In the Supreme Court of the State of Nevada

* * * * *

EVA OLVERA, Appellant, vs. JOSE OLVERA, Respondent,	)	S.C. DOCKET NO. 38233 D.C. CASE D 005709

APPELLANT'S OPENING BRIEF

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STATEMENT OF THE ISSUES

I. WHETHER JOSE COULD RETROACTIVELY RECHARACTERIZE EVA'S SEPARATE PROPERTY SHARE OF THE RETIRED PAY AS HIS PROPERTY BY MEANS OF APPLYING FOR AND RECEIVING DISABILITY PAY.

II. WHETHER FEDERAL LAW REQUIRES NEVADA TO REFUSE TO ENFORCE A FINAL, UNAPPEALED DECREE FROM 1979, AS CLARIFIED IN 1988.

III. WHETHER THE TRIAL COURT ERRED IN REFUSING TO COMPENSATE EVA FOR THE FOURTEEN YEARS THAT THE "NET" VS. "GROSS" ERROR REMAINED UN-NOTICED FROM 1988 TO 1998.

IV. WHETHER THE DISTRICT COURT ERRED IN REFUSING TO DEEM EVA AS THE BENEFICIARY OF THE SURVIVOR'S BENEFIT PLAN.

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STATEMENT OF THE CASE

Appeal from order denying motion to enforce divorce decree's division of military retirement benefits; Eighth Judicial District Court, Clark County, Hon. Lisa M. Brown presiding.

Appellant Eva Olvera appeals from a trial court order refusing to require Respondent Jose Olvera to restore to Eva the sums Jose is redirecting from her to himself each month. Specifically, the Court was asked to enforce the prior division of the Military Retirement Benefits as called for in the *Decree of Divorce*.

The parties were divorced by decree entered August 17, 1979. App. 22. On August 25, 2000, Eva brought her *Motion for a Clarification of the Division of Community Asset (Re: Military Retirement Benefits)*. App. 53. A hearing on this matter was held January 25, 2001; on May 14, 2001, an *Order* was entered denying Eva's motion for compensation due to the reduction of Jose's military retirement pay caused by his application and receipt of Veteran's Disability Pay. App. 255. Notice of Entry was filed May 15, 2001. Eva filed a motion under NRCP 59(e) on May 25, 2001, App. 263, which was denied on July 3, 2001. App. 303. Notice of Entry was filed on July 12, 2001. App. 305. Eva's Notice of Appeal was filed July 19, 2001. App. 308. This appeal follows.

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STATEMENT OF FACTS

There is not believed to be a dispute regarding any facts material to the issues raised in this appeal. The area of law pertaining to this appeal evolved considerably over the years involved in this case, and the relevant developments are included below to place the factual developments of this case in the historical legal context.

On June 4, 1957, Jose entered active military service. Three days later, on June 7, 1957, Eva and Jose were married in New York. App. 17. During the marriage, the parties had five children.

After more than twenty-two years of marriage, and during the last few years of Jose's military career, Eva filed a *Complaint for Separate Maintenance* on September 15, 1978. App. 1. Jose filed an *Answer and Counterclaim* on January 3, 1979, seeking a divorce. App. 9.

A *Decree of Divorce* was entered on August 17, 1979, on Jose's *Counterclaim*.[1] App. 22. The trial court's *Findings of Fact and Conclusions of Law*, drafted by Jose's lawyer, awarded custody of the two remaining minor children to Eva, and awarded child support. App. 17. They also noted that Eva was working, earning approximately $1,200.00 per month, and that Jose was earning approximately $2,545.00 per month. App. 17.

The *Findings and Conclusions* did not address alimony, but the *Decree of Divorce* expressly denied Eva any alimony, instead certifying that Eva

> has a vested right in [Jose's] military retirement calculated from the date of marriage throughout defendant's military service, up to and including the date of divorce. These percentage payments shall commence upon defendant retiring[2] and receiving military pay.

App. 24. The *Findings and Conclusions* entered the same day phrased the award to Eva of a share of the military retirement benefits slightly differently, stating as a conclusion of law that:

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[1] When these parties divorced in 1979, *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981) had not yet been decided, the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1982), had not yet been enacted, and there was no consolidated DFAS (Defense Finance Accounting Service), so the many modern formalities attendant to a military divorce were not present in the decree.

[2] The line of cases starting with *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), had not yet happened, so the decree, typical for its era, did not provide for benefits to begin at eligibility for retirement, but only when Jose retired.

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> [Eva] has a vested right in [Jose's] military retirement, calculated from the date of the marriage up to and including August 13, 1979.[3] That [Eva] shall receive monthly payments representing her percentage interest in said retirement, commencing upon [Jose] retiring and receiving retirement pay. That said percentage shall be computed by dividing the number of years of the marriage by the total number of years of military service by [Jose].

App. 19.[4] The *Findings and Conclusions* and the *Decree of Divorce* were both silent as to the Survivor's Benefit Plan, and made no distinction between disability and non-disability benefits.[5] Jose apparently remarried immediately after the divorce was granted. App. 97.

On June 26, 1981, the United States Supreme Court issued its decision in *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), holding that federal law preempted a state court from dividing military retired pay, and that federal law identified retired pay as a personal entitlement of the retiree, to which the retiree's former spouse had no claim. That decision put in motion a series of changes in the law greatly altering the rights and obligations of military members and their spouses, which continue to this day, in this case.

On April 28, 1982, this Court first addressed *McCarty*, in a case brought by the same firm that had represented Jose in his divorce, *Duke v. Duke*,[6] 98 Nev. 148, 643 P.2d 1205 (1982). This Court joined the California courts in holding that *McCarty* would ***not*** to be applied retroactively to reduce the sums payable to a spouse under a final, unappealed Nevada divorce decree that had awarded a portion of military retirement benefits to a former spouse. In other words, *McCarty's*

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[3] This reference is to the trial date. The four-day variance from the date of divorce was not raised by either party, and is economically insignificant.

[4] Eva appealed the *Decree*, claiming that the lower court should have awarded her a greater share of property, and should have awarded her alimony, in Case Number 12239. This Court dismissed her appeal on July 20, 1981, finding no abuse of discretion in the distribution of property or the denial of alimony. App. 28.

[5] Silence as to both matters was reasonable in 1979. The federal cases dealing with disability benefits had not yet happened, and while laws mandating survivorship benefits for current spouses (unless waived) went into effect in 1972, it was not possible to extend regular survivor's benefit coverage to former spouses (at the election of the members) until 1982. 10 U.S.C. § 1448(a)(1)(A). *See generally* Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE; A LAWYER'S GUIDE TO VALUATION AND DISTRIBUTION (ABA 1998) at 17-21, 140-156. Accordingly, in 1979, the issues were simply not addressed in most cases; in the several hundred military-related Nevada divorce decrees that undersigned counsel has reviewed over the years, it is not believed that any of them dated before the mid-1980s dealt explicitly with survivorship benefits. The court file in this case does not indicate that the attorneys or court considered those benefits in any way at all during this divorce.

[6] That opinion is important to the issues faced in this case, and is set out in full below.

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change in the federal definition of what was considered divisible community property was given no retroactive application in the Nevada courts.

In the meantime, bills were moving through Congress, and in September, 1982, Congress enacted the Uniformed Services Former Spouses Protection Act, or "USFSPA," 10 U.S.C. § 1408 to "reverse *McCarty* by returning the retired pay issue to the states."[7] *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g.*; *see Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983) (noting congressional intent to reverse *McCarty*).

The USFSPA does not give the spouse of a service member any right under federal law to claim a share of the service member's retired pay; it is an enabling statute that allowed state courts to divide military retirement income according to their own state laws after June 26, 1981, the same way that they had prior to that date. *Mansell v. Mansell*, 490 U.S. 581, 584-85, 109 S. Ct. 2023 (1989); *see also Brown v. Brown*, 574 So. 2d 688, 690 (Miss. 1990) (states may treat military retirement pensions as personal property subject to state property laws). The USFSPA has been amended several times; the amendments that are relevant are discussed below.

The USFSPA set up a federal mechanism for recognizing state-court divisions of military retired pay, including definitions that were prospectively applicable, and rules for interpretation to be followed by the military pay centers in interpreting the law; later, regulations were adopted, and the pay centers were consolidated.[8] The USFSPA has included a savings clause since its original passage, intended to prevent misapplication of the law to subvert existing divorce court orders:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that

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[7] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [sic]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 1596, 1611.

[8] The eventual consolidated center is the Defense Finance and Accounting Service, located at Cleveland; the regulations, which have also been amended several times, are found at 32 C.F.R. § 63.

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> payments made out of disposable retired pay under this section have been made in the maximum amount permitted under paragraph (1) or subparagraph (B) of paragraph (4). ***Any such unsatisfied obligation of a member may be enforced by any means available under law*** other than the means provided under this section in any case in which the maximum amount permitted under paragraph (1) has been paid and under section 459 of the Social Security Act (42 U.S.C. 659) in any case in which the maximum amount permitted under subparagraph (B) of paragraph (4) has been paid.

10 U.S.C. § 1408(e)(6) (emphasis added). This Court has already noted the existence of this provision approvingly, but only in unpublished orders.[9]

The parties continued intermittent litigation on matters unrelated to this litigation, concerning a jointly-owned residence, between March, 1983, and April, 1984. App. 29-33. In the meantime, there were some changes to the federal laws in this area, but they did not receive much attention in the legal community. In 1983, military members already retired were permitted to make their former spouses beneficiaries of the Survivor's Benefit Plan ("SBP")[10] during an "open enrollment" period. In 1984, court orders noting a voluntary election by a member to make a former spouse the SBP beneficiary were made enforceable.[11]

During April, 1984, Jose apparently retired from the military on a normal, longevity basis (i.e., with no disability rating) as a full colonel, but gave no notice to Eva. App. 49. He did, however, start sending her a fixed sum of money in June, 1984, which he increased slightly in January 1986, and again in January 1987. App. 33. Either at retirement, or some time thereafter, Jose named his second wife as his SBP beneficiary, again without any notice to Eva.[12]

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[9] Since they were unpublished, the orders are not being cited for the purpose of precedent, which would be prohibited under SCR 123.

[10] The SBP program was created in 1972 to provide a monthly annuity to certain spouses and dependents of retired military members. Only members entitled to retired pay are eligible to participate in the SBP. 10 U.S.C. § 1448(a)(1)(A). Some members retired ***before*** 1972 are also participants in the SBP, since Congress has provided a number of "open seasons" during which non-participants could join the program or increase their level of participation.

[11] *See* M. Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE, *supra*, at 17-21, 140-42.

