IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

| | | |
|---|---|---|
| CARYL-BENCE KRONE, | ) | |
| | ) | |
| APPELLANT/CROSS-RESPONDENT, | ) | S.C. CASE 27235 |
| | ) | D.C. CASE D176240 |
| vs. | ) | |
| | ) | |
| ROBERT M. KRONE, | ) | |
| | ) | |
| | ) | |
| RESPONDENT/CROSS-APPELLANT. | ) | |

# APPELLANT/CROSS-RESPONDENT'S OPENING BRIEF


RADFORD J. SMITH, ESQ.
Nevada Bar No. 2791
3311 S. Rainbow Blvd. #101
Las Vegas, Nevada 89102
(702) 367-9898
Attorney for Respondent/Cross-Appellant

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3551 E. Bonanza Road #12
Las Vegas, Nevada 89110
(702) 438-4100
Attorney for Appellant/Cross-Respondent

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### FEDERAL CASES



### STATE CASES



### FEDERAL STATUTES



### STATE STATUTES

**MISCELLANEOUS**

## STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT ERRED BY FAILING TO REDUCE TO JUDGMENT A SPECIFIC SUM OF ARREARS.

II. WHETHER THE DISTRICT COURT ERRED IN FAILING TO PROVIDE A SCHEDULE OF PAYMENTS ON ARREARS THAT WOULD ALLOW THOSE ARREARS TO EVER ACTUALLY BE PAID OFF.

III. WHETHER THE DISTRICT COURT ERRED BY FAILING TO REQUIRE THE JUDGMENT DEBTOR TO POST SECURITY OR A BOND FOR MASSIVE ARREARS OWED.

## STATEMENT OF THE CASE

Appeal from post-divorce order granting military retirement benefit arrears pursuant to a property settlement agreement incorporated in a divorce decree; Hon. Frances-Ann Fine, Eighth Judicial District Court, Clark County, Nevada.

Judgment Creditor, Appellant/Cross-Respondent, Caryl-Bence Krone ("Bence") filed a motion for the collection of military retirement benefit arrears on May 23, 1994. 1 ROA 43-62. An Order After Hearing, filed March 16, 1995, awarded Bence military retirement benefits arrears (in an unspecified sum), for her share of benefits paid to Judgment Debtor, Respondent/Cross-Appellant, Robert M. Krone ("Robert") but not divided with Bence as called for in their decree of divorce. 2 ROA 342-347. Notice of Entry of that Order was served on March 20, 1995. 2 ROA 348, 349.

Robert filed a "Motion for Clarification of Order; Motion for Rehearing; Motion to Stay Execution Pending Appeal" on March 30, 1995, which was set to be heard on April 27, 1995. 2 ROA 358-408. Bence filed her Opposition to that motion, and her "Countermotion Re: Payment of Arrearages and Attorney's Fees" on April 12, 1995. 2 ROA 410-427. She filed Supplemental Authorities on April 14, 1995. 2 ROA 428-434.

Robert filed a Notice of Appeal on April 19, 1995, divesting the district court of jurisdiction to hear the pending motions. 2 ROA 435-36. Bence filed a Notice of Cross Appeal on May 16, 1995. 1 ROA 440, 441.

On June 3, 1995, the parties filed a Joint Motion for Remand for Further Instructions in this Court, agreeing that the calculation of arrearages was an issue that should be decided prior to any meaningful decision by this Court. On October 18, 1995, this court denied the Joint Motion for Remand, stating:

> The district court may consider a post-judgment motion brought during the pendency of an appeal and deny it, or may certify to this court that it is inclined to grant such a motion, at which time a motion for a remand from this court would be appropriate. Huneycutt v. Huneycutt, 94 Nev. 79, 575 P.2d 585 (1978). If the district court is inclined to grant any of respondent's motions or appellant's motion for an increased rate of payment on the arrearages, it should so certify to this court at which point a request for remand would be appropriate.

A hearing was held on April 3, 1996, after which the district court issued a Proposed Decision. A "Motion for Limited Remand for Entry of Proposed District Court Decision, to Include District Court Decision in the Record on Appeal, and to Re-Set Briefing Schedule" was filed with this Court on May 14, 1996. This Court entered an Order of Remand June 26, 1996, and received a certified copy of the District Court's Decision on August 6, 1996.

Although Bence largely prevailed below, she is treated as Appellant in this court because she was the Plaintiff below and the court below did not otherwise order. *See* NRAP 28(h). Accordingly, this brief follows, addressing the issues in the cross-appeal.

