaced. *See* Contempt OB at 15-16. This is discussed in the following section.

[51] As detailed below, her argument in this regard is something of a tap dance that seeks to deliberately confuse a few similar-sounding terms.

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California law concerning the designation of a specific named beneficiary do not have "a connection with ERISA" and therefore were not pre-empted.[52] *Id.*

Specifically, the court rejected the view that a beneficiary selection form in the possession of the plan constituted one of the "documents and instruments governing the plan." Reviewing the law, the court held that ERISA's technical provisions "[do] not prescribe how to resolve conflicting claims." Thus, a constructive trust requiring delivery of the benefits to the proper party did not violate any provision of ERISA. *Id.* at 957; *see also Equitable Life Assur. Soc. v. Crysler*, 66 F.3d 944, 948 (8th Cir. 1995).

This is a critically defective part of Janis' logic – she asserts that any inability of the plans themselves to alter the beneficiary selection form in their possession, due to any internal technicality of plan administration, somehow constitutes a Congressional blessing of her lying in court as to the distribution of property, cheating the terms of her agreement and *Decree*, and stealing the benefits in question. *See* Money OB at 15-18.

Janis is wrong. As the *Emard* court clarified, a beneficiary selection form in the possession of a pension plan does ***not*** "govern[] the plan," but merely reflects the participant's intent at the moment it was filled out regarding distribution of the proceeds; correcting what would otherwise be an erroneous distribution of proceeds, by way of the state law of constructive trusts, does not run afoul of ERISA, which law was ***not*** created as a technical means for achieving injustice. 153 F.3d at 957. Summing up, the *Emard* court held that the dispute before it could be decided

> without reference to the terms of the plan or the provisions of ERISA. Indeed, neither Hughes nor Met Life [the plans holding the money] need be involved in the action beyond the simple matter of distributing the proceeds to the appropriate recipient or depositing them with the court.
>
> In enacting ERISA, Congress intended to safeguard the rights of plan participants and beneficiaries as against employers, insurers and administrators of employee benefit plans. See *29 U.S.C. § 1001* (setting forth Congress' findings and declaration of policy). ERISA therefore preempts state laws that concern those matters. But we see no indication that Congress intended to safeguard an individual beneficiary's rights to the proceeds of an ERISA insurance plan as against another person claiming superior rights, under state law, to those proceeds. Absent specific contrary provisions in ERISA, an action intended only

[52] This Court's 1990 decision in *Marcoz*, *supra*, is typical of the earlier opinions referenced by *Emard*, in that this Court began its analysis with a nod to the then-prevailing view of ERISA as deliberately over-expansive. *See* 106 Nev. at 741.

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> to enforce such individual rights against a beneficiary does not fall within the scope of § 1132(a), and state laws on which such an action relies are not barred by ERISA preemption.

153 F.3d at 958. Simply ensuring that the correct person actually received benefits as intended just did not "regulate certain ERISA relationships." *Id*. The court of equity was permitted, by means of constructive trust, to alter the designation of ultimate recipient of the benefits, because the determination of the rights to the proceeds had no effect on the plan itself. *Id*. at 960.

The same result is appropriate here. Judy does not seek to "alter the administration" of any ERISA-governed pension plan. Whether and how much of benefits will be paid will remain unaltered. She merely wants to ensure that Janis directs the plans to deposit the sums in question into the court-ordered constructive trust account as she has been ordered to do, which funds have already been adjudicated to belong to Judy, not to Janis.

Several other courts have, similarly, approved the mechanism of constructive trusts to redirect proceeds paid out of ERISA-governed pension plans to ensure that they are ultimately received by the party who should receive them. One of these, *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994, *en banc*) [*Guidry II*], is particularly notable here because it is the subsequent history to a case which was relied upon by Janis, but which she disingenuously omitted.[53]

Guidry II was the final chapter in the saga of an individual who was both an employee of a pension plan and a participant in that plan, who had embezzled money from the plan. *See Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 641 F. Supp. 360 (D. Colo. 1986), *aff'd*, 856 F.2d 1457 (10th Cir. 1988), *rev'd*, 493 U.S. 365, 107 L. Ed. 2d 782, 110 S. Ct. 680 (1990), *decision after remand*, 10 F.3d 700 (10th Cir. 1993).

Mr. Guidry was a judgment debtor of the union; the federal district court had ordered the plan to pay Mr. Guidry's back and future pension benefits after the plan's unsuccessful attempt to impose a constructive trust on pension benefits held by the plan (this was the subject of the original appeal,

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[53] *See* Money OB at 17, 26; Contempt OB at 17. The Bluebook requires the citation of subsequent history where, as here, the later proceedings are central to the holding for which the case was cited (in this case, the permissibility of a constructive trust). THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 10.7, at 68 (Columbia Law Review Ass'n et al. eds., 17th ed. 2000).

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and the only portion of the case that is cited by Janis). The plan then sought to collect its judgment through garnishment of a bank account in Colorado, and through attempted seizure of funds tendered to Mr. Guidry at his home in Texas. Eventually, all the disputed funds were placed in an account in Colorado, and litigation was commenced as to whether those funds could be garnished by the plan.

The United States District Court for the District of Colorado, reading *Guidry I* broadly, concluded the anti-alienation provision of ERISA continues to protect pension benefits from garnishment "so long as the proceeds are clearly identified as such and have not been co-mingled with other funds or used for the acquisition of assets." 39 F.3d at 1081.

A three-judge panel reversed the district court, with one judge dissenting. *Guidry II*, 10 F.3d 700 & 717 (10th Cir. 1993). It was that decision that came before the entire court *en banc* on rehearing. The court framed the issue succinctly: "whether the anti-alienation provision, ERISA 206(d)(1), barred post-payment garnishment." 39 F.3d at 1081.

The court ruled that there was no ERISA bar to garnishment of the funds in the constructive possession of the embezzler. Specifically, upon review of ERISA, its legislative history and interpretive regulations, and other benefit protection statutes, the court found that the scope of section 206(d)(1) did not extend to protect private pension benefits once paid to and received by the beneficiary, which therefore can be reached by garnishment, or constructive trust. 39 F.3d at 1081-83.

Explaining its ruling, the court noted that the "applicable administrative regulations show that the provision was not intended to apply to benefits following distribution to and receipt by the beneficiary," because the anti-alienation provision was intended to ensure that the benefits "will be available for retirement purposes," which purpose is fulfilled as soon as the money is distributed. 39 F.3d at 1081-82.

The court found agreement for its reasoning when it compared ERISA with the "more specific language found in other income protection statutes" such as the Social Security Act, because "ERISA lacks any provision prohibiting garnishment or attachment of benefits once they have been received by the beneficiary." 39 F.3d at 1083. The court noted that "Congress knew how to draft

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a statute protecting benefits that had left the pension plan [as in the Social Security Act], and did not use similar language with ERISA."[54] *Id*. at 1083.

Having held that the funds were within the normal reach of court process, since there was no ERISA pre-emption regarding the funds once they were paid out, the remainder of the opinion dealt with the Colorado state law of garnishments.[55] Other courts have, similarly, found that ERISA has no preemptive effect regarding any funds once they are distributed by a plan. *See*, *e.g.*, *Carbaugh v. Carbaugh*, ___ B.R. ___ (No. KS-01-029, B.A.P. 10th Cir. Kansas, May 1, 2002), 28 F.L.R. 1317 (BNA May 21, 2002) ("Nothing in *Boggs* suggests that uncommingled monies distributed from pension plans and placed in accounts not under the auspices of ERISA remain protected by it").

As the United States Supreme Court noted in *Guidry I*, "there is no meaningful distinction between a writ of garnishment and [a] constructive trust remedy." 493 U.S. 365 at 372; *see also Emard*, *supra*. Therefore, if garnishment of funds is allowable once they are distributed by a pension plan, a constructive trust on those proceeds is equally permissible. And as the holdings of this Court, recited above, indicate, the prevention of unjust enrichment is precisely what the Nevada law of constructive trusts is intended to accomplish. *See Bemis*, *supra*.

The relatively few on-point holdings have agreed that a constructive trust may be obtained in circumstances such as these. In *Central States Pension Fund v. Howell*, 227 F.3d 672 (6th Cir. 2000), the court held simply that "once the benefits of an ERISA employee welfare benefit plan have been distributed according to plan documents, ERISA does not preempt the imposition of a constructive trust on those benefits." 227 F.3d at 678-79.

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[54] For example, the Social Security Act, 42 U.S.C. § 407(a) "prohibits the attachment or garnishment of the right to future benefit payments as well as the 'moneys paid or payable' to the beneficiary." *Guidry* at 1083; *see Philpott v. Essex County Welfare Bd*., 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (Social Security funds on deposit retain protection under § 407 as "moneys paid.")

[55] The only reason the dissenting justices dissented at ***all*** was that the majority's reading of Colorado's garnishment law permitted Mr. Guidry, the wrongdoer, to shield part of his ill-gotten gains. The dissenting justices stated that they would not read Colorado law "as mandating this bizarre result," stating that: "It is nonsensical to assume Colorado would want a thief to keep ill-gotten gains. Like Mr. Bumble of Oliver Twist, I believe 'if the law supposes that, ... the law is a ass--a idiot,' and I am not willing to believe Colorado law to be either." *See* Oliver Twist, Charles Dickens 520 (Dodd, Mead & Co. 1941) (1838). 39 F.3d at 1089.