[12] Dianne L. Olvera, Jose's current spouse is listed as the beneficiary on Jose's Retiree Account Statement of December 7, 2000 (provided by Jose's counsel on January 23, 2001). App. 314.

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Amendments continued to be made to the federal laws, but nothing in the court file indicates that the parties were aware of any of the changes. In November, 1986, Congress expressly granted to state courts the power to ***order*** that former spouses be members' beneficiaries under the SBP.[13]

On February 25, 1987, Eva filed her *Motion to Clarify and Amend Decree of Divorce, to Force Defendant to Comply with its Terms, to Reduce Arrearages in Military Retirement Benefits Due Plaintiff to Judgment and to Extend Child Support*.[14] App. 33-41. The motion quoted the portions of the *Findings and Conclusions* and the *Decree* that are set out above in this brief, and stated that the sums that Jose had sent to Eva "without explanation or justification from [Jose] or his attorney" had been discovered by her to be substantial underpayments. *Id*.

On April 29, 1987, a contested hearing was held before Domestic Relations Referee Terrance Marren, who issued a recommendation that Eva was entitled to 41.2% of the military retirement, accrued arrears of $16,000.00, that she should receive direct future payments from the military, and that until the direct payments started, Jose was required to make up to Eva directly the $533.50 that he had been shorting her each month. App. 43-48. No objection was filed, and the *Referee's Report* was signed as an *Order* by Judge Michael J. Wendell on June 22, 1987, App. 48, and filed on June 24, 1987. App. 43.

Jack Perry, Esq. (Eva's attorney at the time) apparently had difficulties getting the military to directly enforce the *Referee's Report*, and so sought and obtained orders formally amending the *Decree of Divorce*. On February 19, 1988, Judge Wendell issued two separate orders, one reducing arrearages to judgment in the sum of $18,134.00, App. 51, and the other formally amending the *Decree*, replacing the decree language quoted above with:

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[13] *Id*.; *see* Pub. L. No. 99-661, § 641, 100 Stat. 3885 (1986). Other amendments to the USFSPA were not relevant to the issues in this case. For example, the same enactment altered the language of 10 U.S.C. § 1408(a)(4)(E) to provide that where a member ***retired for*** disability, only the non-disability portion of the military retirement benefits was divisible by state courts. However, Jose had a normal, longevity, retirement, rather than retiring for disability, and then applied for and received a post-retirement VA disability award. As all court decisions on point have agreed, that situation is different from that regarding retirement for disability, and the statutory change is mentioned here only to eliminate a red herring, many of which were raised by Jose below.

[14] This Court has indicated that a "motion to clarify" is the correct means by which decree language relating to a pension should be construed, where the question is whether the correct sum is being paid to each party thereunder. *See Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988).

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> IT IS FURTHER ORDERED, ADJUDGED, and DECREED that [Eva], having been married to [Jose] for more than 22 years, has a vested community property right in the military retirement benefits of JOSE OLVERA, the defendant, effective with May of 1984, the month of his retirement, to the extent of 41.2% of all of his said military retirement benefits for each month that such benefits are payable to him.
>
> IT IS FURTHER ORDERED that, effective immediately, said 41.2% of JOSE'S OLVERA's gross military retirement benefits be paid directly to [Eva] . . . .

App. at 49-50. The language quoted immediately above is the critical language at issue in this appeal, because it spells out the court's intent.

No appeal was filed. There is no indication that either side raised, or the judge considered, any question relating to the survivor's benefits, or even that either side knew that the district court had been empowered to make Eva the beneficiary.

In 1989 – a year after the *Order Amending the Decree* was final and unappealable – the United States Supreme Court accepted a divorce case out of California, and issued a decision in *Mansell v. Mansell*, 490 U.S. 581, 109 S.Ct. 2023, 104 L.Ed.2d 675 (1989). The basic holding of the case was to declare that military disability awards were not divisible community property, although the Court also held that "domestic relations are preeminently matters of state law," and that there should be no finding of federal preemption absent evidence that such a result is "positively required by direct enactment." 490 U.S. at 587, 109 S. Ct. at 2028, 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)).

What happened in *Mansell* itself, and the state cases immediately following it, is relevant to the outcome of this appeal. Mr. Mansell had applied for and received disability benefits before the Mansells divorced. Their divorce decree had divided the gross retirement pay anyway. After Congress enacted the USFSPA, Mr. Mansell returned to court seeking to modify the Judgment of Divorce to exclude the disability portion of the retired pay from division with his ex-spouse. *Mansell*, 490 U.S. at 586.

The state court had held that it could divide the disability portion of his pay. The U.S. Supreme Court majority held, however, that a state court may divide only *non*-disability military retired pay. *Id*. at 594-95. The dissent echoed the same conclusions reached earlier by the California

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Supreme Court in *Casas v. Thompson*[15] – that the gross sum of retirement benefits was available to the state divorce court for division.[16]

Ultimately, the matter was remanded to state court. The state court ruled that the previously-ordered flow of payments from the member to the spouse, put into place prior to the appellate *Mansell* decision, was *res judicata* and could not be terminated. *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989). In other words, the bottom line was that the United States Supreme Court opinion had ***no effect*** on the pre-existing order to divide the entirety of retirement and disability payments in the final, un-appealed divorce decree in the *Mansell* case.

Many other courts immediately followed suit, issuing opinions that detailed why they would not allow the inequity of allowing post-divorce status changes by members to partially or completely divest their former spouses, where the original divorce decree had been issued ***prior*** to the *Mansell* decision.[17] *See Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Maxwell v. Maxwell*, 796 P.2d 403 (Utah App. 1990); *MacMeeken v. MacMeeken*, 117 B.R. 642 (1990) (Bankr. D. Kan. 1990).

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[15] 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

[16] Justice O'Connor, joined in a dissent by Justice Blackmun, argued that the term "disposable retired pay" only limited a state court's ability to garnish retired pay-not the court's authority to divide that pay. *Id*. at 594-604. Both the dissent and the majority in *Mansell* concluded that the savings clause merely clarified that the federal direct payment mechanism does not replace state court authority to divide and garnish property through other mechanisms.

[17] It is worth noting that even in ***post***-*Mansell* divorces, the same result has resulted. It would be an error to directly compare cases involving divorces ***after*** *Mansell* as if they were no different from cases where the divorces were prior to that decision, since courts have often held the language used in decrees to a higher standard of clarity after that decision, as to whether or not the divorce court intended to permit or forbid a post-divorce recharacterization of retirement benefits into disability benefits. "Safeguard" clauses and "indemnification for reduction" clauses are permissible after *Mansell*, and are sometimes held to be necessary indicators of intent, after 1989, to protect spouses from members' recharacterization of benefits. The theory is essentially that of constructive trust; once the divorce goes through, the retirement money is considered no longer the member's property to convert. *See In re Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *see also Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992); *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. App. 1995); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993). Some courts simply redistributed other property. In *Torwich (Abrom) v. Torwich*, 660 A.2d 1214 (N.J. Super. Ct. App. Div. 1995), the court found the reduction of payments to the spouse to be an "exceptional and compelling circumstance" allowing redistribution of property four years after the divorce. This case has been relied upon, for the proposition that *Mansell* permits "other adjustments to be made" to take into account the reduction in a spousal share from the disability claim of a member, so as to somehow prevent the inequity that would occur if a member was permitted to redirect money from the former spouse back to himself, without some form of compensation. *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992); *McMahan v. McMahan*, 567 So. 2d 976 (Florida Ct. App. 1990).

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In all these cases, and others discussed in the argument section below, the post-divorce disability award sought and awarded to the retiree was not allowed to block the spouse's right to continued payments under the terms of the decree. This has been the uniform result in every other community property state, and in virtually every appellate decision of every court that has reached the precise issue since issuance of the *Mansell* decision.

Upon service of the direct payment order, both Jose and Eva received direct payments from the military. App. 187-89. Unknown to Eva, however, she was not receiving the sum specified by Judge Wendell's orders, which had specified that she was to receive "41.2% of the ***gross*** military retirement benefits." App. at 50. Because of the date of her divorce and the regulations governing internal calculations performed at the military pay center, the military was sending her only 41.2% of the ***disposable*** pay.[18] She did not realize this systematic underpayment (addressed below in the discussion of "net" vs. "gross") until retaining this office, and thought she was getting the correct sum until the end of 1998.[19]

Three years ***after*** the 1988 *Order Amending Decree of Divorce* in this case – as of February 4, 1991 – the definition of "disposable pay" was altered by Congress to eliminate the pay center's deduction of income taxes from gross retired pay when calculating the sum to pay to spouses. The change ***only*** affected divorces final on or after February 4, 1991, however. All prior cases continued to be governed by the older rules (i.e., the sum payable under divisions of disposable pay as previously defined remained in effect).

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[18] The act used the term "disposable pay" to describe what the pay center is to calculate in making payments to a former spouse; the relevant portion of the statute provided:

> "Disposable retired or retainer pay" means the total monthly retired or retainer pay to which a member is entitled ... less amounts which-
> (B) are required by law to be and are deducted from the retired or retainer pay of such member, including fines and forfeitures ordered by courts-martials, Federal employment taxes, and amounts waived in order to receive compensation under title 5 or title 38 [disability payments].

§1408(a)(4)(B). Eventually (in 1991), the language requiring taxes to be deducted before division of the retired pay between spouses was removed from the statute, but that change was not made expressly retroactive, requiring courts to individually address all cases in which gross pay was ordered divided, but only disposable pay was paid. This is explained in greater detail below.

[19] No disrespect to trial counsel, or the sitting judge at the time, is intended. From my review over the years of a host of court orders throughout that decade, I think it can be concluded that almost no one in this state had any substantive knowledge of the workings of the military retirement system as of early 1986. The first published Nevada CLE materials in the field were apparently my own, starting in 1987.

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For each divorce case (including this one) in which the *Decree* was entered ***prior*** to February 4, 1991 – and due only to the poor phrasing of the old law – the military pay center withheld taxes from the gross retired pay, divided the post-tax amount between the member and the spouse pursuant to court order, and sent a check to each. At the end of each year, the member was eligible to claim a tax credit for amounts withheld on sums ultimately paid to the former spouse, and the former spouse owed a tax liability for any amounts she received.