## STATEMENT OF FACTS

Bence and Robert were married on June 1, 1952, and divorced in Washoe County 24 years later, on April 23, 1976. 1 ROA 3, 5. The Findings of Fact, Conclusions of Law, and Decree of Divorce expressly "approved, confirmed, and ratified" the parties' Property Settlement Agreement, which had been executed two days earlier. 1 ROA 3-4. The Agreement divided Robert's military retirement benefits -- and future increases in those benefits -- equally between the parties. 1 ROA 7-8. Specifically, the Agreement provided:

> (h) Husband is a United States Armed Forces retiree. During the period of husband's active service with the United States Armed Forces, he accrued pension rights in the United States Armed Forces Retirement Pension Program. Husband shall share his pension with wife equally, and shall create an allotment for Wife's benefit in the sum of $620.00 per month from said pension. Husband and wife shall participate equally in future pension raises derived from the United States Armed Forces Retirement Pension Program. Said pension rights of wife shall continue until the death of wife or the death of husband.

*Id*. This was a very common form of military retired pay division in that era. *See Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982) (reciting the decree's award of a percentage of "military retirement pay" and a requirement for execution of an allotment).

Robert was also to pay Bence alimony of $280.00 per month, for thirty-six months, in addition to the payment of Bence's ongoing medical and psychiatric expenses. 1 ROA 7, 8.

Robert did pay Bence the sum of $620.00 per month for her interest in his military retirement, but he failed to pay her any of the yearly cost of living adjustment increases (COLAs) from 1976 until 1979, at which time Bence found out about the increases, corresponded with Robert, and ultimately threatened litigation. 1 ROA 104-116.

Bence hired William W. Simpson, Esq., who sent Robert a formal demand letter for the COLA arrears due Bence. 1 ROA 117-119. Thereafter, an accommodation was reached and Robert

made up all past-due COLA increases and began paying Bence the correct amount (half of the COLA-increased retired pay). Those payments continued through mid-1981. 1 ROA 45.

On June 26, 1981, the United States Supreme Court decided *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981). After Robert heard about the *McCarty* case, he wrote Bence a letter on November 30, 1981, which stated:

> After the Supreme Court decision on the McCarty v. McCarty case - which precluded State courts from dividing military retirement pay - I determined through the military Staff Judge Advocates office that this decision did, indeed, impact the legality of our divorce decree with regard to that issue. After considerable thought about a fair way to react to that decision my conclusion is that your [*sic*] should continue to receive alimony [*sic*] but that the amount to which it has increased is no longer fair to me considering the change of our circumstances . . . .
>
> Therfore [*sic*], I will be asking the Nevada Court to modify the divorce decree to reduce your alimony from the current $957/month to $620/month. That was the amount originally specified and which was over ½ of my retirment [*sic*] pay at the time. The $620/month will terminate only at your death or remarriage. All other provisions of the divorce decree will remain unchanged. This seems to me to be very fair from your viewpoint considering that the law no longer requires that I pay any of my military retirement. A warrant [*sic*] advising of this court action will be delivered to you within the next few weeks. I will not change the amount until after the case is processed in the court and the change would be effective with the end of the month in which the Nevada court handles the case.

1 ROA 122. Robert enclosed a newspaper article to prove he was correct. 1 ROA 123.

On March 16, 1982, Robert informed Bence that he would be filing a motion within days, in Reno, to have the divorce decree modified. He changed his mind about waiting for a court order, however, and told Bence that he had already unilaterally changed the allotment to her to reflect $620.00 per month in "alimony," instead of Bence's ½ share of the retirement. 1 ROA 125. From April, 1982, forward, Bence received only $620.00 instead of her half of the retired pay, which by then was about $1,000.00. *See* 1 ROA 125.

Bence, without the advice of counsel, responded to Robert on April 15, 1982, and thanked him for his "generosity." 1 ROA 50, 127.

On September 8, 1982, Congress legislatively overturned the *McCarty* decision by Congressional passage of the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408.[1]

Robert subscribed to military publications which covered the issue heavily, *see* 1 ROA 123, but he never told Bence that the case had been effectively reversed, and he left the reduced allotment in place even after the USFSPA became effective. Robert never actually returned to court, either when *McCarty* was decided or when it was legislatively overturned.

Bence had no access to information relating to military retirement matters, and did not learn until 1993 that *McCarty* had been overruled in 1983, retroactively to June 25, 1982. 1 ROA 46, 50.

In 1993, after hearing about the USFSPA and its reversal of *McCarty*, Bence consulted with counsel about her right to have her divorce decree enforced with respect to receiving her half of the military retirement benefits. 1 ROA 160. She formally hired counsel in May, 1993, to recover the difference between what Robert had been sending and what was owed to her under the decree. 1 ROA 170, 171.