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Similarly, in *Sun Life v Dunn*, 134 F. Supp. 2d 827 (S.D. Tex. 2001), the court approved the creation of a constructive trust against life insurance proceeds payable to the deceased's second wife, since the deceased had promised to provide those benefits to the disabled daughter of his first marriage, in his divorce decree.

The court found that a reviewing court must apply federal common law to disputes between a non-beneficiary claimant and a named ERISA beneficiary, where the statutory language of ERISA is not explicitly controlling, and draw guidance from analogous state law; therefore, state and federal law are both applicable in determining the proper beneficiary. *Id*. at 833. The factors governing when a constructive trust could be imposed are identical to those in the Nevada cases cited above, and the court noted that the requisite "confidential relationship" grew naturally out of the relationship of family – there, a father-daughter relationship. *Id*.

In passing, the *Dunn* court noted that a court may impose a constructive trust on totally innocent beneficiaries of a wrongful act. *Id*. at 835. Here, of course, Janis is anything but "innocent"; it has already been established that she sought to evade the divorce court's orders from the outset, and obtain benefits in which she had no underlying property interest surreptitiously, without providing any form of compensation for them.

In those few decisions in which it has been held that a constructive trust could ***not*** attach, the basis for the decision has been the special status accorded to ***surviving spouses*** under ERISA. *See*, *e.g.*, *Ford v. Ross*, 129 F. Supp. 2d 1070 (E.D. Mich. 2001). In this case, of course, ***Judy*** was Lupe's "surviving spouse," not Janis. Janis was merely one of Lupe's eight divorced ***former*** spouses – a class of individual given no special protection under ERISA, and whose rights are solely determined by the precise terms of statutory law, and any status granted under state law.

There is no special intended statutory protection for divorced former spouses under ERISA's terms; in fact, the structure of the federal law is designed that it is supposed to take an affirmative court order to ***ever*** have a former spouse such as Janis treated as a "surviving spouse."[56] Certainly,

[56] 29 U.S.C. § 1056(d)(3)(F) states: "(F) To the extent provided in any qualified domestic relations order – "(i) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of section 1055 . . . of this title . . .."

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Nevada law affords no protection to a former spouse who seeks unjust enrichment in defiance of state court orders, and to the detriment of a widow, as Janis admittedly seeks here.

Commentators have been quite harsh regarding courts that confuse the terms "former spouse" and "surviving spouse" when accidentally according the former statutory "rights" that were intended only for the latter. *See*, *e.g.*, Linda Ravdin, MARITAL AGREEMENTS 354 (Tax Management Inc., 2002; pre-publication copy) (discussing *Critchell v. Critchell*, 746 A.2d 282 (D.C. Cir. 2000), and *Marriage of Rahn*, 914 P.2d 463 (Colo. App. 1995), while criticizing other decisions for "misreading the statute" relating to waivers by prospective spouses in prenuptial agreements. Rather, they state, there is nothing in ERISA or elsewhere to prevent courts from doing equity in situations such as this. *See generally* Jan Webster, *Advanced QDROs: Ten Common Drafting Errors and How to Avoid Them*, in 2000 LEI National CLE Conference on Family Law at Vail at 30, n.11 (noting that disputes between current and former spouses "may be resolved under a state domestic relations law").

This brings us full circle to the reason for the lower court's imposition of a constructive trust. When this case is remanded, we will request a QDRO (as explained below) which the Hilton will presumably honor,[57] but which I.A.T.S.E. has indicated that it will not be able to honor under the terms of its plan. The constructive trust ordered below will not require the pension plan administrators to do anything that they are not willing to do under the QDRO to be issued; it will, however, require ***Janis*** to direct the deposit of any funds sent to her into the account for Judy's benefit, in enforcement of the parties' divorce decree and the trial court's subsequent enforcement orders.

3. Inapplicability of Case Law Cited by Janis

Janis premises the entirety of both of her appellate briefs on the concept that ERISA preemption trumps the deal made in her divorce, and the court orders below, and any consideration of equity. She cites only two federal cases in her Money Opening Brief in support of that assertion,

[57] This is in keeping with their plan documents: "benefit payments be suspended until the conflict has been resolved by: . . . a final judicial determination as to who is entitled to the benefits." R. App. I at 18.

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however, and adds only two others in her Contempt Opening Brief. Reasoned analysis of those authorities show that they do not provide any compelling reason to create the injustice she requests in this case.

Janis' cites *Egelhoff v. Egelhoff*, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001) only in her Contempt Opening Brief, for the proposition that if ERISA pre-empts a Washington statute automatically divesting former spouses from beneficiary status, that a Nevada court order setting up a constructive trust to prevent wrongful enrichment must be similarly pre-empted. *See* Contempt OB at 15-16. Her reliance on that opinion is misplaced, for two reasons.

The first reason is procedural. Janis claimed below that the case was so ***factually*** distinguished from the facts of ***this*** case that it just "does not apply to the Carmona case by virtue of the fact that David A. Egelhoff had not retired prior to the divorce." App. 4 at 803. This statement – made entirely in bold print – was part of Janis' claim during the proceedings below that ***pre***-divorce survivorship matters are so different from ***post***-divorce survivorship matters generally, and the facts of *Egelhoff* are so different from the facts of ***this*** case, specifically, that the *Egelhoff* holding could not be legitimately used in analyzing the legal issues involved in this case.[58] App. 4 at 802-803.

Having argued below that the case is so factually distinguishable as to be useless in this analysis, Janis should not be permitted to reverse her position on appeal, and now argue that the case is so similar that it should be considered "controlling." *See Tore, Ltd. v. Rothschild Management Corp.*, *supra* (party on appeal cannot assume an attitude or adopt a theory inconsistent with or different from that taken at the hearing below); *Powers v. Powers*, *supra* (same).

The second reason that Janis' reliance on *Egelhoff* is misplaced addresses the substance of the case. The primary thrust of the decision concerns the burden to be put on plan administrators if they were required to turn to the statutory law of the various states in determining to whom to pay

[58] Of course, Janis made that argument prior to the United States Supreme Court's reversal of the Washington Supreme Court's decision, but the legal conclusion of the matter has no bearing on whether or not the case is so factually different that it is, or is not, relevant to this appeal.

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benefits, and how a state law that would require that result would be "related to" ERISA and therefore pre-empted as conflicting with that statute.

Egelhoff concerned a Washington State statute providing that the designation of a spouse as the beneficiary of a non-probate asset (which was defined to include a life insurance policy or employee benefit plan) is revoked automatically upon divorce.[59] The case was factually distinct from this one in that the decedent was not yet retired when he divorced, remarried, and then died. His heirs attempted to use the Washington statute to effect an "automatic" change of beneficiary designation, which the Supreme Court held had an impermissible relation to ERISA plans and was therefore preempted.

No such statute, of course, is at issue in this case. As noted during the proceedings below, this case concerns a far more clearly permissible result than in *Egelhoff*, "because in this case there has been a contested hearing on the merits, and the decedent clearly and unequivocally stated his intention to exercise his authority under the decree to provide the survivorship benefits to his current wife Judy, rather than his ex-wife with no significant property interest in the benefits." App. 4 at 716.

The impact of the eventual *Egelhoff* decision on constructive trust cases such as this one was discussed at length in *Araiza-Klier*, *supra*, which found that where there has been an affirmative finding of waiver (as Judge Gaston found Janis has done in this case), a constructive trust can and should be imposed under federal common law to prevent "the potential for injustice that would result if a former spouse who had in fact voluntarily and for substantial consideration given up any claim to death benefits were nonetheless permitted to recover them." *Id.*, 2001 Cal. App. LEXIS 2794 at 22-23.

Plan administrators must consider specific state court orders whenever a QDRO is submitted. There is no additional burden on plan administration by having an order based on a waiver (like that made by Janis at divorce) served on the plan, and therefore such an order does not endanger the "nationally uniform plan administration" that the *Egelhoff* decision sought to protect.

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[59] Wash. Rev. Code § 11.07.010(2)(a) (1994).

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When the QDRO is issued, the prediction by the various plan employees that have spoken to the parties and the attorneys over the years – giving different responses – will be put to the test, and the plans either will, or will not, honor a QDRO directing the deposit of the survivorship funds into a specific bank account as directed by the district court. If they do, no further action by anyone is required. If they do not, then the constructive trust requires Janis, not the plan administrator, to take an action – depositing money already adjudicated as not belonging to her into the constructive trust account. There is ***no impact*** on the pension plan administrators, and thus no ERISA implication under the reasoning of *Egelhoff*.

In short, while *Egelhoff* is an ERISA preemption holding, it does not affect the result to be reached in this case, because under federal common law, Janis' relinquishment of the benefits can be recognized and enforced. Janis' reliance on *Egelhoff*, *see* Contempt OB at 15-16, is misplaced.

Similarly, Janis' citation to *Boggs v. Boggs*, 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997), Contempt OB at 16, is not so much incorrect as irrelevant. The proposition for which she cites the opinion – that "ERISA preempts a state community property law permitting the testamentary transfer of an interest in a spouse's pension plan" – is correct, but has nothing to do with this case.