The procedure always resulted in the payment of more actual money to the member, and less to the former spouse, than is indicated on the face of an order dividing retirement benefits by percentage. This is true even where (as here) the court directed a division of the gross amount of the benefits in accordance with state law. There were many problems faced by both sides, but the spouses, mainly, were injured by the old phrasing.[20]

The new law (as of 1991), embodied at 10 U.S.C. § 1408(a)(4), addressed all of those problems, and was explicitly based on the "unfairness" of the effect of the previous phrasing.[21] Taxes are no longer taken "off the top" before the retirement benefits are divided between spouses. Both spouses are now sent a W-2P reflecting what they received during the year (thus allowing for reasonable tax planning), and courts are permitted to divide what is essentially the gross sums of benefits, as they intend.

Unfortunately, the enactment of the correction did ***not*** correct the division for decrees originally entered before 1991, requiring state courts to correct such cases one by one. The American Bar Association has urged Congress to apply the correction to all decrees,[22] but the

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[20] Many former spouses, not receiving a Form 1099 or W-2P, thought the money they received was "tax free," not realizing that it was ***their*** responsibility to account for, and pay taxes on, all sums they received. *See Eatinger v. Comm.*, T.C. Memo 1990-310. Many members did not realize that they had a yearly tax credit coming, and it usually took an accountant to figure out what the credit should be. Most courts were unaware that the payments ordered were being skewed by the phrasing of the USFSPA and the tax code, and simply had no idea that their orders were not being followed, or that an inequity existed that required further court attention.

[21] House Report (Committee on Armed Services) 101-665, at 279-280, on H.R. 4739, 101st Congress, 2d Sess. (1990).

[22] *See* M. Willick, AMERICAN BAR ASSOCIATION REPORT TO MR. FRANCIS M. RUSH, JR., ACTING ASST. SECRETARY OF DEFENSE, RE: NATIONAL DEFENSE AUTHORIZATION ACT FOR 1998 § 643, COMPREHENSIVE REVIEW OF FEDERAL FORMER SPOUSE PROTECTION LAWS dated March 14, 1999. The reason for the ABA request for a uniform national law is that all of the corrections possible for a state court in an individual case are relatively inefficient and

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Department of Defense was not convinced that the problem was significant enough to require a change in the law, and so recommended letting the courts address these cases one at a time. *See A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Common Armed Services of the House of Representatives) at 85 (Department of Defense, Sept. 4, 2001).[23] Congress has not acted.

Eva was complacent during the years that she received less than what was ordered because she received payments each month from DFAS after entry of Judge Wendell's clarifying orders in 1988, and had no reason to inquire into the correctness of the calculations until January, 1999.[24] At that time, Eva was informed that Jose had applied for and received VA disability benefits.[25] The gross amount of the military retired pay was $4,298.00 per month, making the decree-ordered share payable to Eva $1,770.78 per month. Because the military was only sending Eva a portion of the disposable pay, she had been receiving $1,570.53, which she thought was the correct sum.

Jose's recharacterization, however, further reduced the gross income by the amount of the VA payment, causing Eva's monthly payment to drop to $769.97 (before her taxes), or by about half of the amount she had been receiving. Every dollar that Eva's share was reduced was paid instead to Jose.

On August 25, 2000, Eva filed a motion seeking enforcement of the order for division of the gross military retirement benefits, for arrears, and to be named the beneficiary of the SBP. App. 53.

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clumsy. Specifically, a court can hold the member in contempt, and order him to pay the former spouse directly the differential between what the military pay center is sending, and what the court ordered. This can work, but has all the same enforcement problems as any required stream of monthly payments from one former spouse to another. Some courts have ordered members to initiate allotments, so the money comes directly from the pay center, on time, and providing that contempt charges will result if the member cancels the allotment.

[23] Http://dticaw.dtic.mil/prhome/spouserev.html.

[24] Since Eva was not, in the years after the divorce, sent any documentation by the military pay center, she had no idea that she was getting anything less than the division the *Amended Decree* ordered. Jose, of course, ***did*** get statements from the military pay center showing how much Eva was getting, and how much he was getting, and presumably was fully aware that the retirement was not being divided pursuant to that order, but he never volunteered to her that the *Amended Decree* was not being followed.

[25] *See* App. 57, 71. Because the military pay system always pays a month behind, Eva did not actually learn of the January drop in payments until February. As shown in the exhibits submitted in the court below, App. 73, the annual COLA had just increased her payments from $1,550.78 to $1,570.53 for one month when Jose's VA waiver kicked in, dropping Eva's payments to $769.97. This drop was what put her on notice to look into the matter.

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Between the net-versus-gross differential, and the much larger sums suddenly shifted from Eva to Jose by way of his disability recharacterization of the funds, Eva noted that Jose had diverted some $40,000.00 from her to himself. App. 64.

Jose eventually opposed Eva's *Motion*, on January 17, 2001. App. 96. He argued the various legal matters discussed below, and asserted that if he did owe Eva any money, she was barred from collecting any arrearages older than six years prior to her motion, by way of the statute of limitations. App. 108, at n.3. Eva filed a *Reply* on January 22, 2001, noting that during the time Jose had delayed, and given that he was then diverting about $1,000.00 per month from her to himself, her damages had grown.[26] App. 121.

The district court entertained a hearing on January 25, 2001, at which it was clear that there were no disputed question of material facts; the extended argument regarded the nature and meaning of the law.

On May 14, 2001, the district court denied all of Eva's substantive requests for relief. The district court concluded that Judge Wendell's 1988 *Amended Decree* could not be honored, because Jose's 1999 application for and receipt of disability benefits made the sums he was receiving "veteran's disability benefits" that the court was prohibited from "dividing." App. 256-57. The district court reasoned that it could not order Jose to compensate Eva for any sums he had redirected from her to himself, because to do so would be to "pay sums indirectly that it could not order . . . directly." App. 257.

The district court further found that Judge Wendell was not permitted to have ordered a division of the gross military retired pay in his 1988 *Amended Decree*, because the USFSPA had been enacted in 1983, and stated that state courts could divide only "disposable military retired pay." *Id*.

[26] By February, 2001, Eva's total damages exceeded $67,000.00, some $25,000.00 of which was cut off by the statute of limitations. App. 191, 199.

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Finally, the district court refused to order Eva named the beneficiary of the SBP, reasoning that Jose had paid premiums for 16 years with his current spouse as the named beneficiary, and that Eva had waited too long to ask to be named. App. 258-59.

This appeal followed.

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ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

The Arizona Court of Appeals very recently decided a case similar to this one. *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001) (military member who claimed disability benefits after divorce required to compensate former spouse for retirement benefits awarded to her in decree). The court first determined that even though factual findings are only overturned if clearly erroneous, and orders relating to community property apportionment are reviewed for an abuse of discretion, the appropriate standard of review on this question of law is de novo:

> This case, however, involves largely undisputed facts and essentially hinges on interpretation of statutes and an out-of-state decree and order, issues that are subject to our de novo review. *See Citibank (Arizona) v. Bhandhusavee*, 188 Ariz. 434, 435, 937 P.2d 356, 357 (App. 1996); *see also Anderson v. Anderson*, 522 N.W.2d 476, 478-79 (N.D. 1994) ("When one court interprets the decree of another court, the interpreting court is in no better position than [the appellate court is] to determine the original judge's intentions should the decree contain ambiguities" and, thus, review of "such interpretations [is] *de novo*.").

36 P.3d at 754. *See also Johnson v. Johnson*, *infra*, 37 S.W.3d 892, 894 (Tenn. 2001) (question of whether spouse should be compensated for military retiree's waiver of retired pay for disability pay is strictly a question of law to be reviewed de novo on the record with "no presumption of correctness").

This Court has, similarly, held that questions of law are to be reviewed de novo. *See Diamond v. Swick*, 117 Nev. ___, 28 P.3d 1087 (Adv. Opn. No. 54, Aug. 17, 2001); *State, Dep't of Mtr. Vehicles v. Lovett*, 110 Nev. 473, 874 P.2d 1247 (1994) (the construction of a statute is a question of law subject to review de novo).

Here, as in *Danielson*, the relevant facts are undisputed and the questions are strictly legal.[27] There are only two relevant distinctions between that case and this one. First, the prevailing former spouse in *Danielson* was held to the "higher standard of clarity" in the underlying decree (discussed above in footnote 17) to protect her interests, because that decree had been issued ***after*** *Mansell* rather than (as here) before that decision. Second, the case had originated in Colorado, and been transferred to Arizona where the decree was construed; here, the case had been decided by a now-

[27] This office had the honor of participating in that case as counsel for Amicus Curiae.

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retired judge of the Civil/Criminal Division, and was transferred to a different judge in Family Court, where the decree was construed.

It is submitted that the same (de novo) standard of review is applicable in this case, since the issues are legal, the facts undisputed, and the decree being construed was issued by a different court than the one issuing the order now on appeal. The sole exception is the last issue (as to Eva's request to be deemed the beneficiary of the SBP), since that decision was not purely a legal one and did involve some application of judicial discretion (which discretion, as we assert below, was abused in this case).

II. JOSE COULD NOT RETROACTIVELY RECHARACTERIZE EVA'S SEPARATE PROPERTY SHARE OF THE RETIRED PAY AS HIS PROPERTY

This appeal is from an order of the district court refusing to do anything about Jose's diversion to himself each month of sums that were ordered paid to Eva in 1979. Specifically, the court below was asked to enforce Eva's vested right to a share of the Military Retirement Benefits as set out in the 1979 *Decree of Divorce* and affirmed and clarified in the 1988 *Amended Decree*. App. 24, 49-50.

The refusal by the district court to enforce the decree has allowed Jose to unilaterally alter the property division of the *Decree of Divorce*, many years post-decree, by the recharacterization of the military retirement. The effect has been to allow Jose to divert two-thirds of Eva's property award to his own pocket, a possibility not contemplated in the property settlement, and in violation of state law.

A. The 1988 *Amended Decree* Was Final as to the Division of Property

The 1979 *Findings and Conclusions* and *Decree of Divorce* (carried over to and repeated in the 1988 *Amended Decree*), declared Eva's interest in the military retirement benefits a final award of a "vested community property right." App. 49.

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In Nevada, parties are not permitted to take any steps post divorce that have the effect of altering a final distribution of property. *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980); *see also Fuller v. Fuller*, 106 Nev. 404, 793 P.2d 1334 (1990); *Walsh v. Walsh*, *supra*.