On July 25, 1993, Robert sent an unsolicited letter to Bence's attorney, after Robert received notice of counsel's discovery efforts through the military pay center. 1 ROA 243, 244. A response, declining employment and clearly stating that counsel already represented Bence, went out the same day Robert's letter arrived. 1 ROA 236. The response also put Robert on notice of Bence's claim for arrearages. 1 ROA 236-37.

---

[1] Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA. 10 U.S.C. § 1408; Pub. L. No. 97-252, 96 Stat. 730 (Sept. 8, 1982), amended by Pub. L. No. 98-94, 97 Stat. 653 (Sept. 24, 1983), Pub. L. No. 98-525, 98 Stat. 2545 (Oct. 19, 1984), Pub. L. 98-525, 99 Stat. 677 (Nov. 8, 1985), Pub. L. No. 99-661, 100 Stat. 3885 (Nov. 14, 1986), Pub. L. No. 101-510, § 555, 104 Stat. 1485, 1569 (Nov. 5, 1990).

Formal demand for payment of the arrearages, with all supporting calculations, was made on Robert November 15, 1993, once partial discovery was received from the military pay center as to the retirement benefits paid from 1983 to 1993. 1 ROA 238-242. Robert responded to the demand by retaining the law firm of Jimmerson, Davis & Santoro, P.C. Robert's counsel, Radford J. Smith, Esq., requested additional time to discuss the issue with Robert, which was granted. 1 ROA 47.

Since no formal response to the demand was received, and all attempts to resolve the issues informally failed, Bence filed a formal motion on May 23, 1994. 1 ROA 43-62. After numerous delays by Robert, the matter was heard by Judge Frances-Ann Fine on October 3, 1994. An Order After Hearing was entered on March 16, 1995, essentially finding that the divorce decree meant what it said and that Bence was entitled to half of the retirement that had been, was being, and was in the future to be, paid. 2 ROA 342-255.

The court ordered that Bence was entitled to one-half of Robert's pension, plus one-half of all increases, as agreed to in the Property Settlement Agreement, from July 29, 1987, forward,[2] finding specifically that "future pension raises" as used in the agreement was analogous to the current term of art "cost of living adjustments," and noting that the agreement and decree were written some nine years before the current statutory terms of art existed. 2 ROA 344-45.

The lower court also granted statutory interest on the arrearage owed by Robert to Bence, 2 ROA 345, and made a provision for payment of arrears (at $250.00 per month), but it failed to specify any precise dollar amount of those arrearages. 2 ROA 345.

---

[2] This is the furthest the Court believed that it could go back, given the statute of limitations -- Robert's wrongful retention of the funds that should have been paid to Bence from 1981 to 1987 (about $72,000.00) was not considered remediable. The date used for figuring the statute of limitations was that of Bence's demand for payment, in consideration of the many months after that date that Robert stalled the formal initiation of proceedings by asking for time to hire counsel and then having his attorney request (and receive) the "professional courtesy" of still further extensions.

By May of 1994, Bence's half of the retired pay was $1,809.00 per month. 1 ROA 218. By the time the Court entered its order in 1995, half of the retirement was $1,859.00. Robert still sent Bence only $620.00.[3] 2 ROA 427.

On March 30, 1995, Robert filed a "Motion for Clarification of Order; Motion for Rehearing; Motion to Stay Execution Pending Appeal." 2 ROA 358. Robert's motion asked for clarification and modification of the court's Order After Hearing. Specifically, he asked the court below to (1) change the effective date of the statute of limitations; (2) find that Bence had agreed with Robert to modify the parties' obligations to each other; (3) find that only "disposable" pay was to be divided, so that only some $52,000.00 in arrears were owed; (4) reverse its finding that the Decree of Divorce contemplated the payment by Robert to Bence of Cost of Living Adjustments (COLAs); and (5) stay execution pending appeal. 2 ROA 358-408. Robert attached his own arrearage calculation to the Motion as Exhibit "B", conceding that under Judge Fine's Order he owed Bence $52,838.51.[4] 2 ROA 408.

On April 12, 1995, Bence filed her "Opposition to Motion for Clarification of Order; Motion for Rehearing; Motion to Stay Execution Pending Appeal and Countermotion Re: Payment of

---

[3] Counsel for Bence asked the court below to at least impound and hold the monthly amount being kept by Robert that should have been going to Bence (about $1,200.00 per month), to prevent the arrears from continuing to increase. 1 ROA 142-46. The court below never acted on this request, allowing Robert to receive about $12,000.00 that should have been paid to Bence during his multiple delays of the proceedings below. Since even today Robert is not providing half the retired pay to Bence, he continues to take Bence's money each month this matter remains on appeal. The court below has stated in writing that until remittitur issues from this Court, nothing can be done concerning Robert's disregard of the order requiring equal division of the monthly retired pay. Arrearages continue to increase every month, and will continue to do so every month until this Court resolves this appeal; counsel thus requests as expeditious a resolution of this appeal as possible, so that contempt proceedings may be begun immediately.