Boggs dealt with a situation where the sons of a predeceased spouse tried to prevent the new spouse from collecting the survivor benefits, based upon a purported testamentary transfer of the survivorship interest. The Supreme Court held that ERISA preempted a state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits. Again, there is no such statute involved in this case, the plans have not been asked to do anything in contravention of their internal documents, and the question is whether the state court has the power to enforce its own orders by ordering Janis to deposit sums already adjudged to not belong to her, pursuant to a relinquishment of those benefits made at divorce.

In other words, the situation is like that with *Egelhoff*; while *Boggs* is a case involving ERISA, it is irrelevant to the outcome of this appeal.

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Janis cites to *Guidry I*[60] at page 17 of her Contempt OB and pages 17 and 26 of her Money OB, in all three places for the insupportable conclusive pronouncement that ERISA pre-empts all constructive trusts. She never provides any background or explanation for her claim. The case, and its prior history and subsequent history, is discussed at length above, in Section III(D)(2) of this brief.

If the case actually contained the holding proposed for it by Janis, then the Tenth Circuit Court of Appeals would necessarily have been in contempt of the United States Supreme Court by approving the constructive trust on remand, as they did. *See Guidry II*,[61] *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, *supra*, 39 F.3d 1078, 1081-83 (10th Cir. 1994) (*en banc*) (ERISA does not prevent imposition of constructive trust on proceeds of pension plan after distribution to beneficiary).

Actually, *Guidry* contains ***no*** such prohibition on constructive trusts, which is why a variety of state courts, and federal district and circuit courts, have imposed, approved, or upheld constructive trusts, since *Guidry*, when it has been appropriate to do so. *See*, *e.g.*, *Sun Life v Dunn*, *supra*, (S.D. Tex., 2001), *Araiza-Klier v. Teachers Insurance and Annuity Association*, *supra* (California Court of Appeals, 2001), *Central States Pension Fund v. Howell*, *supra* (6th Cir., 2000), *Emard v. Hughes Aircraft Co.*, *supra* (9th Circuit, 1998), *Guidry II*, *supra* (10th Circuit, 1994), *Fox Valley*, *supra*, (7th Cir. 1990).

Thus, Janis has mis-cited (or, to be generous, over-stated), the holding of *Guidry I*, which just does not stand for the sweeping prohibition against the equitable remedy of constructive trusts she claims. It does not support her request that this court is somehow prohibited from doing equity and achieving justice by affirming the decision below. It is worth noting that the Ninth Circuit, in deciding *Emard*, *supra*, cited and relied upon ***both*** *Guidry I* and *Guidry II* as being entirely consistent with and supportive of its decision to impose a constructive trust. 153 F.3d at 954.

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[60] *Guidry v. Sheet Metal Workers' Nat'l Pension Fund*, 493 U.S. 365, 107 L. Ed. 2d 782, 110 S. Ct. 680 (1990).

[61] *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 39 F.3d 1078, 1081-83 (10th Cir. 1994) (*en banc*).

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Janis makes most of her ERISA citations, and pins most of her case, on *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997), which she claims is "directly on point." Money OB at 16. Her claim is disingenuous.

Hopkins dealt with a former spouse trying to collect unpaid alimony from an obligor's subsequent spouse by means of attaching that subsequent spouse's survivorship benefits. Technically, the question presented was the qualification of the order sought by the former spouse as a QDRO. The alignment of the parties was the reverse of the situation presented by this case – the former spouse (the person in Janis' position), who happened to be owed money by the decedent, sued the pension plan arguing that the plan should not pay survivor's benefits to the final spouse and widow (the person in ***Judy's*** position), as the plan intended to do.

The court affirmed the dismissal of the former spouse's case, due primarily to the priority provided under ERISA to protection of ***surviving spouses***; that doctrinal priority – which has no application to any claim made by Janis – is discussed at length above, in Section III(D)(2) of this brief.

Hopkins is necessarily distinguished on its facts for a few reasons. First, as noted, it involved a suit by a ***former*** spouse trying to invade survivorship benefits being paid to a ***surviving*** spouse (the reverse of the facts of this case) for collection of an award (alimony) that was unrelated to the benefits themselves, and had to deal with the priority given surviving spouses under law.

Second, the case did not involve a constructive trust, and did not address any part of the federal common law discussed above for determining when such a constructive trust will be found to exist. Under the facts of *Hopkins*, any such inquiry was irrelevant.

Third, the *Hopkins* court stated that it "need not consider the interests of a subsequent spouse" because of the applicability in that case of § 1055(f). *See* 105 F.3d at 157 n.6. The provision is an optional one, which states that a plan ***may*** provide that survivorship benefits are conditioned upon the marriage of the participant and named beneficiary for a year prior to the date of death or the annuity starting date. In this case, the Hilton plan has no such provision, while the

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I.A.T.S.E. plan appears to contain it.[62] It is therefore uncertain whether one, the other, or both plans will honor a QDRO formally deeming Judy the surviving spouse.

A couple of other courts have faced the kind of claim made by Janis here – that *Hopkins* somehow makes it impossible for a worker who made a beneficiary designation, and then retired, and then remarried, to ensure that the later wife and widow (in this case, Judy) received the benefits. In varying ways, and for various reasons, those courts have determined that the repugnant result sought by Janis can be rejected.

In *Lewis v. Atlantic Research Corp.*, 1999 U.S. Dist. LEXIS 13569 (W.D. Virginia, Aug. 30, 1999), the worker had named his children as beneficiaries of an ERISA-governed plan; he retired four years later, remarried after another three years, and then died two years after his last marriage.

The children in that case, like Janis in this case, claimed that under 29 U.S.C. §1055(f) and the holding of *Hopkins* that their father's final spouse and widow was not his "surviving spouse" based on their claim that the survivorship benefits had "vested" in them upon his retirement. The court rejected the argument, finding that the fact of naming others could not defeat the primacy given protection of surviving spouses, even where it appears that it was the decedent's intention to do so. Of course, in this case, it was clearly established that the decedent – Lupe – wanted the benefits to go to his surviving spouse and widow – Judy.

The *Lewis* court noted that the code section at issue in *Hopkins*, Section 1055(f) is "an optional provision, providing that a plan 'may,' not 'shall' or 'must,' incorporate certain requirements governing whether a spouse can receive spousal benefits." *Id*. at 10. *Lewis* instructs that there are no mandates to the code section at issue in *Hopkins* at ***all***. The court held that the widow, who had married the plan participant after his retirement, was entitled to the benefits. *Id*.

The impact of equitable doctrines where § 1055(f) is implicated was recently faced by the court in *Croskey v. Ford Motor Company*, 2002 U.S. Dist. LEXIS 8824 (SDNY, May 6, 2002), in a case involving a bigamist whose two "wives" both made claims to the same stream of survivorship benefits. After a lengthy analysis, the court eventually remanded for a trial court determination of

[62] § 7.02, although the phrasing is different than that of § 1055(f).

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whether the equitable doctrine of laches should bar the earlier wife from denying the legitimacy of the second wife's marriage, thus placing the latter wife in the position of "surviving spouse" under the statute; the trial court was directed to ***state*** law in making its determination of entitlement, which is not very different from the analysis required for making a determination to impose a constructive trust.

In any event, the key distinction making *Hopkins* inapplicable to the result here is that it did not concern a constructive trust, and certainly nothing in it contradicted the express approval of constructive trust remedies where the facts are similar to those of this case, in *Emard*, etc.[63] Judge Gaston was fully briefed on *Hopkins* (as he was on every case Janis cites on appeal), *see* App. 4 at 713-16, and found them of no importance to the result reached here. *Hopkins* – in which the surviving spouse was protected from even a sympathetic claim from a former spouse who had a legitimate debt to collect – provides no justification for granting a windfall to an undeserving former spouse with no legitimate claim of any kind to the benefits at issue.

Hopkins did ***not*** hold that someone in Janis' position has any "right" that could have forced the court below to reach an inequitable and unjust result. The case was factually and legally distinct from this one, and its holding is ultimately irrelevant to Janis' quest to force an inequitable result out of this Court.

Since none of the four federal cases Janis relies upon actually compel this Court to impose an inequitable result, and the state cases she cites say no such thing, the remainder of this brief turns to Janis' misuse of terminology, mis-statements of law concerning contempt, various red herrings she tries to raise, and other reasons why the decision below should be affirmed in all respects.

4. Janis' Misuse and Confusion of Terminology

At multiple points in her two briefs, Janis (apparently deliberately) confuses the concepts of "beneficiary designation" and "form of benefit," in an effort to mislead this Court into believing that

[63] Even if there ***was*** some contradiction between *Hopkins* and *Emard* – and there does not appear to be – this Court would presumably find the *Emard* decision, as a later decision of the Ninth Circuit Court of Appeals, more persuasive as to applicable law in this federal district.

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an inability to change benefit ***options*** post-retirement somehow makes it impossible for a worker to alter the determination of who ultimately receives the money.[64] *See*, *e.g.*, Money OB at 16.