The court in *Danielson*, applying substantively identical community property law, turned aside the military member's attack on the Arizona equivalent of this Court's rule of finality of property distributions set forth in *Kramer*:

> According to Evans [the member], *Gaddis*[28] and *Harris*[29] rest on "fallacies" about "vested" rights and "unilateral" or "voluntary" choices that do not apply here. For example, he contends Danielson's [the spouse's] interest in his retirement benefits was "vested" only "in the sense that no one else [could] claim a right to them." That interest, he asserts, neither entitled Danielson to a fixed, lifetime benefit nor guaranteed that his "disposable retired pay" would not change. Rather, Evans argues, the value of Danielson's interest in his retirement benefits was "contingent" on future circumstances, including his "suffering the disabling consequences of a service related injury" after the dissolution and after his retirement.
>
> The problem with that argument is that neither the record nor the law supports it. The dissolution decree and post-decree order did not condition Danielson's interest in the military retirement benefits on anything, let alone on Evans's unforeseen future disability ratings and corresponding waivers of retired pay. . . . the trial court did not find, and implicitly rejected, any condition subsequent that could reduce or otherwise affect Danielson's decreed interest in the retirement benefits. In short, her interest was no less "vested" than the interests of the non-military former spouses in *Gaddis* and *Harris*. *See Johnson v. Johnson*, 37 S.W.3d 892, 894, 897 (Tenn. 2001) (holding that when parties' marital dissolution agreement "divides military retirement benefits, the non-military spouse obtains a vested interest in his or her portion of those benefits as of the date of the court's decree" and that such "vested interest cannot thereafter be unilaterally diminished by an act of the military spouse").

36 P.3d at 756. Jose espoused the rationale, apparently accepted by the district court below, that his decision to apply for disability benefits somehow exempted him from application of the community property rules against retroactive redistributions of property awarded in a final, unappealed decree, on the theory that any order directing him to make "payments-in-kind" so as to "make up" for any retired pay waived in order to receive disability benefits, would "circumvent Congressional intent" and "violate the Supremacy Clause of the federal constitution." App. 98-99. The *Danielson* court rejected that argument, because the trial court did not divide a portion of retirement pay that had been waived due to acceptance of the VA benefits:

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[28] *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), *cert. denied*, 525 U.S. 826 (1998).

[29] *Harris v. Harris*, 991 P.2d 262 (Ariz. Ct. App. 1999).

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> Evans also contends that, unlike the husband in *Gaddis* who voluntarily obtained civil service employment, he did not voluntarily choose to "suffer[] from a service related disability." Of course that may be true, and Evans certainly had the right to apply for and obtain nontaxable VA disability benefits in lieu of retired pay. But Evans concedes he unilaterally and voluntarily applied for the disability benefits, without notice to Danielson and without any suggestion in the dissolution proceedings that he might do so. *See Harris*, 195 Ariz. 559, ¶13, 991 P.2d 262, ¶13. *See also Scheidel v. Scheidel*, 2000 NMCA 59, 4 P.3d 670, 675, 129 N.M. 223 (N.M. App. 2000) (affirming trial court's determination that husband's post-dissolution "application for an increased disability rating was voluntary, and in furtherance of his own financial interests"). At any rate, the nature, extent, and enforceability of Danielson's interest in the retirement benefits do not hinge on the voluntariness of Evans's post-dissolution actions in the disability process.
>
> In sum, *Gaddis* and *Harris* pose major obstacles to the arguments advanced by Evans . . . . the fundamental principles recognized and applied in *Gaddis* and *Harris* apply here and undermine Evans's position. . . . Accepting Evans's position would require us to either overrule *Gaddis* and reject *Harris* or distinguish them on grounds that are insignificant and unpersuasive. We are not inclined to do so.

36 P.3d at 756-57.

In other words, it makes no difference ***how***, or ***why*** Jose diverted money to himself that had been awarded to Eva in a final, unappealed decree in 1979; his act of doing so was an independent violation of the *Decree* every month he took and kept sums awarded to Eva. As the *Danielson* court noted in a footnote from the last line of the text quoted above, this conclusion is entirely in line with the USFSPA, which contains a savings clause[30] specifically intended to stop military members from cheating their spouses by such post-decree actions as those of the members in *Gaddis*, *Harris*, and this case:

> As we noted in *Gaddis*, our decision there conformed to prior Arizona law. 191 Ariz. at 469, 957 P.2d at 1012, *citing In re Marriage of Crawford*, 180 Ariz. 324, 327, 884 P.2d 210, 213 (App. 1994)("[A] community interest in military retirement benefits cannot be transformed into separate property by one spouse's electing to forego a portion of retirement pay in exchange for disability benefits"); *McNeel v. McNeel*, 169 Ariz. 213, 215, 818 P.2d 198, 200 (App. 1991)(rejecting husband's attempt "to transform retirement benefits constituting community property to disability benefits constituting separate property"). *See also Perras v. Perras*, 151 Ariz. 201, 726 P.2d 617 (App. 1986) (to same effect). The results in *Gaddis, Harris*, and this case also appear consistent with the Act's savings clause. 10 U.S.C. § 1408(e)(6) ("Nothing in this section shall be construed to relieve a member of liability for . . . other payments required by a court order on the grounds that payments made out of disposable retired pay under this section have been made in the maximum amount permitted under [§ 1408(e)(1) or (e)(4)(B)]").

36 P.3d at 757, n.7. The substantive Arizona law of community property and the finality of judgments is identical to that of Nevada. The same result found to be compelled by state law, and

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[30] Quoted above at pages 5-6.

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permitted by federal law, should be ordered by this Court. Further substantiation of that result, taking into account all factors applicable under state and federal law, is set out below.

B. The 1988 *Amended Decree* Clarified a 1979 *Divorce Decree* and Correctly Divided the Gross Military Retirement Benefits

The original 1979 *Divorce Decree*, drafted by Jose's counsel, declared that Eva had a "vested right" to a portion of the military retirement benefits in a percentage to be defined in the future when Jose retired. App. 24. This was a correct statement of Eva's rights under Nevada community property law. *See Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983) (all property acquired after marriage is presumed to be community property; retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable), *citing In re Marriage of Gillmore*, 629 P.2d 1 (Cal.1981); *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988) (retirement benefits earned during marriage are community property).

It is worth stressing that the sum divided by the 1979 divorce court was necessarily the ***gross*** sum of the benefits – it was the uniform policy of the community property states to divide the ***entirety*** of the assets accrued during the marriage, and there was neither anything in the law, nor anything in the record of this case, to indicate that Judge Wendell had any different intent in rendering the *Decree* in 1979. *See Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Casas v. Thompson*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

The 1988 proceedings sought only to ***enforce*** the original divorce court division of benefits; it clarified, not modified, the division of benefits in the *Decree*, by phrasing the award in a manner that was intended to allow enforcement of the award by the military pay center. App. 33-37. As stated by the South Dakota Supreme Court, "While a property division is irrevocably fixed by the terms of the divorce decree and cannot be later modified, if indeterminate language was employed, a court may clarify its decree and the agreement it was based upon." *Hisgen v. Hisgen*, 554 N.W.2d 494, 497 (S.D. 1996).

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One Texas court approved a trial court's 1995 insertion of the word "gross" in construing and enforcing its 1979 decree dividing military retirement benefits; the court found the rephrasing to be merely "reiterating" what was ordered in 1979, and added the home-spun explanation that:

> though an ancient proverb attributes to lawyers the ability to change white to black, we cannot do so. A directive that X is awarded "a one-third ownership interest in an apple pie" does not mean a one-third of the pie remaining after the government or anyone else takes a bite from it.

Matter of Marriage of Reinauer, 946 S.W.2d 853, *opn. on reh'g*, n.2 (Tex. Ct. App. 1997).

The *Danielson* court reviewed a similar situation. There, the member asserted that a court order was in violation of *Mansell* because it followed his application for and receipt of disability benefits. The court observed that the later order only sought to put a precise percentage on the divorce court's original "formula" division of the retirement benefits, and so was not a division of disability benefits, because there ***were*** no disability benefits when the decree was entered. 36 P.3d 754.

The same thing occurred in this case: the original decree was a formula order, with an unknown denominator (because Jose was still on active duty). App. 19. The post-retirement order put a specific percentage on the award, to allow for its enforcement through the pay center. App. 49-50. In this case, there was no disability award when the decree was entered, and there was still no disability when the clarifying order was entered in 1988; Jose was not to even seek out a disability rating and award for another ten years – in 1998.

Further, when Judge Wendell issued the *Amended Decree* in 1988, the "disposable pay" language in the USFSPA, passed in 1983, did not affect the jurisdiction of the state courts. Most states considered the language of the USFSPA to be, at most, limiting of the amount that the military pay center would pay directly to a former spouse, rather than any kind of limitation on the subject matter jurisdiction of state courts to render an award. This stemmed from the conclusion that the USFSPA had been intended to entirely repeal *McCarty* and "return the law to what it had been" before that case had been decided. *See Casas v. Thompson*, *supra*, 228 Cal. Rptr. 33, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987). As noted above, that was the position of this Court. *Burton v. Burton*, *supra*.

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Casas was the single clearest restatement of the law of military retirement benefits division as it had evolved in California through 1987, and as followed by several other states, including Nevada. The portions of the case most relevant to this appeal were the holdings by the California Supreme Court that (1) *McCarty* was not to be construed as acting retroactively; and (2) rejecting the member's assertion that Section (c)(1) of the USFSPA limited state courts to prospective division of *disposable* retired pay.[31]

Because the *Casas* court concluded that the USFSPA entirely rejected *McCarty*, it found no need to look for specific authority to divide the gross amount of military retirement benefits, since community property law provided for division of the total (gross) sum of ***all*** property accrued during the marriage. The court then looked at the detail of the USFSPA to see if there was any prohibition in the federal law preventing state courts from dividing gross retired pay, and found none, viewing the concept of "treating" disposable pay as a mere collection limitation that left former spouses to other (state law) remedies for collection of all amounts ordered paid by state courts that could not be paid directly from military pay centers. *Id*. at 931.

Mansell, in 1989, first declared the "disposable pay" language in the USFSPA to be a substantive limitation on the power of state courts to make awards. The district court in this case applied *Mansell* retroactively, to prevent itself from enforcing Judge Wendell's *Amended Decree*, which was rendered more than a year ***before*** the *Mansell* case, and in any event only clarified a *Decree* rendered in 1979. Neither the 1979 *Decree* nor the 1988 *Amended Decree* was appealed.

The district court erred. This Court has held that federal cases changing what is considered to be divisible community property are ***not*** to be applied retroactively to reduce the sums payable to a spouse under a final, unappealed Nevada divorce decree. *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982). In *Duke*, the 1981 decision in *McCarty* was given no retroactive application in the

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[31] The court found the member's argument of such a limitation "illogical," because it necessarily permitted members to take actions altering their tax status, which would have the effect of reducing the community property share payable to former spouses. Further, the court considered the USFSPA a complete repudiation of the *McCarty* holding, and considered the limiting language of the federal act to be merely procedural limitations upon garnishment. The court focused upon that portion of the legislative history that declared Congress's intent to "restore the law to what it was," and noted that previous California law had called for division of the entirety of military retirement, as it did with all other retirement benefits. *Id*. at 928 & n.33, 930 & n.10 (quoting 1982 U.S.C.C.A.N. 1599).