[4] As detailed below, Robert's summary contained errors making this sum considerably too low; what is important here is the concession that over $50,000.00 in arrearages were owed under what (to Robert) could be the ***best*** of circumstances.

arrearages and Attorney's Fees. 2 ROA 410. The Countermotion requested (1) an increase in the rate of the arrearage payment; (2) that Robert be required to post sufficient security to ensure payment of judgment in the event of his death, etc.; and (3) an award of Attorney's Fees and other sanctions. 2 ROA 410-421. Bence submitted an arrearage calculation showing $126,388.18 in arrears, based upon the statute of limitations date that the lower court originally set in its "Order After Hearing." 2 ROA 344, 423-427.

Before the motion and opposition were heard, Robert filed a Notice of Appeal on April 19, 1995. 2 ROA 435. On May 16, 1995, Bence filed her Notice of Cross Appeal, on the basis that Judge Fine had failed to provide a means for Bence to ever actually collect the judgment. That began the proceedings detailed above that allowed the lower court to enter a further "Decision" on limited remand of July 30, 1996. 2 ROA 444.

The "Decision" modified the lower court's earlier "Order After Hearing." Specifically, the Decision: (1) moved forward the effective date of the statute of limitations; (2) allowed Robert to pay only the arrearages to be calculated on a "net" basis for monies received by Robert prior to the lower court's affirming that Robert was to pay half the gross retirement; and (3) awarded Bence additional attorney's fees of $1,500.00. 2 ROA 444-454.

The measuring date for the statute of limitations, from which arrearages were to be calculated, was moved forward from Bence's demand for payment, to Bence's formal initiation of proceedings (May 23, 1994). 2 ROA 451. Robert therefore was allowed to retain another ten months of payments due to Bence, worth about $10,000.00.[5]

In its later decision, the lower court clarified its reliance upon *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982), in rejecting Robert's contention that his decree had been "amended" either

[5] The difference between the $620.00 that Robert paid and the approximate $1,800.00 that Bence was supposed to receive.

by a 1989 decision of the United States Supreme Court,[6] or by his decision to reduce the monthly payments to Bence (and her acceptance of those payments).

In *Duke*, this Court reviewed a former spouse's efforts to collect arrearages in military retirement benefits that had accrued but not been paid. The former husband in *Duke*, like Robert here, had stopped payments after issuance of the *McCarty* decision, and the former wife sued.

The divorce decree at issue in that case awarded the wife "35 percent of [the member's] military retired pay" and ordered the member to execute a permanent allotment to the wife. When he failed to do so, the wife filed a motion to reduce arrears to judgment. Expressly relying on the California line of authority that led to *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987), this Court held that *McCarty* was **not** retroactive, and that the member owed his former spouse 35% of the retired pay, because "*McCarty* does not alter the res judicata consequences of a divorce decree which was final before *McCarty* was filed." 98 Nev. at 149.

In this case, the lower court noted that Supreme Court reinterpretations of payment limitations under the USFSPA were not retroactive (citing *Duke*), and that if Robert thought his rights had been altered, it was incumbent upon him to get a court order so stating. 2 ROA 447-450; *see also* 2 ROA 416 (listing post-*Mansell* cases).

In both its "Order After Hearing", (2 ROA 342), and its later "Decision" (2 ROA 444), the court below found that the Property Settlement Agreement was unambiguous -- i.e., when the Agreement stated: "Husband shall share his pension with wife equally," it meant "Husband shall share his pension with wife equally." Rejecting Robert's attempt to re-argue Bence's entitlement to share in the cost of living adjustments over the years, the lower court held:

---

[6] *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), *remanded*, 265 Cal. Rptr. 227 (Ct. App. 1989).

> The Court believed then and continues to believe that [Robert's] argument regarding usage of the language "Cost of Living Adjustment" versus "Pension Increases" is nothing more than subterfuge in his attempt to protect his own interests.

2 ROA 447. The lower court specifically found that the parties had never made any "agreement" to alter the terms of the property settlement agreement incorporated in their decree of divorce, and made numerous other findings supporting its original decision that the property settlement agreement and decree required Robert to divide the retired pay, and all increases thereto, with Bence "equally." 2 ROA 446-48.