The two concepts are only barely related. Pension plans contain prohibitions against changing the ***form of benefit*** from a retirement that ***does*** include survivorship benefits to a form of benefit that does ***not*** include survivorship benefits, once payments have begun. *See* App. 4 at 810.[65] This prohibition is for the actuarial protection of the plans, since payouts to retirees are adjusted to be actuarially equal whether with or without survivor's benefits, and such changes could cause an increase in the total amount of payments made.[66] *See*, *e.g.*, Marvin Snyder, VALUE OF PENSIONS IN DIVORCE § 7.4 (Wiley & Sons 1992 & Supp. 1998).

The selection of a particular ***beneficiary***, by contrast, is irrelevant to the financial viability of a pension plan, or the terms of that plan – it is merely the person who gets the money.

The prohibition in pension plans – like the I.A.T.S.E. plan language quoted above – is against a participant, who has started receiving his benefits under the plan, going back and terminating the Joint and Survivor Annuity Benefit in favor of, for example, a Single Life Annuity.[67]

Nowhere in the plan documents for either the I.A.T.S.E. or Hilton pension plans is any statement that the identity of a ***beneficiary*** can not be changed. It is for that reason that it is not clear, to this day, if the plans will honor a QDRO specifically naming Judy which we ask to have issued upon remand.

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[64] Janis relies on the "Instructions for Employee Benefit Election" form. App. 2 at 258. It says nothing about the designation of beneficiary being irrevocable, only that the **election of the benefit is irrevocable**.

[65] The Nevada Resort Association – I.A.T.S.E. Local 720 Pension Plan pursuant to Article VII, Section 7.02 Joint and Survivor Annuity Benefits does not provide for any revocation after the benefit commencement date.

[66] It is for this reason that Janis would, of necessity, be unjustly enriched if she received the benefits at issue. Lupe suffered a lifetime ***decrease*** in his flow of post-divorce payments during his life, as the funding mechanism by which he gained the benefit of being able to leave a stream of payments after his death to an intended beneficiary. Janis did not compensate Lupe in any way for that reduced benefit stream, and both the detriment, and the benefit, were his sole and separate property.

[67] Lupe requested and was given the power to do exactly that, ***if*** the plan would have allowed it, by the terms of the divorce decree. ***All*** the orders (including the one Janis claims was "final") so state on their face. *See* App. 1 at 88-89. As everyone anticipated, the ***form*** of benefit could not be changed once Lupe retired; the litigation was therefore over changing the identity of the person who was to receive the flow of survivorship benefits that had been irrevocably created when Lupe chose a "joint and survivor" form of benefit at retirement.

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This Court should not believe that Janis' confusion in her filings of "benefit election" and "named beneficiary" is in any way accidental. It is that confusion of concepts by which she hopes to persuade this Court that ERISA pre-emption somehow mandates the imposition of an inequitable result. From the earliest cases, courts have distinguished the matters, leaving to ERISA what benefit elections can be made, and to state divorce decrees the decision of who is to get the money. *See*, *e.g.*, *Carpenters Pension Trust v. Kronschnabel*, 460 F. Supp. 978, 982 (C.D. Cal.1978), *aff'd* 632 F.2d 745 (9th Cir. 1980):

> Community property laws do not act as assignment but rather prescribe property rights in pension benefits as between spouses, and ERISA's anti-assignment provision cannot be read to outlaw as prohibited assignments dissolution decrees issued pursuant to state's community property laws.

See also Monsanto Co. v. Ford, 534 F. Supp. 51 (E.D. Mo. 1981) (whether there is a legitimate spousal interest in ERISA-governed benefits is a question of state, not federal law).

ERISA, as modified by the Retirement Equity Act of 1984, creates a derivative, not independent right in a spouse to receive a stream of income from a pension plan as an alternate payee. *Kronschnabel*, *supra*. Direction of that benefit stream is subject to the controls of ERISA and its provisions governing management of plan monies, meaning a QDRO is required. To be "qualified," a court order need only relate to the provision of marital rights.

By citing statutes and cases dealing with form of benefit selection, instead of the constructive trust cases which (necessarily) deal with selection of the appropriate ***beneficiary*** receiving the money, Janis seeks to confuse the analysis to be completed by this Court, and obtain "cover" for her misappropriation under various cases and laws not intended to protect a wrongdoer.

The plans themselves do not allow a change to the benefit, and as noted above, only the Hilton plan states that the named beneficiary might be changed by such an order[68] while the other plan is silent. The district court did not ask or require that the ***plan*** do anything it does not already do, only that, as in the constructive trust cases cited above, if the wrongdoer (Janis) actually gets her hands on any of the money that does not belong to her, she be compelled to give it up, as ordered.

[68] *See* fn. 43, *supra*.

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Similarly, Janis misuses the term "vested." *See*, *e.g.*, Contempt OB at 16. A "vested" benefit is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

As several courts have observed, provisions for a joint and survivor option under a retirement plan are in accord with the applicable provision of ERISA (§ 1055(a)), which requires only that if a plan provides for benefits to be paid as annuities, it must also provide the option for payment of such benefits in the form of a qualified joint and survivor annuity. No independent, "vested" rights for a non-participating spouse are created by election of the joint and survivor option. *Hernandez v. Southern Nevada Culinary and Bartenders Pension Trust*, 662 F.2d 617 (9th Cir. 1981); *Kronschnabel*, *supra*.

Janis, however, deliberately confuses the concepts of "vestedness" of a retirement (which ***Lupe*** had) with the technical happenstance of the ***absence*** of a specific plan provision for replacing Janis' name as designated beneficiary with that of Judy, as bargained for, agreed, and ordered.

The unreasonableness of Janis' position is easily illustrated by a hypothetical that is actually not much different from the facts of this case. According to Janis, if a man worked for 30 years while single, married the day before he retired, and divorced a week later, only to marry a second wife to whom he remained married for another 30 years, wife one would receive the entirety of his survivorship benefits, wife two would get nothing, and there is nothing in either law or equity that could be done about it.

The hypothetical is not very different from the facts of this case, because Janis was not married to Lupe during ***any*** of the time he earned the pension, with attached survivorship benefits, under I.A.T.S.E.; her underlying community property interest in the Hilton pension, while not zero, was so small that offsetting her interest in Lupe's pension from his interest in hers required an exchange of only $1,500.00. If Janis gets Lupe's survivorship benefits, she will receive an utterly undeserved windfall in direct contravention of the express wishes of the man who worked for many years to produce the benefits at issue, and at the expense his designated survivor and widow. If she

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gets away with it, she will have succeeded in her unscrupulous campaign to "pick the bones of a dead person" that Judge Gaston identified and condemned in 1999.

Any such construction of the laws –federal or otherwise – would be absurd on its face, and this Court has repeatedly held 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.

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

Throughout both opening briefs, Janis quotes ERISA sections as through they hold some hidden meaning that only pertains to her. They do not. The benefits at issue are the creation of Lupe Carmona's separate property effort and toil for many years before he met Janis, and her confusion of terminology in the federal law should not be allowed to substantiate her efforts to subvert Lupe's ultimate control of the recipient of his efforts, as bargained for, agreed, and ordered.

E. Upon Remand, A QDRO Should be Entered as Soon as Practicable

Since the lower court issued its constructive trust enforcement order in 1999, backing up its 1998 ruling enforcing the *Decree of Divorce*, Janis has kept this case in perpetual litigation, often in multiple courts simultaneously. At her urging, there has been continual litigation of stay requests, jurisdictional conflict, repeated and unfounded efforts at judicial disqualification, and questions between federal, state, probate, and bankruptcy courts, for most of four years at this point.

While Janis continues to make new filings in the bankruptcy and probate courts through Mr. Jenkin, and we expect still further filings from him in other venues,[69] we have managed to get the remaining actions either completed or at least suspended indefinitely, pending this Court's resolution of the underlying issue of which party is entitled to the money at issue.

The lower court's March, 1998, *Order* provided for the issuance of a modified QDRO deleting Janis as the survivor beneficiary, and allowing reformation of Lupe's plan selection as a

[69] Mr. Jenkin, on Janis' behalf, has apparently vowed to file another federal lawsuit as soon as this Court issues its decision in this case; it is not certain if he again intends to sue members of the judiciary, including the members of this Court.

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single life annuity, or for him to name Judy as his named survivor. App. 1 at 88-89. That *Order*, confusingly drawn by Mr. Freedman, was clarified by the lower court in its *Order* of April 16, 1999, under which the plans were ordered to change the beneficiary designation to Judy and, if they could not or would not, Janis was required by constructive trust to deposit all funds received in an account for Judy's benefit.

A QDRO embodying the lower court's "direct order" to change the beneficiary designation has not yet been served on the plans, because of the incessant litigation from that time to this time. Judge Gaston eventually stated that he would take no further actions beyond safeguarding the money in the constructive trust account, until this Court rules on who is entitled to the money.[70]

Mr. Freedman and Mr. Jenkin have both made it clear that they intend to attempt to subvert the conclusions of the Nevada state courts by obtaining conflicting orders from the federal courts. However, we are reasonably confident that the federal courts will respect the decision of this Court, under the various doctrines under which Janis' earlier foray into the federal court was dismissed, and because the federal and state courts have coextensive original jurisdiction to issue rulings relating to ERISA-governed pension plans. *See* 29 U.S.C. §§ 1132(e)(1) &1132(a)(1)(B); *In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997).