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Nevada courts, and this Court ordered that a divorce decree that had awarded a portion of military retirement benefits to a former spouse was to be enforced. The opinion is quite short, and directly on point, and so is set out in full below:

> PER CURIAM:
>
> The issue presented by this appeal is whether McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728, 69 L. Ed. 2d 589 (1981), should be given retroactive effect so as to disrupt a final, unappealed divorce decree.
>
> The relevant facts are undisputed. On July 18, 1980, the district court entered a decree of divorce which awarded 35% of appellant Forrest Duke's military retirement pay to respondent Dicksie Duke as community property. [FN1] The court ordered Forrest to execute a permanent allotment with the United States Air Force, specifying that Dicksie's 35% share be sent directly to her. Forrest failed to execute a permanent allotment as ordered.
>
> On June 5, 1981, Dicksie filed a "motion for judgment of arrearages," seeking to recover her share of Forrest's military retirement benefits which he had failed to pay her. Forrest opposed Dicksie's motion and filed a counter-motion to modify the divorce decree contending, inter alia, that, in view of McCarty, the district court lacked power to enforce the portion of the decree which awarded Dicksie a share of his retirement pay. The district court denied Forrest's motion to modify, and Forrest has appealed.
>
> In McCarty, the United States Supreme Court held that military retirement benefits are not divisible as community property in state court divorce decrees. Nothing in McCarty, however, suggests that the Supreme Court intended its decision to apply retroactively to invalidate, or otherwise render unenforceable, prior valid and unappealed state court decrees. A clear majority of courts have held that McCarty does not alter the res judicata consequences of a divorce decree which was final before McCarty was filed. E.g., Erspan v. Badgett, 659 F.2d 26 (5th Cir. 1981); In re Marriage of Fellers, 125 Cal. App. 3d 254, 178 Cal. Rptr. 35 (1981); In re Marriage of Sheldon, 124 Cal. App. 3d 371, 177 Cal. Rptr. 380 (1981). We are persuaded by the rationale of these cases. Accordingly, we hold that the district court did not err by denying Forrest's motion to modify.
>
> Other contentions have been considered and found to be without merit.
>
> Affirmed.
>
> [FN1.] Forrest did not appeal from the divorce decree.

There is no legal distinction between the assertion rejected in *Duke* (that *McCarty* indicated that military retired pay was not divisible ***at all***, and that therefore no arrears could be imposed against the retiree) and Jose's argument in this case (that *Mansell* indicated that military retired pay waived for disability could not be divided, and therefore no arrears could be imposed against the retiree). Both cases involve divorce decrees that were final – and unappealed – before the alleged

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defense, based on federal law, came into existence. Any attempt to distinguish the two would be sophistry.

The district court misunderstood the task before it, and accepted the argument made by the member and rejected by the court in *Danielson* – that enforcement of the decree by ordering a member to restore to a former spouse the sums he redirected after divorce from her to himself would constitute some "indirect" violation of *Mansell* by ordering division of veteran's benefits. 36 P.3d at 755. As that court (like the many others cited above and below) concluded and concisely explained:

> This court rejected similar arguments in *Gaddis*, as did Division One of this court in *Harris*. In *Gaddis*, we concluded that "Arizona law does not permit, and federal law does not require," reduction of a former spouse's decreed interest in military retirement benefits based on the retired veteran's post-dissolution waiver of those benefits in order to receive civil service compensation. 191 Ariz. at 469, 957 P.2d at 1012. Accordingly, we upheld the trial court's order that had compelled the husband to pay "'the original, actual value'" of the wife's interest in the retirement benefits. Id. at 468, 957 P.2d at 1011. We found no violation of federal law because the trial court "did not divide a portion of retirement pay that had been waived due to civil service employment at the time of the decree." Id. at 470, 957 P.2d at 1013. And we distinguished *Mansell* because the dissolution decree there had "awarded the wife a community property interest in the portion of retirement pay the husband already had waived to receive disability benefits and thus directly conflicted with the requirements of 10 U.S.C. §§ 1408(a)(4)(B) and 1408(c)." Id.
>
> In *Harris*, the dissolution decree awarded the non-military wife "'one-half of [husband's] Military Retirement, not including [husband's] disability payment.'" 195 Ariz. 559, ¶2, 991 P.2d 262, ¶2 (alteration in original). The husband's disability rating was sixty percent at that time, but he subsequently obtained additional ratings that ultimately "transformed all of [his] non-disability retirement pay into disability benefits." *Id.* at ¶7. Applying the reasoning in *Gaddis*, the court in *Harris* concluded that federal law did not preclude the wife from seeking "the value of the non-disability retirement [pay]" she had been awarded in the prior dissolution decree, *id.* at ¶5, without reduction for retired pay the husband waived post-decree in order to receive additional disability benefits. *Id.* at ¶13.

36 P.3d at 756.

The district court's foundational conclusion, from which all her other rulings flowed, was that Judge Wendell exceeded his jurisdiction by his division of the gross military retired pay. App. 255-58. That conclusion was clearly erroneous. The year involved was 1979. There was no federal limitation of or prohibition against the order entered, which was perfectly in keeping with Nevada community property law. There was likewise no prohibition against division of the gross sum of benefits in 1988.

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As this Court has noted, the passage of the USFSPA in 1983 was specifically intended to ***not*** disturb final and unappealed divisions of property.[32] *See Burton v. Burton*, *supra*. As stated by various courts over the years, it would "thwart the very title of the Act, the 'Uniform Services Former Spouses' Protection Act,' to construe the law as preventing a spouse from actually receiving a court ordered portion of military retirement benefits. *See Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983); *Burton v. Burton*, *supra*. The district court's statement that the USFSPA operated retroactively to limit the jurisdiction of state courts, App. 256, was clearly in error.

Similarly, this Court's holding in *Duke v. Duke*, *supra*, mandates that the construction of the USFSPA by a federal court in 1989 could not be applied retroactively to deprive the divorce court of its jurisdiction in 1979, and the district court's holding to the contrary, App. 257, was clearly in error.

Thus, the lower court's refusal to enforce the 1979 decree by requiring Jose to compensate Eva for the sums his post-divorce actions caused to be redirected to himself, was just wrong. The district court's rulings violate this Court's holdings in *Duke* and *Kramer*, and a federal decision occurring ten years ***after*** the underlying divorce decree can not have any impact on Eva's vested rights, and Jose's continuing obligation not to interfere with those rights, under that pre-existing decree.

As set out in the following sections of this brief, virtually every court that has ever examined the question has come to exactly the same conclusion, and the very few contrary cases are obviously distinguished on their dates, and facts. In reviewing the decisions of those other states, there are a couple of additional Nevada cases that the Court should keep in mind. In *Powers v. Powers*, 105 Nev. 514, 779 P.2d 91 (1989), this Court noted that disability retirement benefits may contain two components, and that the portion of disability benefits replacing retirement benefits is divisible in our courts. In this case, of course, the post-divorce waiver constituted a dollar-for-dollar giving up of retirement benefits for disability benefits.

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[32] *See Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986) ("Nothing in the federal statute or legislative history . . . indicates that Congress intended [the USFSPA] to create new rights . . . to alter final decrees issued prior to *McCarty*").

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This Court has also held that "An employee spouse cannot defeat the nonemployee spouse's interest in retirement benefits by invoking a condition wholly within his or her control." *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), approving holdings and reasoning of *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981) and *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980). Whenever a disability award is claimed ***after*** the division of property in the divorce, it reduces the spousal share that the divorce court has already ordered belongs to the former spouse, in violation of that holding.

As detailed below, ***all*** other community property states, and virtually every decision of every court that has ever addressed the issue, have concluded that any such retroactive transfer of money from the former spouse to the member is a violation of law for which compensation to the former spouse must be ordered. The issue presented by this appeal is whether Nevada will join her sister states in prohibiting such inequity.

III. NOTHING IN FEDERAL LAW REQUIRES NEVADA TO REFUSE TO ENFORCE A FINAL, UNAPPEALED DECREE FROM 1979, CLARIFIED IN 1988

A. Introduction

To receive VA disability pay, a service member must waive an equivalent portion of retired pay. Such waived pay is excluded from the definition of "disposable" pay under 10 U.S.C. § 1408, which is all the military pay center is permitted to "treat" when enforcing a court order to divide benefits between a member and a spouse. As the *Danielson* court noted,

> Unlike military retired pay, VA disability payments are nontaxable to the recipient. *See* 38 U.S.C. § 5301(a); *Absher v. United States*, 9 Cl. Ct. 223 (1985), *aff'd*, 805 F.2d 1025 (Fed. Cir. 1986). Because of that tax incentive, disabled veterans often waive retired pay in favor of disability benefits. *See Mansell*, 490 U.S. at 583-84, 109 S. Ct. at 2026, 104 L. Ed. 2d at 682.

36 P.3d at 752, n.2.

When a disability award is in existence ***before*** a divorce, the sum of retired pay that had been waived for disability is not before the divorce court for division, but is considered the separate property of the member, although it can be taken into consideration by the divorce court as a separate property income stream on which an alimony award can be based. *Mansell*, *supra*; *Riley v. Riley*,

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571 A.2d 1261 (Md. Ct. Spec. App. 1990) (VA disability benefits "may be considered as a resource for purposes of determining [one's] ability to pay alimony"). That is not the circumstance of this case – there was no disability award either in existence, or contemplated, in either the 1979 divorce proceedings or the motion practice leading to entry of the 1988 *Amended Decree*.

Rather, this case is one of the class of cases in which the parties divorced, dividing military retirement benefits along with all of their other assets, and then at a ***later*** date the military member applied for and received VA disability benefits. In such a case, the result is always to reduce the spousal share that the divorce court had already ordered belongs to the former spouse. Such a result is inequitable, as it takes property awarded to the spouse and gives it back to the retiree, and courts have generally not allowed it for a variety of reasons, as explained below.

The post-divorce disability cases fall into two categories – those, like this one, where the divorce and division of retired pay occurred before the *Mansell* decision in 1989, and those in which the divorce occurred ***after*** *Mansell* was issued.[33] In ***both*** groups of cases, the former spouse's share of the benefits has been held immune from reduction by post-divorce recharacterization of the retired pay by the member. In the post-*Mansell* cases, however, some reviewing courts have required the divorce court to insert additional safeguarding language to reach that result, and a couple of decisions have come down on the side of allowing the recharacterization when the additional language was purposefully omitted.