By the time of the Las Vegas proceedings, Robert was a retired university professor receiving over $6,600.00 per month in various retirements. 2 ROA 326-331. Bence had just lost her $1,900.00 per month job and was unemployed (she has since tried to earn a living by selling used women's clothing on consignment). 2 ROA 318, 335.

No mechanism was ever put into place for Bence to actually ***get*** half the monthly retired pay being paid to Robert every month (which she is still not receiving), or to reduce the arrears to judgment so they could be collected, or to require Robert to actually pay down the arrearages.

This Cross-Appeal followed.

## ARGUMENT

### I. THE DISTRICT COURT ERRED BY FAILING TO REDUCE TO JUDGMENT A SPECIFIC SUM OF ARREARS

Robert realizes that as long as he keeps the case going, he can evade paying Bence the sums owed her. The Court should note that only two weeks after the "Order After Hearing" was entered, he filed a motion for "clarification," essentially attempting to reargue the entire case that had just been decided. 2 ROA 358. Even by his own estimation, however, Robert conceded that under the lower court's original order, he owed Bence $52,838.51. 2 ROA 408. Calculations submitted by Bence's counsel showed that the arrearages from August, 1987, through April, 1995 (with interest) were actually $126,388.18. 2 ROA 425-427.

The court's post-remand Decision (made after those calculations were performed) drastically reduced the arrearage in two ways. First, by changing the applicable statute of limitations date from Bence's demand for payment to Bence's formal filing of a motion, the lower court ruled that Bence was only entitled to arrears as of May 24, 1988.[7] 2 ROA 451.

As noted above, this allowed Robert, by delaying proceedings directly and through his attorney's request for professional courtesy extensions, to retain about $10,000.00 additional that should have been paid to Bence. It is unfortunate that counsel's extension of professional courtesies under SCR 171(2) have resulted in such a large loss to the injured party. *See* 2 ROA 414-16. However, as a technical matter, the result is correct under the statute of limitations. Since the lower court declined to perform the equitable estoppel analysis requested by Bence (given Robert's numerous delays), Bence is willing to accept the resulting loss unless this Court sees Robert's delay tactics as so egregious that it is inclined to remand for the purpose of requiring the

[7] It is long established that when a stream of monthly payments is due, the statute of limitations runs from each payment due individually. *See*, *e.g.*, *Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970); *Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 707 P.2d 1137 (1985).

lower court to perform that analysis and find Robert to owe arrears from the date of Bence's original demand. *See* 2 ROA 414-16.

Second, and with a far larger financial impact, the court below issued a ruling as to how the arrears were to be calculated. Although the court agreed with Bence that the decree required that she was supposed to receive half of the entire (i.e., gross) retirement, the lower court accepted Robert's position that it was "unfair" for him to remit half the gross pay to Bence when he had already paid taxes on the sum he kept as if it was all his. *Id.*

Thus, the Court ruled that Bence was entitled to a judgment for half of the money Robert **actually received** through October, 1994 (when the first order for prospective division of gross was made in the Las Vegas court), less the $620.00 per month that she actually received.[8] 2 ROA 451. Bence was to receive her half of the ***total*** retired pay, as called for in the 1976 decree of the divorce, only **after** October, 1994. *Id.* Presumably, this would make any arrearage payments to Bence post-tax payments.[9]

The Decision contained a provision that Michael Kern, an accountant, would calculate the precise arrears. 2 ROA 451. At the proceedings on remand, Bence's counsel had no opposition to having Mr. Kern verify counsel's calculations (if Robert paid for those services). It was clear at the proceedings on remand that the work would be done *during* the remand from this Court, so

---

[8] This is half of the "net," rather than half the total amount being paid, so that the arrears to be repaid to Bence would be post tax.

[9] While it is believed that the lower court erred in selectively excusing Robert from his duty to share the retired pay equally, the matter has not been raised as a separate issue in this cross-appeal since the net effect to both parties would be largely the same as if Robert had to pay Bence half the gross, got to claim a tax credit, and she had to pay taxes on her half of the gross. So long as it is made clear in this Court's opinion that the resulting judgment is for a post-tax sum, Bence is willing to accept the lower court's ruling, which decreased the arrearages owed by many tens of thousands of dollars. It would be obviously unfair for the arrears to have been already reduced for taxes, and then have Robert claim another tax credit for any sums Bence collects, with her paying taxes on that amount.

that the final order on remand would contain a specific sum of arrearages.[10] 2 ROA 451. However, all attempts to have Robert give Mr. Kern the necessary documentation to enable him to verify the calculations failed, and no arrearage figure has ever been entered by Judge Fine.