If this Court affirms the orders on appeal as we have requested, we ask that the order of remand include the direction to the district court to issue a QDRO as to each plan carrying the affirmed orders into effect, by formally naming Judy as Lupe's survivor beneficiary. *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (since existing orders did not constitute a QDRO under ERISA that would cause survivor's benefits to be paid to party prevailing in appeal, remand included direction to lower court to issue QDRO naming her as "surviving spouse").

After those QDROs are served, the two plans either will or will not find that they can honor the orders. If they do, then no further action by any person will be required, since the survivorship funds will flow directly to Judy as agreed during the divorce. To whatever extent the plans find they

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[70] As noted in the statement of facts, after this Court issued its order of October 5, 2000, staying proceedings due to Janis' bankruptcy, the lower court took all motions off calendar until this Court issues a decision on these appeals; the communication from the department made it clear that no further requests were to be made in that court until this Court concludes the appeals.

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cannot honor the QDROs due to the language of their plan documents, the constructive trust in effect will require Janis to deposit any money misdirected to her into the constructive trust account for Judy's benefit. If Janis continues her defiance of all court orders, she can be further punished for contempt.

1. Janis' Bankruptcy Filing does not Permit Contemptuous, Unethical Conduct to go Unpunished

Even in bankruptcy litigation, interests in property are determined by state law. *In re Trujillo*, 215 B.R. 200 (B.A.P. 9th Cir. Nev. 1997), *aff'd as amended*, 166 F.3d 1218 (9th Cir. 1998). Legal and equitable interests of a debtor included in the property of the estate are created and defined by state law. *Wilson v. Bill Barry Enterprise, Inc.*, 822 F.2d 859 (9th Cir. 1987). Threshold issues of the existence and scope of debtor's interest in property are properly resolved by reference to state law since the Bankruptcy Code itself does not determine those issues. *In re Harrell*, 73 F.3d 218 (9th Cir. 1996).

Presuming this Court affirms the result reached below, we believe that the bankruptcy court will not unduly interfere with its enforcement. As recounted above, Janis has sought to discharge in bankruptcy the attorney's fees previously imposed against her for contempt; those proceedings are still ongoing, and their results are unknown. However, that bankruptcy would not shield her from any further sanctions imposed in the future from her ongoing refusal to comply with court orders.

There appear to be no Ninth Circuit cases directly on point, but the question has been addressed in other jurisdictions, which have taken at least three different approaches. One approach is that the automatic stay applies to civil contempt proceedings. *In re Cherry*, 78 B. R. 65, 70 (Bankr. E.D. Pa. 1987). However, this is the rule in only a minority of the jurisdictions. The second line of cases examines the circumstances surrounding the issuance of the order of contempt to determine whether or not the intent of the court issuing the order was to force a judgment to be satisfied or if the intent was to punish. *International Distribution Centers, Inc. v. Walsh Trucking Co., Inc.*, 62 B.R. 723, 729 (Bankr. S.D.N.Y. 1986). The third line of cases holds that, "[i]t is within

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a court's inherent power to take whatever steps necessary to ensure those persons within its power comply with its orders. . . [a] civil contempt judgment is one effective method of coercing compliance and upholding the dignity of the court." *US Sprint Communications Co. v. Buscher*, 89 B.R. 154, 156, (D. Kan. 1988).

What can be gleaned from the cases is that courts will, at a minimum, look at the facts and circumstances surrounding the contempt of a debtor. If this Court affirms the decision below, then the survivorship funds will have been found conclusively to not belong to Janis and to therefore be outside the bankruptcy estate. If it appears that the contempt issue does not affect the property of the bankruptcy estate, then no request for relief from the automatic stay is required. In other words, if Janis continues to ignore State court orders simply because she does not agree with them, it is well within the district court's power to enforce her compliance, and the bankruptcy courts should not be expected to offer cover to her ongoing theft of the proceeds, or to shield her from further sanctions.

2. Janis' Probate References are Disingenuous Red Herrings

Janis misstates both the facts and the law in sections IV and V of her Money Opening Brief, which relate to the issuance of orders by the district court after Lupe's death, and to the appointment of his widow, Judy, as successor representative.[71]

Lupe was very sick during the proceedings. With his death approaching in the Spring of 1999, evident by his physical condition and "hacking" blood into his handkerchief during the proceedings, Janis and her agents did what they could to delay proceedings, including "sitting" on proposed orders (ultimately submitted without her attorney's signature) hoping to force the case into abatement.[72] This machination by Janis was anticipated and brought to the court's attention in Lupe's *Opposition to Defendant's Motion to Strike Plaintiff's Countermotion for Establishment of Constructive Trust; Reply to "Response."* App. 1 at 169. It correctly identified the actual reason

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[71] If Janis misstated everything, this section of the responsive brief would be quite short. However, her careful misstatement of facts out of context, and deliberate citation of legal dicta out of context, requires a more thorough response.

[72] The court issued its orders during Lupe's life and later formalized them with the entry of the April 16 and June 22 orders.

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they were trying to defer the motion hearing (they alleged that it was "premature" because Lupe was still alive at the time):

> Janis' other, equally-unsupported arguments do not require much further analysis. She argues that his motion is premature because Lupe, while critically ill, is not dead yet. *See* "*Response*" at 4. Again, this is sophistry. ***We are dealing with Lupe's efforts to control disposition of the property awarded to him; one can practically hear Janis complain about the "action abating" and there being no legitimate party before the Court, should he die and Judy try to actually attempt to bring his wishes regarding his property into effect.*** It is necessary to have this heard while Lupe is still alive.

App. 1 at 174 (emphasis added). We were, unfortunately, entirely correct; our opponents were attempting to manipulate the legal system to obtain the desired unjust enrichment by abatement.

The court's entry of the April 16 and June 22 orders after hearing the matters and making its decision during Lupe's life is consistent with statutes, rules, and case law. NRS 17.140 provides direction on judgments in the present situation:

> If a party dies after a verdict or decision upon any issue of fact, and before judgment, the court ***may*** nevertheless render judgment thereon. Such judgment shall not be a lien on the real property of the deceased party, but shall be payable in the course of the administration of his estate.

(Emphasis added.) This is a ***discretionary*** statute for the Court to apply, by the legislative inclusion of the word "may."[73] The rule for the timing of the entry of a judgment is found in NRCP 58(c):

> *When judgment entered.* The filing with the clerk of a judgment, signed by the judge, or by the clerk, as the case may be, constitutes the entry of such judgment, and no judgement shall be effective for any purpose until the entry of the same, as hereinbefore provided. The entry of the judgment shall not be delayed for the taxing of costs.

It is well understood that NRS 17.140 and NRCP 58(c) are consistent with one another. This Court has found harmony between the statute and the rule, so that a personal representative under NRCP 25 need not be appointed for the entry of orders following the death of a party. Specifically, *Koester v. Estate of Koester*, 101 Nev. 68, 71, 693 P. 2d 569 (1985) ***does not require*** the substitution of a personal representative for the court to enter an order previously made during proceedings held during the lifetime of the decedent.[74]

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[73] *See Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994) (use of word "may" in NRS 125.180 indicated legislative allowance of judicial discretion in electing whether to reduce arrears to judgment).

[74] This is the point Janis misstates as law, representing to the Court that a personal representative is required under NRCP 25. *See* Money OB at 25.

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In *Koester*, the findings of fact, conclusions of law, and decree of divorce on all issues, including community property, were signed by the district court judge two weeks after the decision.[75] The wife died the day the judge signed the decree. The clerk filed the decree the day after the death of the party. Two years later, the estate moved for an order nunc pro tunc setting the divorce for either the date of decision or the date of signing (date of death), and the lower granted the motion.

The bulk of the opinion dealt with the propriety of entry of the nunc pro tunc decree to a date earlier than its actual filing, which this Court approved. 101 Nev. 72-73. Before even reaching that question, however, the Court disposed of the objection that the decree was filed after one of the parties died:

> This court has not interpreted NRS 17.140. A similar statute [citation omitted] was interpreted in *John v. Superior Court*, 90 P. 53 (Cal. 1907), as permitting the entry of a final decree of divorce following the husband's death so long as the death occurred after a decision of all the issues of fact had been entered. . . . . In the instant case, Sherry died after the lower court had entered its decision. Therefore, the lower court had the power, pursuant to NRS 17.140, to enter judgment after Sherry's death.

101 Nev. at 71-72. The Court was not concerned with entry of the judgment prior to appointment of the successor representative, stating at page 72 of the decision:

> At best, if a party dies after commencement of an action and after the court has acquired personal jurisdiction over the party, a judgment rendered against a deceased party without substitution of the personal representative is voidable. *Wooley v. Seijo*, 36 Cal. Rptr. 762 (Ct. App. 1964). Therefore, the judgement entered against Sherry after death was voidable because her personal representative or administrator was not substituted.

The Court also noted that a judgment can be held to have been entered at a prior point in time in order to "make the record speak the truth as to what was actually determined or done or *intended to be determined or done* by the court." 101 Nev. at 72, *quoting from Finley v. Finley*, 65 Nev. 113, 119, 189 P. 2d 334, 337 (1948), *overruled on other grounds*, *Day v. Day*, 80 Nev. 386, 395 P. 2d 321 (1964) (emphasis in original).

[75] It is not clear, but it seems that the case is referring to a minute order style document.