This case falls into the first class of cases, like the decisions that were issued right after *Mansell* was issued, which held, apparently unanimously, that where a divorce decree issued before *Mansell* divided the "gross" or "total" or "all" military retirement benefits, and the member subsequently applied for and received disability benefits, the member was required to reimburse the former spouse, dollar-for-dollar, for any reduction in monthly payments she suffered as a result of his election. *See Toupal*, *supra*; *Berry*, *supra*; *Maxwell*, *supra*; *MacMeeken*, *supra*, discussed at page 9 of this Brief. The language used in such decisions was, logically, generally similar to that used by this Court in *Duke v. Duke*, *supra*.

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[33] The two groups of cases were noted above, in describing the historical development of this field. See text and note at fn. 17, *supra*.

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What makes this case somewhat unusual is that such a long time went by between the divorce court's division of the benefits (1979) and the member's application for disability benefits (1998). Eva's vested portion of those benefits did not become any ***less*** vested during the 20 year interval between those events. A sampling of the many cases so holding, in the following section, illustrates the way in which courts have explained why this is so, and why a spouse in Eva's position should be compensated when someone like Jose finds a way to gain possession of her long-since-final property award.

B. The Near-Unanimous Consensus of Authority is that Eva Should Have Been Protected from Jose's Actions

Many other state courts over the years have faced the question of what to do when the member obtains, or increases, a disability award after a divorce, thus reducing the payments to the former spouse. The Statement of Facts noted the cases just after the *Mansell* decision refusing to permit post-divorce waivers of retired pay by members to affect the spouses' right to continued receipt of the flow of retired pay benefits awarded at the time of divorce, including in the *Mansell* case itself, and noted some of the many cases reaching the same conclusion even after *Mansell* was issued in 1989.[34]

In the years since *Mansell*, a continuing stream of case decisions, from all over the country, have reached the same result. The reasoning and conclusions of that overwhelming weight of authority are in accord with the decision of this Court in *Duke* and the Arizona Court of Appeals in *Danielson*, and should be followed here, requiring reversal of the decision of the district court.

In 1995, the Texas Court of Appeals had the opportunity to examine a case in which the husband waived a portion of retired pay already granted to the former spouse, thus transferring the money from her receipt to his, just as Jose has done to Eva here. The husband claimed that under federal law, he was "exempt" from contempt sanction by reason of his waiver of retired pay in favor of disability benefits. *Jones v. Jones*, 900 S.W.2d 786 (Tex. Ct. App. 1995).

[34] *See* text and note at fn. 17, *supra*.

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The court disagreed, and the wife collected from the husband all sums called for by the decree but which he had sought to re-characterize as disability. The court held that the husband's attempt to reduce the value of the wife's interest in the military retired pay by accepting a 40% disability rating at the time of retirement (post-divorce) constituted an improper "collateral attack on a final unappealed divorce decree." 900 S.W.2d at 788. The *Jones* cases is "on all fours" with this case; the applicable facts, law, and equities are all equivalent.

In holding that the husband could not divert funds ordered paid to the wife, the Texas court in *Jones* sided with the clear majority. It saw the proscription of *Mansell* – that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability payments" – to mean exactly what it says, and neither more nor less than it said. As the Texas court concluded, *Mansell* calls on courts to essentially take a snapshot at the time of divorce – when the award to the spouse is made. If sums of disposable retired pay had been waived up to that point, they are not divisible. When a member seeks a ***post***-divorce reduction in retired pay, however (as Jose has done ***20 years*** post-divorce, in this case), his efforts at re-characterization are seen as attempting a "de facto modification" of a final property award, which community property law does not permit, in Texas ***or*** Nevada. *Kramer v. Kramer*, *supra*.

As noted by the *Danielson* court, the Arizona Court of Appeals came to a similar holding, using the same reasoning, in *In re Gaddis*, 957 P.2d 1010 (Ariz. Ct. App. 1997), when it held that reductions in military pay benefitting the member (i.e., waivers of retired pay for disability pay) only bar compensation to the spouse if those reductions in retired pay existed ***when the award to the former spouse was made***. It makes no difference how or why the member reduces the existing award to the spouse – the fact that he does so mandates that compensation be provided. *See Crawford v. Crawford*, 884 P.2d 210 (Ariz. Ct. App. 1994) (same result in VSI and SSB cases).[35]

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[35] The VSI and SSB programs are early-retirement programs offered at times by the military by means of which members can terminate service before completing 20 years, receiving lump-sum or time payments instead of a regular military pension. The *Crawford* court specifically quoted and analogized to *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995), which addressed disability benefits. The Arizona court held that in both situations the spousal interest had been "finally determined" on the date of the decree, and enforcing that order in the face of a post-decree recharacterization by the member did not violate *Mansell*.

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New Mexico has quite recently again reached the same result, verifying the holding of *Toupal*, *supra*. In *Scheidel v. Scheidel*, 4 P.3d 670 (N.M. Ct. App. 2000), the wife successfully pursued arrears from a husband who reduced the stream of payments to her from his military retirement benefits by increasing a disability award.[36] The Court rejected the ruling made by the district court in this case, that "federal law prohibits enforcement" of the divorce decree[37]:

> In reliance upon Mansell, Husband contends that the trial court's order, which requires him to compensate Wife for the reduction in benefits that she suffered as a result of the increase in his disability rating, amounts to an impermissible distribution of disability benefits to Wife. We disagree.
>
> Courts in a number of other states have addressed post-judgment waivers of retirement pay in circumstances similar to those presented here. In recognition of the fact that Mansell merely prohibits state courts from ordering the division of the military spouse's disability pay, several courts have determined that nothing in Mansell or in the USFSPA prohibits them from enforcing indemnity provisions designed to guarantee a minimum monthly income to the non-military spouse. See, e.g., Abernathy v. Fishkin, 699 So. 2d 235, 239-40 (Fla. 1997); In re Marriage of Strassner, 895 S.W.2d 614, 617-18 (Mo. Ct. App. 1995); Owen v. Owen, 14 Va. App. 623, 419 S.E.2d 267, 269-71 (Va. Ct. App. 1992).
> . . . .
>
> We find these cases persuasive. Not only is the rationale analytically sound, but the result is equitable. As this Court has previously noted, one spouse should not be permitted to benefit economically in the division of property from a factor or contingency that could reduce the other spouse's share, if that factor or contingency is within the first party's complete control. See Irwin v. Irwin, 121 N.M. 266, 271, 910 P.2d 342, 347 (Ct. App. 1995).

That reasoning, and holding, is almost identical to this Court's holding in *Gemma v. Gemma*, *supra*. *See* 105 Nev. at 463-64. Finally, the *Scheidel* court held:

> In light of the fact that Husband's increased disability rating has inured to his financial benefit, effectively creating additional income to him at Wife's sole expense, we do not hesitate to suggest that Husband may be required to shuffle assets or rearrange his finances in order to facilitate the satisfaction of his indemnity obligations to Wife.

Precisely the same result was reached very recently in three cases from Tennessee, two from that state's Court of Appeals, and a third from the Tennessee Supreme Court; *Hillyer v. Hillyer*, 59 S.W.3d 118 (Tenn. Ct. App. 2001); *Smith v. Smith*, 2001 Tenn. App. LEXIS 149 (No. M1998-

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[36] A number of courts have noted that there is no analytical difference between making a new disability application post-divorce, on the one hand, and increasing an award that existed upon divorce, on the other. In both situations, the member's post-divorce action redirects money awarded to the spouse on divorce to the member.

[37] The underlying divorce in *Scheidel* was entered ***post-Mansell***, so the court there had to deal with the indemnification language that is relevant for post-, but not pre-, *Mansell* divorces. *See* explanation at fn. 17, *supra*.

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00937-COA-R3-CV, Tenn. Ct. App., March 13, 2001); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

All three decision discussed the *Mansell* holding at length. They started with legal principles identical to those in effect in Nevada: military retired pay is marital property subject to distribution, and periodic payments to a spouse are distributions of property rather than alimony; as such, the divorce decree's division of retired pay was final, and when not appealed, was not subject to later modification.

The three Tennessee courts all rejected the argument made by Jose below and accepted by the district court – that the divorce court order dividing retired pay could not be enforced because it did not mention ***disability*** pay, and once Jose converted retired pay into disability pay post-divorce, it just "wasn't there" for the court to address. *See* App. 97-98, 257. Turning to the language in the order before it, the court in *Johnson* held:

> "all military retirement benefits" is unambiguous . . . . We find that "retirement benefits" has a usual, natural, and ordinary meaning. In the absence of express definition, limitation, or indication to the contrary in the MDA, the term comprehensively references all amounts to which the retiree would ordinarily be entitled as a result of retirement from the military. Accordingly, we hold that under the MDA, Ms. Johnson was entitled to a one-half interest in all amounts Mr. Johnson would ordinarily receive as a result of his retirement from the military.

37 S.W.3d at 896-97. In this case, the language used in the *Amended Decree* was that Eva had a "vested right" to "41.2% of all of his said military retirement benefits." App. 49-50. As in *Johnson*, the language is unambiguous, and has the same "usual, natural, and ordinary meaning" – all amounts to which the retiree would ordinarily be entitled by retirement (including any amounts subsequently waived).

The two intermediate appellate court opinions quoted verbatim the core of the *Johnson* holding, which bears repeating here:

> Once Ms. Johnson obtained a vested interest in Mr. Johnson's "retirement benefits," Mr. Johnson was prohibited from taking any action to frustrate Ms. Johnson's receipt of her vested interest. "Nothing in the [USFSPA] suggests that a court's final award of a community property interest must [or may] be altered when the military retiree obtains [disability benefits]." *Gaddis*, 957 P.2d at 1013. Mr. Johnson's failure to compensate Ms.

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> Johnson to the extent of her vested interest in his retirement benefits constituted a unilateral modification of the MDA and the divorce decree in violation of *Towner*.[38]

Approaching the question of federal preemption and the Supremacy Clause head-on, the Tennessee Supreme Court rebuffed the position adopted by the district court in this case:

> In so holding, we are undeterred by the United States Supreme Court's ruling in *Mansell v. Mansell* [citation deleted]. *Mansell* held that the USFSPA "does not grant state courts the power to treat as property divisible upon divorce military retired pay that has been waived to receive veterans' disability benefits." *Id.* at 594-95. The trial court's decree did not divide Mr. Johnson's disability benefits in violation of Mansell.
>
> Immediately following Mr. Johnson's retirement, Ms. Johnson received $1,446.00 per month of Mr. Johnson's $2,892.00 per month retirement pay. Neither party has contended that this amount did not accurately represent one half of the amounts to which Mr. Johnson would ordinarily be entitled as a result of his retirement from the military. Thus Ms. Johnson's vested interest in half of Mr. Johnson's "retirement benefits" entitles her to monthly payments of $1,446.00.
>
> Accordingly, this case shall be remanded to the trial court for further proceeding as may be necessary to enforce its decree to provide Ms. Johnson with the agreed upon monthly payment of $1,446.00. On remand, the trial court shall give effect to its decree without dividing Mr. Johnson's disability pay.