By the simple expedient of not giving any information to the accountant that Robert himself requested do the work, Robert prevented the lower court from entering an order requiring him to pay a specified sum of arrearages. While morally unprincipled, it appears that Robert's inaction was tactically astute. NRS 17.130(1) states:

> In all judgments and decrees, rendered by any court of justice, for any debt, damages or costs, and in all executions issued thereon, the amount must be computed, as near as may be, in dollar and cents, rejecting smaller fractions, and no judgment, or other proceedings, may be considered erroneous for that omission.

In other words, it appears that for a judgment to be ***collectible***, it may be necessary for it to be stated as a dollar sum certain. In *Everson v. Everson*, 431 A.2d 889 (Pa. 1981), the Court found that a judgment for payment of money cannot be enforced in another state unless it is a final judgment for a specific amount of money.

Robert is a resident of the State of California. His assets are located in that State and he has additional income, other than his Military Retirement Benefits, generated in that State, which help make up his monthly income of more than $6,600.00. 2 ROA 328.

Thus, Robert's failure to provide figures to the accountant he requested, and the lower court's resulting failure to reduce a specific dollar amount of arrears to judgment, has apparently left Bence unable to collect any arrears due to her.[11] The parties agree that Robert owes Bence

---

[10] That was the original reason for the parties' joint motion for remand.

[11] The $250.00 per month arrearage payment, which Robert is making, is less than the sum by which he is shorting Bence of her half of the retired pay each month, thus causing the arrears to increase every month. Additionally, the arrears are so large that about $450.00 in ***interest*** accrues each month. This is detailed further in the second section of the Argument, *infra*.

arrears somewhere between $52,838.51 and $126,388.18, but without the specific sum reduced to judgment, Bence will never be able to actually collect any of the money that Robert admittedly owes her, even if Robert comes into possession of tens of thousands of dollars of lump-sum funds.[12]

NRS 21.020 states in relevant part:

> The writ of execution must be issued in the name of the State of Nevada, sealed with the seal of the court, and subscribed by the clerk, and must be directed to the sheriff; and must intelligibly refer to the judgment, stating the court, the county where the judgment roll is filed, the names of the parties, the judgment, and if it is for money, the amount thereof, and the amount actually due thereon; and if made payable in a specified kind of money or currency, as provided in NRS 17.120, the writ must also state the kind of money or currency in which the judgment is payable . . . .

(emphasis added). In other words, our entire law of judgments is designed around having a sum certain to enforce. To have Bence's judgment enforced by execution, attachment, and garnishment proceedings, a specific dollar amount must be ordered, and the lower court's failure to enter such an amount renders the judgment rendered hollow and unenforceable, giving Robert -- the party who lost in court, a financial victory.

This should be held by this Court to be error, and the matter remanded for immediate entry of a judgment for a specific sum of arrearages in accordance with counsel's calculations.

## II. THE DISTRICT COURT ERRED IN FAILING TO PROVIDE A SCHEDULE OF PAYMENTS ON ARREARS THAT WOULD ALLOW THOSE ARREARS TO EVER ACTUALLY BE PAID OFF

[12] During the pendency of this appeal, events have occurred highlighting Bence's inability to execute against even windfall income paid to Robert. While the specifics are not citable pursuant to NRAP 29(e), counsel would be glad to supplement these submissions with specifics if directed by the Court to do so.

The Order After Hearing entered below ordered Robert to pay Bence the sum of $250.00 per month toward the constructive arrears. 2 ROA 345. Even if Robert's calculation of the arrears had been correct (they are not),[13] it would have taken over seventeen and one-half years for Bence to collect just the **principle** sums due to her, even if interest was not accruing (which it is).

With interest at the current legal rate accumulating on the judgment, as provided by law, the judgment increases each month by approximately $200.00, ***after*** consideration of Robert's payment. Using Robert's arrearage calculation of $52,838.51 and applying interest at the legal rate from the time the lower court made its judgment in March, 1995, the arrears have increased to approximately $56,266.54.[14]

In other words, the judgment can ***NEVER*** be paid off at the rate of payment ordered by Judge Fine. The parties are both over sixty-three years old. Without putting too fine a point on it, the current ruling is no different in substance than if the court below had not rendered judgment in Bence's behalf at all. A legal right must have a corresponding remedy, or it is worthless.