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On that basis, the Court held that "[t]he rule [NRCP 58(c)] and the statute [NRS 17.140] are not inconsistent," 101 Nev. at 71, and provided the general rule by which an order nunc pro tunc is to relate a final divorce back to a point in time before the death of a party.[76]

Thus, Janis' assertion that the two orders of April 16, 1999, and June 22, 1999, fail for lack of appointment of a personal representative under NRCP 25 is simply wrong. The district court had issued its written decision resolving the disputed issue of fact (as to the intent of the *Decree* regarding the survivor's benefits) months earlier, App. 1 at 198-201, and only the deliberate stalling of Janis' attorney caused entry of the formal order to be delayed until April 16, 1999. App. 1 at 204; R. App. at 87-89.

The district court had the authority to direct the "ministerial act" of filing the order formalizing its decision, despite Mr. Freedman's months of delay, and despite the fact that it was formally filed the day after Lupe died, consistent with the court rules, statutes and case law. 101 Nev. at 73, n.2.

Section V of Janis' Money Opening Brief relates only to her claim of some sort of procedural error in setting the probate case in motion. As detailed above, the procedures followed were initiated only ***at Janis' insistence***.[77] Janis has never yet argued or alleged that the stream of income from the retirement accounts in question are distributable by way of a probate order. Therefore, the only known asset for possible distribution through a probate proceeding is the money held in the constructive trust. That probate proceeding has a case number and the ability to distribute assets through it should an asset be later developed as a result of the family court proceedings.

Under the guidance and recommendation of the Eighth Judicial District Court's Probate Commissioner, Don Ashworth, the court has held the probate case "open" pending the results of this Court's determination on the appeal. Should an asset be developed that requires probate administration, the mechanism is in place to deal with it. The case remains in status quo by order

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[76] "[i]f the facts justifying the entry of a decree were adjudicated during the lifetime of the parties of a divorce action, so that a decree was rendered or could or should have been rendered thereon immediately, but for some reason was not entered as such on the judgment record. . ." 101 Nev. at 73.

[77] *See* text and notes at fn. 15, *supra*.

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of Judge Gates until the results of the appeal are issued. No one is burdened or prejudiced by the case in its current form, which is active.

With this in mind, there is no appealable issue for Janis to raise. ***She*** insisted on the set up of a probate case and she has been accommodated. The matter remains in stasis pending appeal results. There is nothing further to be done there until a determination is made by this Court although, as discussed above, Janis continues to have Mr. Jenkin make unnecessary and duplicative filings in that court anyway.

From the remainder of section V of Janis' Money Opening Brief, we can decipher only three small items to discuss, all of which have been touched on generally above. First, Janis questions why a "special administration" under NRS 140.010(6) was not used in place of a regular probate proceeding. Money OB at 27. No special administrator was required because Janis insisted upon a "full-on" probate proceeding. That proceeding placed a personal representative in charge of collecting the assets and prosecuting the case. Again, no appellate issue is raised.

Second, Janis takes exception to the brief period of consolidation of the probate and family court cases by Judge Gaston, but notes that Judge Gates now controls the probate matter. Money OB at 27. It is possible, but unnecessary, to enter into an extended discussion of this Court's expansion of the subject matter jurisdiction of the family courts under *Barelli v. Barelli*, 113 Nev. 873, 944 P.2d 246 (1997), and propose that it was a legal assertion of subject matter jurisdiction by the district court. However, it should suffice here to state that matters of case assignment are internal to the clerk's office, have nothing to do with the merits of this case, and present no issue in this appeal.

Third, Janis questions whether there is sufficient jurisdiction for the probate matter to be held open under NRS 136.090. Again, the merits could be reached and discussed, but it is unnecessary to do so, because no such "issue" is before this Court and no probate orders have ever been appealed. Briefly, the Probate Commissioner and the court handling the probate matter have ordered the probate case to remain open to accommodate both Janis' 1999 request and the interest of judicial economy should the decision of this Court develop an asset for distribution.

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In summary, no issue meriting appellate attention has been raised by Janis. All of Janis' use and abuse of the probate laws and courts – from her initial demand for opening of a probate through her most recent rehearing demand that the action be dismissed – have been specious. The only legal significance of them relates to the request below that she and her attorneys be held financially responsible for their abuse of the legal process.

IV. JANIS WAS PROPERLY HELD IN CONTEMPT OF COURT

A. If There is No Jurisdiction to Review the Order, There is No Jurisdiction to Reverse the Sanctions Imposed in that Order

Janis' logic is difficult to follow. She concedes that she acted in contempt of the lower court's orders. Contempt OB at 12. She further concedes that this Court lacks jurisdiction to consider an appeal of an order of contempt. Contempt OB at 13. She asserts, however, that since she believes she is right on the merits of the substantive questions, it is "abundantly clear" that the lower court "erred and abused its discretion" by holding her financially responsible for a portion of the economic damages caused by her contemptuous conduct, and requests reversal of the order below. *Id*.

Starting with the question of jurisdiction, this Court has already considered and rejected Janis' argument, in its denial of her petition for a writ of prohibition or mandamus, filed December 10, 1999. App. 3 at 581. The only difference between her argument there and here is that the contempt ruling had not yet been made when Janis asked this Court to stay it. The Court refused to do so. *Id*. at n.1. *See Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 807 P.2d 208 (1991) (discussing "law of the case" doctrine where case returned to this Court after earlier appeal and remand).

A review of *Pengilly v. Rancho Santa Fe Homeowners*, 116 Nev. ___, 5 P.3d 569 (Adv. Opn. No. 75, Aug. 18, 2000), indicates that the five lines devoted to it in Janis' brief are insufficient. Contempt OB at 13.

In *Pengilly*, this Court flatly stated that it lacked jurisdiction "over an appeal from a contempt order." Adv. Opn. at 4. Nothing in the opinion hinted that this Court might look ***inside*** a contempt

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order during an appeal, as Janis requests here, choosing to review the monetary sanction imposed while "not reviewing" the contempt order itself. In fact, the opinion specifically states that "Whether the contempt sanction is imposed on a nonparty or a party, the proper way to challenge it is through a writ petition." *Id*. at n.2. The "sanction" in question can only be monetary, or an order of incarceration.

It is respectfully suggested that Janis' position is illogical. If this Court has declared itself to lack jurisdiction to consider an appeal from an order of contempt, then there is simply no jurisdiction over the subject matter of Appeal No. 36220, and it should be dismissed on that basis alone without further comment.

B. The Award of Attorney's Fees as a Sanction was Perfectly Permissible

If, for whatever reason, this Court elects to "peek inside" the contempt order whether or not it has jurisdiction to review it, the order appealed from should be specifically affirmed.

The lower court informed Janis (during the months that she openly defied the order to preserve the funds at issue pending a judicial decision as to who was entitled to them) that such defiance carried with it the risk that she could have imposed against her the costs and fees that her defiance was causing Judy to incur. Tr. 3/13/2000 at 12-15.

Mr. Freedman then attempted to categorize the proceedings as criminal in nature. *Id*. at 15. After another extended colloquy, the trial court stated that it was not going to impose a criminal sanction, but that if it found that Janis' violations of the court's orders had caused Judy to incur fees and costs, it could order that both be reimbursed to her. *Id*. at 16-19.

In *Pengilly*, this Court noted that where the purpose of contempt proceedings are to coerce compliance with district court orders, a lower court is to be given the maximum amount of flexibility to "modify its orders to meet changing circumstances," and that since the question of "whether a person is guilty of contempt is generally within the particular knowledge of the district court," an order adjudicating that fact "should not lightly be overturned." 116 Adv. Opn. 75 at 4. This Court described the "fitting level of deference for the review of contempt orders."

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Janis, however, asserts that the financial penalty imposed against her was too high, and asserts that since a monetary sanction was imposed, the contempt order is appealable under *Smith v. Crown Financial Services*, 111 Nev. 277, 890 P.2d 769 (1995) (order awarding attorney's fees to defendants under NRS 18.010 was appealable "special order after judgment"). Contempt OB at 13-14.

First, it is submitted that *Pengilly* would be rendered meaningless if this Court reviewed a contempt order whenever a monetary sanction is imposed, because such a sanction is the usual result of a finding of contempt. The Court has often ruled that in interpreting statutes, it avoids any reading by which terms become nugatory or meaningless, and it is presumed that the same rules of construction should apply to this Court's own decisions. *See Rodgers v. Rodgers*, 110 Nev. 1390, 887 P.2d 269 (1994) ("no part of a statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided").

Presuming that the Court chooses to reach the question of the appropriateness of the financial penalties assessed against Janis for her contempt, the result is the same. The order appealed from does not state that it is being awarded under NRS 18.010 – Janis simply pronounces it so in her brief. Contempt OB at 14; *cf.* App. 6 at 1134 (formal order providing an award to Judy's counsel of $15,000.00 in attorney's fees, about half of what was incurred in the proceedings). Therefore, *Smith* is inapplicable on its face.

The references in the transcripts as to who "prevailed" did not address NRS 18.010, but the obvious truth that if Janis had "prevailed," she would not have been held in contempt and no sanction would have issued at all. *See* Tr. 2/29/00 at 38.