37 S.W.3d at 898.

The Tennessee courts universally took the USFSPA's prohibition of division of disability pay as simply "limiting the trial court's ability to order direct payments . . . from the payor of [the] benefits, which we understand to be the Veterans Administration." *See Hillyer*, 59 S.W.3d, Slip Opn. at 15-16.

There is no meaningful distinction between the facts of these cases and those of this case. In fact, *Hillyer* involved a 1986 divorce decree, while *Johnson* construed a decree issued in 1996, and the fact that the decrees at issue were issued after passage of the USFSPA, or *Mansell*, was considered irrelevant.[39]

The Tennessee courts squarely addressed, and rejected, the proposition that a retiree might in any way be entitled to turn the former spouse's property into his property years after divorce. *See Johnson*, 37 S.W.3d at 896-97. The courts were also just as unimpressed as the Arizona courts had been with the retirees' claims that their applications for waiver of retired pay to get disability pay

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[38] *Towner v. Towner*, 858 S.W.2d 888 (Tenn. 1993).

[39] As noted above, the district court in this case decided that it could not enforce Judge Wendell's 1988 *Amended Decree* enforcing his 1979 *Decree* in part, because the order had issued after passage of the USFSPA. As nearly as my research has disclosed, no appellate court anywhere has ever reached a similar conclusion.

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were not "voluntary" or the result of the retirees' unilateral acts. *See Hillyer*, 59 S.W.3d, Slip Opn. at 14, n.11[40]; *see Danielson*, *supra*, 36 P.3d at 756.

The courts of Washington state have also explored the issue in the recent past, and have also come to exactly the same conclusion – a retiree cannot terminate a stream of payments to a former spouse by electing, post-divorce, to begin taking disability rather than retired pay. Where a military retiree does so, he creates such "extraordinary circumstances" that the trial court should take the"justified remedial action" of awarding compensatory spousal support four years after the divorce in order to "overcome a manifest injustice which was not contemplated by the parties at the time of the 1992 decree." *In re Marriage of Jennings*, 980 P.2d 1248 (Wash. 1999). The court noted the reduced stream of payments to the spouse, and held that:

> Regardless of the reasons, the result was fundamentally unfair because it deprived Petitioner of her entitlement to one-half of a substantial community asset with her receiving $677.50 per month less than the amount awarded her by the court. It was therefore appropriate for the trial court, in ruling on the motion by Petitioner for modification or clarification, to devise a formula which would again equitably divide the community assets without requiring the monthly amount payable to Petitioner to be paid direct from the Respondent's military retirement.

Id. at 1256.

The state high court concluded that the result reached by the trial court was "fair and equitable and within its authority." We note in passing that this Court has also approved of a post-divorce imposition of spousal support where necessary to correct an inequitable deprivation by one party of the other of property and debts. *See Martin v. Martin*, 108 Nev. 384, 832 P.2d 390 (1992)(alimony justified for one party's non-payment of debts as promised in decree); *Siragusa v. Siragusa*, 108 Nev. 987, 843 P.2d 807 (1992)(spousal support justified in light of bankruptcy eliminating property payment set out in decree).

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[40] "We are unpersuaded by Mr. Hillyer's attempts to characterize the waiver of his retirement pay in exchange for disability benefits as something other than his unilateral act. Having failed to retract the waiver or to otherwise disavow the benefits of the substitution of the disability pay, he cannot seek to be relieved of its consequences on the basis he did not 'act.' We note that, pursuant to 38 U.S.C. § 5305, Husband was only able to receive the disability benefits 'upon the filing . . . of a waiver of so much of [his] retired or retirement pay as is equal in amount to such pension or compensation.' Further, he has failed to pay his former spouse the money that she stopped receiving directly from the military, certainly a voluntary and unilateral act on his part. . . ."

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The rationale underlying the Washington Supreme Court's determination to re-establish the equitable balance set out in the divorce decree for the former spouse is explained in similar decisions of that state issued at the same time. In *In re Marriage of Knies*, 979 P.2d 482 (Wash. Ct. App. 1999), the wife had been awarded half of the husband's state pension. However, six years after the divorce was finalized, the husband was granted a job-related disability benefit in lieu of his retirement. *Id*. at 483-84. The wife requested an order requiring the retiree to pay a portion of his disability retirement to her. The Court of Appeals, reviewing the matter, held:

> In general, retirement benefits are considered deferred compensation for past services and thus are determined to be community property to the extent earned during marriage. *In re Marriage of Nuss*, 65 Wn. App. 334, 343, 828 P.2d 627 (1992). Disability payments, on the other hand, are considered compensation for lost future wages and are not an asset for distribution at the end of a marriage. Id. Nevertheless, courts look carefully at the disability payment received to determine whether the payment has characteristics of an earned pension in addition to disability. *Arnold v. Department of Retirement Sys*., 128 Wn. 2d 765, 778-79, 912 P.2d 463 (1996) (citing *In re Marriage of Anglin*, 52 Wn. App. 317, 759 P. 2d 1224 (1988)). The *Nuss* court explained:
>
> > [S]ome disability pensions may substitute for regular retirement pensions or contain elements attributable to retirement pensions. Where a spouse has elected to receive disability in lieu of retirement benefits, for instance, only the amount of disability received over and above what would have been received as retirement benefits is considered that spouse's separate property. *Id*. (citations omitted) (finding no abuse of discretion where trial court determined that company plan was community property when plan in question contained elements of both deferred compensation and future earnings replacement). *In re Marriage of Kittleson* similarly held that the trial court did not abuse its discretion when it characterized disability pension as community property. The court stated: [T]he husband had an election here between either taking his regular retirement benefit or taking the disability award, which he chose to do. Certainly, the husband could not by electing to take a disability award rather than a regular retirement eliminate the community interest in the award. *In re Marriage of Kittleson*, 21 Wn. App. 344, 352, 585 P.2d 167 (1987); accord *In re Marriage of Huteson*, 27 Wn. App. 539, 541-42, 619 P.2d 991 (1980) (determining that disability contained no elements of deferred compensation where disability occurred seven months after permanent separation of parties).

Marriage of Knies, *supra*, 979 P.2d at 486-87. These holdings are substantively identical to this Court's decisions in *Powers*, *supra*, and *Kramer*, *supra*.

In California, the courts have been even more direct. In *Krempin v. Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999), the court ordered that the spouse be compensated for

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all reductions in the sums awarded at divorce, carefully explaining why there was no conflict with federal law, while reviewing cases from all over the United States:

> There is no such "direct" conflict when the waiver of retirement pay occurs *after the judgment* and new payments are ordered to enforce what had been a proper division of marital property, even if the payments account for the military spouse' s receipt of new benefits or pay which could not have been divided in the first instance. . . .[*Mansell* distinguishable if judgment did not divide disability.] The order need only avoid "'specifying an improper source of funds' " for the payments. . . . *Mansell* does not apply to post-judgment waivers of retirement pay because it held only that disability benefits could not be divided "*upon divorce." (Mansell v. Mansell, supra*, 490 U.S. at pp. 583, 595 [italics added].)
>
> Thus, "[a] majority of state courts," on one theory or another, "take equitable action to compensate the former spouse" when that spouse' s share of retirement pay is reduced by the other' s post-judgment waiver. . . . A review of the out-of-state precedents confirms that this result is nearly universal.

83 Cal. Rptr. 2d at 138 [citations omitted; emphasis in original text].

The *Krempin* decision noted the "continued relevance" of at least one pre-*Mansell* case from California, quoting from *In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1087 (1986). That decision held that to whatever degree direct enforcement of a divorce decree might be prevented by application of federal law, 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 language quoted was the *Gillmore* principle adopted by this Court in *Gemma*.[41]

Indeed, at least one California case has gone further, and stated that where (as in this case) the original divorce decree predated *McCarty*, the existence of a disability is simply irrelevant to an attempted equal division of retirement benefits. *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (1986).

It should be stressed that the holdings quoted and cited above are not exhaustive. There are believed to be many more, but the space available on appeal is limited and this Court has previously indicated that it finds string-cites of similar cases of less use than a selection of on-point cases,

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[41] "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 of service personnel that is manifest in [the USFSPA]. . . . Under [the USFSPA], at the time the military spouse becomes eligible for longevity retirement the nonmilitary spouse' s right to share in the retirement benefits becomes fully recognized, and it was the specific purpose of [the USFSPA] to recognize and protect the rights of military 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." *In re Marriage of Daniels, supra,* 186 Cal. App. 3d at 1092-1093.

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especially if they are of recent vintage, on similar facts, and similarly situated (such as from community property states with similar laws).

Commentators and researchers have reviewed the cases from throughout the country, and reached the same results; the consensus is that a retired member cannot, by application for disability benefits, divest the former spouse of her share of military retirement benefits divided in a final and unappealed decree. *See*, *e.g.*, Fenton, *Uniformed Services Former Spouses' Protection Act and Veterans' Disability and Dual Compensation Act Awards*, Army Law., Feb. 1998, 31, 33 (noting a "'growing trend'" among courts to ensure that former spouses' property interests are protected in the event of a future VA disability award to the service member, and that such is the majority view in this country); Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 Mil. L. Rev. 40, 49 (June 2001) (noting in part the rationale that "military spouses contribute to the effectiveness of the military community while at the same time forgoing the opportunity to have careers and their own retirement").

The "bottom line" to the cases nationally is that in post-decree enforcement of a division of retired pay as property, the spouse is to be compensated for any action taken by the member that lowers the sums payable to the spouse. As in *Hillyer*, *Smith*, and *Johnson*, *supra*, the spousal interest in this case vested as of the date of the court's 1979 *Decree* and could not be unilaterally altered by any action taken by Jose after that date.

Eva was awarded a "vested right" to 41.2% of the military retired pay over 20 years ago. Jose is not allowed to unilaterally re-characterize the benefits so as to take Eva's property away from her. Since he did exactly that, the district court was required to make Eva whole by ordering Jose to restore to her the sums of which his actions deprived her. For the district court's stated grounds for refusing to do so to be valid, the court would have to have perceived some aspect of federal and community property law that has somehow evaded the appellate courts of California, Arizona, New Mexico, Washington, and Texas, among many others. It is respectfully submitted that all of our sister community property states actually got it right, and the district court erred.