The lower court's Decision on remand stated that the court "could not force Robert to pay money he does not have," and allowed Robert to continue paying $250.00 per month towards the

---

[13] There are many reasons why the calculations submitted by Robert are wrong, from the simple to the technically complex. For example, his figures showed a lower gross pay figure for 1993 than for 1992, which is impossible (it has never happened since the inception of the military retired pay system). 2 ROA 408. More subtly, Robert's arrearage chart claimed the full bracket amount for his effective tax rate. The effective tax rate for a married taxpayer up to $95,000.00 per year **never** gets higher than 22.51%, and is usually lower. The same consideration lowers the effective state tax rate. Accordingly, the 36% effective tax rate he claimed is probably at least 10% too high. These are matters best formally ruled upon in the district court on remand, and it is unfortunate that Judge Fine did not take the opportunity provided by this Court on remand to do so.

[14] For the convenience of the Court, the mathematical computations supporting this statement are set out in Exhibit 1 as an appendix to this Brief; it is submitted that the Court may take judicial notice of mathematical computations. *See* NRS 47.130.

arrears. 2 ROA 452. It is believed that the lower court may have simply mis-read the Affidavits of Financial Condition filed by the parties.

By his own admission, Robert has a monthly income in excess of $6,600.00. The Court's judgment allocates less than 3.8% of that sum toward paying off the arrearage owed, although all parties acknowledge that Robert has kept, spent, or invested tens of thousands of dollars that ***should have*** been paid to Bence between 1981 and 1987, in ***addition*** to the tens of thousands that he owes her under the lower court's orders that were within reach of the statute of limitations.

Robert's Affidavit of Financial Condition shows that he has the means to pay Bence an increased amount toward the arrears. Robert declared his gross monthly income as $6,621.33, ***not*** including his wife's income. 2 ROA 331. Robert's Affidavit of Financial Condition contains many errors.[15]

In other words, a reasonable reading of Robert's own Affidavit of Financial Condition eliminates some $2,678.00 worth of debt, which could be paid to Bence towards the arrears each month. The court below apparently relied on Robert's "deficit amount," which showed he was negative $2,507.00 after paying his monthly bills, when setting the arrearage payment that he is to pay Bence. This was error, and this Court has held that a party submitting a false or misleading financial affidavit is not entitled to any court rulings based thereon. *See Perri v. Gubler*, 105 Nev. 687, 782 P.2d 1312 (1989).

---

[15] For example, he double-counts his expenses, by counting them in his normal monthly expenses, and then deducting them by claiming his charge card expenses as "additional expenses." 2 ROA 329-331. He also calculated one-time expenses of $1,966.00 into his *monthly* expenses, claimed to be paying the mortgage on one of his rental properties until it rented in the sum of $530.00, and listed his monthly out-of-pocket medical expenses to be $193.00 per month. 2 ROA 329. These expenses are not monthly obligations, but expenses which happened to be (allegedly) due at the time Robert submitted his Affidavit of Financial Condition.

It is true that the lower courts have discretion to determine the method of paying a judgment. *See Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972). However, an order for payment that does not in fact result in ***payment*** of that judgment is an abuse of discretion as a matter of simple logic. It is respectfully submitted that an arrearage payment that would never satisfy the judgment during the parties' expected lifetime constitutes an abuse of discretion as a matter of law.

In *Reed*, the payments specified would have eventually paid off the judgment rendered. The next relevant discussion of liquidating judgments was in *Kennedy v. Kennedy*, 98 Nev. 319, 646 P.2d 1226 (1982). There, this Court noted that where (as here) interest is accruing on a judgment, the payment schedule must "allow the liquidation of arrearages on a reasonable basis," including the accruing interest. 98 Nev. at 320.

In *Kennedy*, this Court vacated the amount of the arrearage payment set by the district court, and remanded for an increase in the monthly payment to allow for its liquidation, including the interest that was accruing. The same order should enter in this case. Just to break *even*, the minimum payment on arrears that Robert must make is about $480.00. In the proceedings before Judge Fine on remand, it was demonstrated that payment of the arrears at $500.00 per month would take about thirty years, while payment of the arrears within eight years would require monthly arrearage payments of at least $750.00. At the time of the 1985 order, Robert had a life expectancy of about 16.9 years; Bence's was just a few years longer. *See* National Center for Health Statistics, Vital Statistics of the United States, 1992, vol. II, sec. 6 life tables (Washington, Public Health Service 1996) at 12.

The arrearage payment set by Judge Fine constituted an abuse of discretion. If Robert cannot maintain all of his investments, then he should be compelled to liquidate some of them in order to pay the sums he owes to Bence -- after all, they were obtained in part with her money that he has kept all these years. As a matter of fundamental justice, it is not appropriate for Bence to

continue doing without the money that Robert has wrongfully taken from her. Rather, it is Robert's burden to reorder his lifestyle to accommodate prompt and full repayment to Bence, the wronged party, of the sums that he has taken from her. If he cannot maintain the standard of living he has constructed with her money, then it is his standard of living that must yield.