Instead, the lower court found that Lupe was entitled to an unspecified sum in compensation of his costs of enforcing court orders and defending against the motions brought by Janis to reverse them, which motions were ultimately held to be groundless, and which orders Janis ultimately admitted to repeatedly, and willingly violating. Tr. 2/29/00 at 38-40. The lower court requested and received written documentation as to the scope of the fees incurred, but reserved any ruling until the scope of Janis' contemptuous conduct was proven. *Id.* The *Order* of May 31, 2000, identified the five separate ***kinds*** of contemptuous conduct committed by Janis (comprising a host of separate

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incidents and events), and awarded fees to counsel in partial compensation of all proceedings up to that time, which had been caused by her contemptuous acts.

The award or denial of attorney's fees in domestic relations proceedings lies within the sound discretion of the trial judge and, absent evidence of abuse, the trial court's determination should not be disturbed on appeal. *Burr v. Burr*, 96 Nev. 480, 611 P.2d 623 (1980); *see also Sargeant v. Sargeant* 88 Nev. 223, 495 P.2d 618 (1972); *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992); *Schwartz v. Schwartz*, 107 Nev. 378, 812 P.2d 1268 (1991); *Duff v. Foster*, 110 Nev. 1306, 885 P.2d 589 (1994).

This Court has explicitly held that the family court is empowered to award attorney's fees relating to a post-divorce motion under either NRS 18.010(2)(b) ***or*** NRS 125.150(3). *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998); *Halbrook v. Halbrook*, 114 Nev. 1455, 971 P.2d 1262 (1988); *see also Leeming v. Leeming*, 87 Nev. 530, 490 P.2d 342 (Nev. 1971); *Korbel v. Korbel*, 101 Nev. 140, 696 P.2d 993 (1985); *Fletcher v. Fletcher*, 89 Nev. 540, 516 P.2d 103 (1973).

Janis studiously avoids any mention of NRS 125.150; there is no specific limitation on the power of the courts to award fees in domestic relations matters thereunder, and where an award of attorney's fees is made after review of detailed billing sheets, the award will be affirmed even if this Court thinks the total sum was questionable. *See*, *e.g.*, *Kantor v. Kantor*, 116 Nev. ___, 8 P.3d 825 (Adv. Opn. No. 96, Sept. 15, 2000). This Court has specifically directed the family courts to determine who is responsible for the scope of fees incurred, and to take that into account when deciding who should bear the burden of their having been incurred. *Schwartz*, *supra*, 107 Nev. at 386 & n.8.

Finally, it is hoped that the history recounted above gives this Court some understanding of the degree to which Janis and her counsel have been wildly out of control throughout their years-long, multi-court barrage of excessive litigation and simultaneous defiance of court orders. A trial court has jurisdiction to make such orders as are necessary to enforce its judgments and orders. *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972); *In re Chartz*, 29 Nev. 110, 85 P. 352 (1907) ("The power of courts to punish for contempt and to maintain decency and dignity in their proceedings is inherent, and is as old as courts are old"). If anything, Judge Gaston was too lenient and permissive in

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allowing Janis and her counsel to distend the proceedings to the degree they did before imposing any kind of sanction, and in issuing sanctions obviously too slight to prevent their wrongful behavior from continuing, as it has.[78]

C. Even if the District Court's Orders are Now Reversed, Janis was Bound to Obey Them when They were Entered

The thrust of Janis' Contempt Opening Brief is found at pages 14-17, where she repeats her claims regarding ERISA pre-emption, and claims that since she is right on the merits of the underlying appeal, she cannot be held to account for violating district court orders that she contends were legally incorrect. Janis is wrong.

Janis requested a stay from this Court. It was denied. App. 3 at 581. Execution or any other enforcement proceedings may begin immediately upon the entry of a judgment unless the court directs otherwise on condition of posting security. NRCP 62(a).

Even if this Court should somehow determine that Janis prevailed in this appeal, the orders of the court below would be voidable, not void, and were and are fully subject to enforcement until this Court says otherwise. *See Moore v. Moore*, 75 Nev. 189, 336 P.2d 1073 (1959).[79] Judge Gaston explained the matter well during the hearing of March 13, 2000:

> THE COURT: Nevertheless, you understand, Mr. Freedman, that this order is still in effect until which time it's stayed. So if it was three weeks while you were waiting for the stay, this order still would be in effect. If it was two weeks, this order would still be in effect. If it was two months, this order would be in effect, which means that your client has to follow the order, notwithstanding her beliefs that -- whatever her beliefs are. You've advised your client of that.
>
> MR. FREEDMAN: Your Honor, what you were referring to there is if we file a notice of appeal --
>
> THE COURT: Um-h'm.

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[78] In fact, the improper act of suing the judge personally obtained for Janis "relief" to which she has already been ruled (twice) to not be entitled – recusal of the judge, who withdrew from the action (and joined the growing number of judges who have barred Mr. Jenkin from any further appearances in their courtrooms) to avoid any "appearance of impropriety."

[79] "[A]nd the rule in such cases is, that if there be a total defect of evidence to prove the essential fact, and the court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable."

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> MR. FREEDMAN: -- if it's not practicable to ask for a stay, you can go directly to the Supreme Court and ask for a stay, or you can apply, if it is practicable, to the Court and ask for a stay.
>
> THE COURT: But you don't -- but you don't stay the order just because you've asked for a stay.
>
> MR. FREEDMAN: However, on a writ of prohibition, 8A, you do not apply to the Court, the district court, for a stay. That's the rule of --
>
> THE COURT: It's irrelevant at this point, Mr. Freedman.
>
> MR. FREEDMAN: Okay.
>
> THE COURT: What I'm trying to advise you of is the fact that this -- until such time as another court stays this order, the order is in effect and your client is responsible to abide by the order. That's just the law.
>
> MR. FREEDMAN: Right. . . .

Tr. 3/13/00 at 27-28.

Janis' Contempt Opening Brief merely repeats the same arguments regarding preemption that she makes in her Money Opening Brief, and that she made below. Nowhere does she assert the existence of authority stating that if she somehow prevails on the merits, she was free to thumb her nose at the Nevada Judiciary for years, without obtaining a stay, and without having any penalty imposed upon her for doing so. It is not believed that any such authority exists.

It would be highly damaging to the authority of the district courts for parties to take it upon themselves to ignore district court orders pending an appellate resolution of the legal claims at issue. Allowing such behavior – or excusing it after the fact – would constitute the allowance of an "automatic stay" which this Court has repeatedly stated does not exist, since any such practice would bring "untold mischief" to our courts. *See State ex rel. P.C. v. District Court*, 94 Nev. 42, 574 P.2d 272 (1978) (argument that there should be an automatic stay is "torture [of] our prevailing rules of court," would "render the language meaningless," and "would do untold mischief to the effective administration of justice").

During the entire time that there was a final, un-stayed order of the district court, Janis was compelled to comply with it, and the district court was within its plenary power to enforce its orders by contempt, including financial sanction and incarceration, in defense of its inherent authority. *See In re Chartz*, *supra*.

D. This Court Should Make Judy Whole

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As noted above, Janis has sought refuge from the effects of her contemptuous conduct in bankruptcy court, where she is in the midst of proceedings to dismiss in bankruptcy the $15,000.00 sanction imposed against her in the district court. That sum, when it was awarded, was only about ***half*** of the economic damage that Janis' actions had cost Lupe and Judy. *See* R. App. I at 90.

This Court has previously indicated that it will consider the reality of economic damage inflicted by one party upon another in considering what results are appropriate on appeal. In *Allen v. Allen*, 112 Nev. 1230, 925 P.2d 503 (1996), this Court reviewed an appeal from a divorce in which the husband had filed for bankruptcy in the middle of a divorce, and so had defrauded the wife out of her share of the community property which, because of the bankruptcy, had not been equally divided as intended.

Reversing the district court's refusal to set aside the decree, this Court noted its holding in *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992), in affirming that the lower court could indeed consider the effect of the husband's bankruptcy upon the community and the rights of the parties, "but this is not to say the state court would be interfering in any way with the bankruptcy court's decree." 112 Nev. at 1233. The Court concluded that even aside from the question of fraud, the decree entered was inherently unfair and should be set aside: "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." *Id*. at 1234.

The situation presented by this case is analogous. Like the husband in *Allen*, Janis here does not even pretend that her actions below were defensible; like Mr. Allen, she has chosen to "rely entirely on federal law as a defense." *See* 112 Nev. at 1283.

Of course, we are not asking this Court to circumvent the bankruptcy judgment. However, this Court has the authority to impose attorney's fees as costs on various grounds, including where this Court perceives that "the appellate processes of this court have otherwise been misused." NRAP 38. Further the Court has indicated that sanctions under NRAP 38 are likely where there was abuse of court processes below, since it gives rise to the inference of abuse of appellate process as well. *Young v. Johnny Ribiero Building*, 106 Nev. 88, 787 P.2d 777 (1990).

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It is partly for that reason that we have detailed above Janis' pattern of outright defiance and open contempt of the district court, and her simultaneous abuse of the litigation process by requiring the re-litigation of this case in five separate venues (including the spurious litigation filed against the judge and counsel, personally), in all of which she has raised identical arguments without identifying her parallel litigation. That litigation abuse continues – shortly before this brief could be transmitted, we received a copy of additional filings by Janis, through Mr. Jenkin, this time in the probate action, in the guise of yet another "Motion for Rehearing" filed June 21. It is procedurally and substantively derelict, and was obviously intended more to consume our time and effort in response than for any objectively justifiable substantive purpose.

We ask this Court to note Judge Pro's statement of regretful inability to impose sanctions under FRCP 11 for the misbehavior of Janis and her attorneys in the Nevada state courts.[80]

The total cost to Lupe, Lupe's estate, and Lupe's widow Judy in resisting Janis' efforts to subvert the rulings below since April, 1999, has been some $93,000.00 as of this time. Our client ran out of money a long time ago, and about $72,000.00 of that sum is outstanding and unpaid. This firm also permanently wrote off and thus absorbed over $45,000.00 of billable time.

Of the $15,300.00 in fees and costs that was awarded by Judge Gaston in 2000, only some $2,000.00 was actually collected before Janis fled to bankruptcy court. In that court, Janis has demanded that the $2,000.00 be ***returned*** to her as a "preferential transfer."

Of the $93,000.00 this case has cost the totally innocent party (Judy), almost half has been incurred in these appeals and related filings and procedures over the past year.[81] In view of the gross abuse of the litigation process by Janis and her attorneys (and their vow to continue their efforts after conclusion of these appeals), this Court should make an award to Judy, on appeal, of $41,000.00,

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[80] *See* text at page 24.

[81] All told, the appellate proceedings in this case have consumed about $41,000.00 of all the sums incurred in this action. We have had to deal with the writs, motions, and other matters filed by opponents in this Court that are detailed in this Court's file, as well as deal with two settlement conferences, two opening briefs, six volumes of record on appeal, and seven separate transcripts. Items strategically omitted by Janis have required us to put together an additional two-volume Respondent's Appendix, which is submitted with this brief. The entire file occupies some eight banker's boxes in this office.

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"as costs on appeal . . . to discourage like conduct in the future." NRAP 38; *see Works v. Kuhn*, 103 Nev. 65, 732 P.2d 1373 (1987).

It is acknowledged that such an award is highly unusual in this Court. The reality of the situation, however, is that Janis' defiance of the Nevada state courts has inflicted massive economic damage on innocent persons, for which she has taken no responsibility. Additionally, as detailed above, her attorneys appear to be in full complicity with her wrongful behavior, and have engaged in repeated unethical and inexcusable behavior throughout this litigation; this Court should hold them jointly and severally responsible for satisfying that award, which should be imposed irrespective of the Court's rulings as to any other aspect of these appeals.[82]

[82] Counsel is torn between conflicting duties as to what can and should be stated in this brief; on the one hand, matters conducted by the Bar that are not made public are usually presumed to be confidential, and on the other hand, as an officer of the Court, counsel has a duty of full candor and to be sure this Court is fully informed. SCR 121; SCR 105(1); SCR 172. Further, this Court has inherent supervisory power over the State Bar, and has the power to examine anew any action taken by the Bar relative to attorney misconduct. *Waters v. Barr*, 103 Nev. 694, 747 P.2d 900 (1987); *In re Kenick*, 100 Nev. 273, 680 P.2d 972 (1984). Given the request made here for imposition of joint liability against Janis' attorneys, it seems to counsel that these duties can best be balanced by suggesting that this Court, in its supervisory capacity, consider making an inquiry of the Bar as to the contents of all disciplinary files relating to Mr. Jenkin, Mr. Freedman, and this litigation, in determining whether or not to grant our request for joint liability, if sanctions under NRAP 38 are granted. Prior to transmission of this brief, an inquiry was made to the office of Bar Counsel, which indicated that the balance and procedure set out in this footnote is the correct one.

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CONCLUSION

Lupe Carmona stopped accruing I.A.T.S.E. retirement credits in 1978, a decade before he married Janis, while married to one of his prior seven wives. When Lupe married Janis, he was reaching the end of his employment with Hilton. Virtually all of his retirement benefits were Lupe's separate property.

As he completed his working career, Lupe knew he had a terminable condition (asbestosis); he was intent on making sure that there was a survivor's benefit he could leave to his surviving spouse and widow. At the time, Lupe's marriage to Janis was in decline, but it took years of separation and legal proceedings to get divorced, and when he filled out his benefits selection form, he honestly listed Janis as his present "spouse."

In their divorce settlement, Lupe received all of his pension interests, and Janis received all of hers; Lupe paid Janis the $1,500.00 differential in the values that had accrued during their relatively brief marriage. Both parties verified on the record that they understood the deal and it was a fair one. As soon as the lengthy divorce was concluded, Lupe married Judy, with whom he had been living for some time.

Janis never intended to comply with the agreement and *Decree*, however; she has admitted that she always planned to get the survivorship benefits under Lupe's pension without compensating Lupe in any way. Lupe died leaving Judy as his surviving spouse and widow.

During the lengthy proceedings following Lupe's death, the district court directed that all survivorship payments made be held in a constructive trust account pending final resolution of the question of ownership of the money. The district court found that the parties and the court had always intended that the benefits were entirely Lupe's to do with as he pleased, and that if there was any way to cancel the survivorship benefit naming Janis, Lupe was free to do so, or to name Judy as survivor beneficiary, as he wished. The district court found that Judy was entitled to the survivor's benefits.

Janis never accepted the district court's rulings. Directly and through counsel she has defied the orders at every opportunity, refused to deposit the survivorship funds coming into her possession, and diverted a portion of the money to pay her taxes. As a result of Janis' admitted contempt of the

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district court's orders, she was sanctioned in the sum of $15,300.00. She is currently seeking discharge of that sanction in bankruptcy court.

Janis filed a new motion to reverse every order entered against her, and had her attorneys to file duplicative (and sometimes contradictory) proceedings in family court, probate court, bankruptcy court, and federal district court (in which she sued Judge Gaston for ruling against her, as well as undersigned counsel), in addition to the writ petition and two appeals filed in this Court. Those filings in other courts have continued unabated throughout the pendency of this appeal. Through Mr. Freedman and Mr. Jenkin, Janis has continued non-stop litigation since 1998, often in multiple courts simultaneously, at enormous cost.

Since Janis did not appeal the substantive rulings against her, but only the denial of her duplicative motions to reconsider and reverse those rulings, this Court could and should dismiss her appeals on procedural grounds, in light of her egregious abuse of the court system.

Should this Court choose to reach the merits, the Court should find that Judge Gaston was permitted to construe the *Decree* he issued to find, consistent with the intent of the parties and district court on divorce, that Lupe bargained for and received full control of his designation of survivor beneficiary.

As the trial court found, any receipt of the benefits by Janis in violation of the parties' agreement, her relinquishment of those benefits, and the *Decree of Divorce*, would constitute unjust enrichment. A constructive trust is therefore an appropriate remedy by which any funds wrongly paid to Janis could be redirected to the party entitled to them – in this case, Judy.

Federal law does not prevent the Nevada courts from doing equity and enforcing the *Decree*, because Janis' relinquishment of the benefits constitutes a waiver that is enforceable by means of a constructive trust under federal common law. Janis' position that the law requires this Court to reach an unjust result is indefensible, based on inapplicable case law and a misuse and confusion of terminology. All relevant decisions of federal and state courts have upheld the use of constructive trusts in factual situations analogous to those presented here; there are no decisions stating that a court cannot impose a constructive trust in this situation, to force Janis to disgorge money she

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receives but to which she is not entitled. Federal preemption does not require or result in "a sanctuary for a wrongdoer's gains."

The district court should be directed to issue a QDRO on remand directing the two plans to pay the survivorship money to Judy. If either of them cannot do so under their own terms, Janis should be bound by the constructive trust to deposit any sums paid in her name into the constructive trust account. Janis is not permitted, by means of her bankruptcy filing, to escape responsibility for her contemptuous conduct and the multiple unethical and indefensible actions of her attorneys. Her probate arguments are irrelevant, and should be found deliberate misstatements of both fact and law.

Janis was required to obey unstayed district court orders from the time they were entered. The district court could enforce its rulings by finding Janis in contempt of court for her admitted, multiple, and ongoing acts of contemptuous disregard for those orders. A monetary sanction, for a portion of the economic harm she caused an innocent party, is a perfectly permissible contempt sanction. On appeal, this Court should obtain the necessary files from the State Bar, and review the totality of actions taken by Janis and her attorneys in ***all*** forums, and impose joint and several liability against Janis and her two attorneys for the full appellate costs imposed on Judy as a result of Janis' actions.

The rulings appealed from should be affirmed, either by order dismissing Janis' appeal, or by Opinion affirming the rulings below. In either event, the funds held in constructive trust should be ordered paid to Judy, both plans should be ordered to pay future survivorship sums to Judy, QDROs to that effect should issue, and Janis should remain liable for depositing any sums reaching her into the constructive trust account. Costs on appeal should be assessed against the Appellant.

Respectfully submitted,

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_____

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this respondent's 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 _____, 2002.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of THE LAW OFFICE OF MARSHAL S. WILLICK, P.C., and on the **28th** day of **JUNE**, 2002, I deposited in the United States Mails, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the **RESPONDENT'S ANSWERING BRIEF**, addressed to:

William E. Freedman, Esquire.
Nevada Bar No. 000110
411 South Sixth Street
Las Vegas, Nevada 89101
Attorney for Appellant

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

An Employee of the LAW OFFICE OF
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