Robert has cheated Bence out of her rightful share of the money -- and the quality of life that goes along with that money -- long enough. The court below should be directed to increase the arrearage payment substantially so that Bence can receive what was and is rightfully due her in a reasonable period of time -- during her expected lifetime.

## III. THE DISTRICT COURT ERRED BY FAILING TO REQUIRE THE JUDGMENT DEBTOR TO POST SECURITY OR A BOND FOR THE MASSIVE ARREARS OWED

The Order After Hearing entered below failed to require Robert to post security or a bond for the arrears owed to Bence, while restricting payments each month to the grossly insufficient $250.00 that does not even cover accruing interest. 2 ROA 342-347. The court's Decision on remand stated that "Bence will have the option of making a claim against Robert's estate in the event that the entire arrearage is not paid off at the time of Robert's death," but it failed to make any provision to ensure that would even ***be*** such an estate. 2 ROA 452.

While Bence would clearly have a claim against Robert's estate if the arrears were not paid off at the time of his death, this is no guarantee at all that Bence will actually ever get any money, as Robert can easily make his estate worthless prior to his death, just by transferring all assets into the name of current wife. Besides, there is no guarantee that Bence will outlive Robert at all, and (as argued above) it is grossly unfair to say that Bence cannot have the money that Robert has already cheated her out of until she is in the last few years of her life.

For all the reasons set out in the preceding section, a judicial statement of a right (to collect against an estate) without provision of a remedy (that the estate actually have any assets of any value), is worse than worthless -- it is a sham.

Other courts have seen the necessity of providing such protection when a large arrearage may not be promptly and fully paid off. In *Sobelman v. Sobelman*, 541 So. 2d 1153 (Fla. 1989), the court held that to the extent necessary to protect an award (in that case, alimony), the lower court was authorized to order the obligated party to purchase a life insurance policy or a bond, or to otherwise secure such award with any other assets which may be suitable for that purpose. The court stressed the need to protect the receiving party when arrearages are owing.

Likewise, in *Ehrenzweig v. Ehrenzweig*, 89 Misc. 2d 211, 390 N.Y.S.2d 976 (N.Y. Sup. Ct. 1977), the court directed the obligor to post a bond as security for outstanding arrears and previously awarded counsel fees. In *Longo v. Longo*, 533 So. 2d 791 (1988), the court held that insurance or some other form of protection may be required to insure payment of arrearages in child support, permanent periodic or rehabilitative alimony, or balance due of lump-sum alimony payable in installments, "to provide security for all payments due until the death of the obligor spouse."

It is submitted that this issue should be remanded to the district court with instructions to require Robert to post a bond or other security on the judgment. If the court below is to be permitted a breadth of discretion that could delay Bence's collection of her judgment for many years -- perhaps for Robert's entire lifetime -- it is incumbent on the court below to ensure that the resulting estate contains assets against which collection can be made.

## CONCLUSION

Bence has the right to collect her portion of Robert's military retirement benefit arrears that were not paid to her. Robert kept Bence's money for himself, and used it to invest and enjoy a higher standard of life throughout the ensuing years, including today. It is considerably past time for Robert to return to Bence the quality of life she should be enjoying -- immediately -- with her money that is in his possession.

This Court should remand the case to the lower court with instructions to immediately reduce to judgment a specific sum of arrears, to compel payments on arrears sufficient to pay off the arrearage judgment and interest in a reasonable period of time, and to compel Robert to provide security until such time as payment is made in full.

DATED this _____ day of _____, 1996.

Respectfully submitted:

LAW OFFICE OF MARSHAL S. WILLICK

_____

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3551 E. Bonanza Road #12
Las Vegas, Nevada 89110
(702) 438-4100
Attorney for Appellant/Cross-Respondent

## ATTORNEY'S CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate 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 _____, 1996.

LAW OFFICE OF MARSHAL S. WILLICK

_____

MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3551 E. Bonanza Road #12
Las Vegas, Nevada 89110
(702) 438-4100
Attorney for Appellant/Cross-Respondent

## ***CERTIFICATE OF MAILING***

I HEREBY CERTIFY that a true and correct copy of the foregoing **APPELLANT/CROSS-RESPONDENT'S OPENING BRIEF** was forwarded to:

RADFORD J. SMITH, ESQ.
3311 S. Rainbow Blvd. #101
Las Vegas, Nevada 89102

Attorney for Respondent/Cross-Appellant

by placing same in ordinary United States mail, postage prepaid, on the _____day of October, 1996.

_____

Employee of Marshal S. Willick, Esq.

P:\WP51DOCS\BRYAN\D0184.WPD