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C. The Federal Courts Permit Enforcement of the 1979 and 1988 Decrees

The federal courts have come to the same conclusion as to finality of property judgments that was expressed by this Court. *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). In that case, the member stopped making payments, the former spouse sued for arrearages, and the member argued that the divorce court's order was "void and unenforceable" under 10 U.S.C. § 1408(a)(4) because his "pay from the United States Air Force is due to his medical disability and is not retirement pay subject to disposition by state court order."

The federal court rejected that argument, finding that if the retiree objected to the award to the former spouse, he had the obligation to appeal the state court judgment awarding it at the time it was entered. The federal court refused to prevent Colorado from enforcing the New Mexico judgment reducing arrears to judgment.[42]

Of course, reducing arrears to judgment is exactly what was sought here. If Jose had any problem with the award to Eva of a percentage of the gross sum of military retired pay, he was required to appeal it in 1979; if he thought the clarification embodied in the *Amended Decree* was in any way incorrect, he was required to appeal ***that*** order in 1988. *See also White v. White*, 731 F.2d 1440 (9th Cir. 1984) (no federal claim just because federal rights are implicated in a state court proceeding; suit dismissed); *Fern v. United States*, 15 Cl. Ct. 580 (1988), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990) (refuting wide assortment of federal offenses allegedly committed by spouses in state divorce courts in consolidated action brought by former military service members).

In other words, even if the Court's 1979 *Decree* or 1988 *Amended Decree* stating that Eva was to receive 41.2% of Jose's gross retirement benefit as her share of the community property ***had***

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[42] The reluctance of the federal courts to prevent enforcement of divorce court orders is a mainstay of law, both federal and state, and has been so since the founding of the republic. In *Stumpf v. Stumpf*, 249 Ga. 759, 294 S.E.2d 488 (1982), the court noted that

> federal courts rarely impinge on state domestic relations law. . . . State family and family-property law must do "major damage" to "clear and substantial" federal interest before the Supremacy Clause will demand that state law be overridden . . . The pertinent questions are whether the right as asserted conflicts with the express terms of federal law and whether its consequences sufficiently injure the objectives of the federal program to require nonrecognition.

Id., *quoting from McCarty v. McCarty,* 453 U.S. at 220.

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been somehow in error, the failure of Jose to appeal those orders back in 1988 made them final adjudications not subject to modification at any later date as a matter of *res judicata*. *Kramer*, *supra*; *Walsh*, *supra*.

D. The Cases Relied Upon by Jose are Inapposite

Unfortunately, Jose falsely claimed during the proceedings below that there was a substantial body of case law stating that courts have upheld post-divorce waivers of retirement benefits for disability benefits, and denied compensation to former spouses; indeed, he went so far as to claim that there was no majority of case law stating otherwise, and claimed (but did not identify) "many" cases supposedly so holding. App. 106-107. Even more unfortunate, by reason of apparent confusion, the district court accepted that representation, finding there to be a (essentially non-existent) "split in authority" as to whether Eva should be compensated for Jose's recharacterization and diversion of her property. App. 257.

During the five months Jose delayed filing an *Opposition* to Eva's *Motion*, he came up with only two cases that were claimed support his position; they are clearly distinguished on their facts and timing, as the district court should have held.

Both cases cited by Jose involved post-*Mansell* divorces. The first, *In re Marriage of Pierce*, 982 P.2d 995 (Kan. Ct. App. 1999) was a "double-divorce" case in which both parties were apparently fully aware of the disability. The reviewing court indicated its frustration that it had almost no factual record before it from which to say who did, or knew, what, when. The Court found, in passing, that the law was so well developed by the time of the divorce that if the spouse had sought to protect against the conversion of retirement to disability benefits, she could easily have done so.[43] 982 P.2d at 999.

Ultimately, in a divided opinion, a majority of the intermediate appellate court of Kansas upheld the use of a one-year statute of limitations to prevent the former wife from seeking modification of a property settlement involving military retired pay, acknowledging that its ruling

[43] Specifically, the court found that "Priscilla had every ability at the time of the divorce to protect herself from the situation with which we now deal. She failed to do so."

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was clearly at variance from the majority of opinions in the subject area, but was required by Kansas state law. *Id*. at 1000. The dissent noted that the result reached was "patently unfair to former spouses." *Id*. at 1000-01 (Green, J., dissenting).

In 1979, when Eva and Jose divorced, the USFSPA did not yet exist, neither *McCarty* nor *Mansell* had been litigated, and there was no law regarding conversion of retired pay to disability pay in divorce. Eva obviously ***could not have*** "protected herself" by use of "obvious" means, as the former spouse was found to have been able to do in *Pierce*.

Pierce is something of an orphan, standing on its own odd factual context, and has no following. The only known case to cite it approvingly was subsequently reversed on appeal. *Johnson v. Johnson*, 1999 Tenn. App. Lexis 625 (Tenn. Ct. App., Sept. 14, 1999), *rev'd*, *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001). All other citations appear to be to note it as an aberration, in decisions holding that the former spouse must be compensated for the member's recharacterization of her property. *See Scheidel*, *supra*; *Danielson*, *supra*; *Hillyer*, *supra*; *Smith*, *supra*.

The only other case cited by Jose as supporting his position was *Lambert v. Lambert*, 395 S.E.2d 207 (Va. Ct. App. 1990), which was inapplicable on its face, since it concerned a divorce decree rendered when the member was already drawing disability pay, and so fell squarely within the prohibition of *Mansell*. As that court pointed out, when there ***is*** such a disability award, the divorce court is to take the cash flow into account when determining an appropriate alimony award to be made to the former spouse who is being denied a portion of the cash flow as property.

The court that issued *Lambert* has subsequently held that parties are perfectly free to use a property settlement agreement to guarantee a certain level of income by providing for alternative payments to compensate for any reduction caused by a disability award, and that such an order "does not offend the federal prohibition against a direct assignment of military disability pay by property settlement agreement." *See Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (affirming an order providing that the spouse was to receive a sum equal to a percentage of the member's "gross retirement benefits," and stating that the member's request to reduce what she was owed due to his later disability claim would be "irrational").

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Jose cited several other cases in his submissions below, see App. 96-109, but he did so more for the purpose of confusion than enlightenment, mixing cases dealing with "current" divorces with those, like this one, involving claims of disability conversion.

In short, the minimal case law Jose found and presented – or that apparently exists – could not have reasonably led the district court to the conclusions it reached. The remainder of the argument submitted by Jose was merely an attempt to confuse and obfuscate the legal issues which, unfortunately, had the desired effect. App. 98-108, 255-59. To be blunt, there is no conceivable legal rationalization that could support the district court's decision in this case, and it must be reversed as a matter of law.

IV. THE TRIAL COURT ERRED IN REFUSING TO COMPENSATE EVA FOR THE FOURTEEN YEARS THAT THE "NET" VS. "GROSS" ERROR REMAINED UNNOTICED FROM 1988 TO 1998

As noted above, Eva sought and received an order for direct payment by the military pay center. It never occurred to her that the military, because of its internal regulations, would do anything other than honor the court order as written. The historical basis and description of the legal evolution of the definition of "disposable pay" is reviewed in the Statement of Facts.[44] This case is one of the "one by one" corrections that Congress has left to state courts, by finding it "unnecessary" to apply the 1991 corrected definition of "disposable pay" retroactively.

There can be no question as to the meaning of Judge Wendell's *Order* of February 19, 1988; a "vested right" to "41.2% of all of his said military retirement benefits." App. 49-50. The order was for a set percentage of the gross retired pay, and the record clearly discloses that Eva did not receive what was ordered. App. 185-200. It is conceded that the statute of limitations could be raised as to all arrearages which accrued prior to August 25, 1994, and the arrears that accrued from 1988 to 1994 would thus constitute sums ordered paid to Eva that Jose will be allowed to keep by operation of law. *See* NRS 11.090; App. 53.

[44] *See* text and notes at pages 10-11, *supra*.

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As to all sums at variance from what was ordered paid to Eva in the 1979 *Divorce Decree*, clarified in the 1988 *Amended Decree*, however, which Jose has diverted and retained, he should be ordered to disgorge them, with interest.[45]

Put more precisely, Jose should be held to be obligated as a constructive trustee to pay over to Eva any sums that were ordered paid to her, but of which he subsequently gained possession. *See Cummings v. Tinkle*, 91 Nev. 548, 550, 539 P.2d 1213 (1975) ("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").

It is worth noting that no affirmative finding of wrongdoing is required for Jose to be considered a constructive trustee of Eva's funds, only a finding that he is receiving funds ordered paid to her. *See Bemis v. Estate of Bemis*, 114 Nev. 1021, 1027, 967 P.2d 437 (1998):

> "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, 98 Nev. 369, 650 P.2d 803 (1982).

114 Nev. at 1027; *see also Danning v. Lum's, Inc.*, 86 Nev. 868, 871, 478 P.2d 166 (1970); *McKissick v. McKissick*, 93 Nev. 139, 560 P.2d 1366 (1977); *Locken v. Locken*,[46] 98 Nev. 369, 372,

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[45] This Court has held that when a judgment requires payments at a series of future dates, no cause of action accrues until and unless a court-ordered payment is missed. At ***that moment***, the missed payment "draws interest . . . until satisfied." *See e.g., Jones v. Jones*, 86 Nev. 879, 478 P.2d 148 (1970); *Foster v. Marshman*, 96 Nev. 475,611 P.2d 197 (1980); *Arnold v. Mt. Wheeler Power*, 101 Nev. 612, 707 P.2d 1137 (1985). *See also Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994) (inclusion of statutory interest is ***mandatory*** on arrears judgments); *Schoepe v. Pacific Silver Corp.*, 111 Nev. 563, 893 P.2d 388 (1995) (recovery of interest is required as a matter of right, is not discretionary, and requires determination of only the rate of interest, the time it commences to run, and the amount to which interest applies; these are factual, not discretionary, inquiries).

[46] In *Locken*, *supra*, this Court 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 Jose and Eva; that is what gave rise to her interest in the military retirement benefits in the first place. *See Rush v. Rush*, 85 Nev. 623, 460 P.2d 844 (1969) (noting "confidential relations" between spouses); *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)). Next, while Jose had a legal right to request disability benefits, his retention of legal title to the portion of the monthly benefits ordered paid to Eva would be inequitable, and in violation of the *Divorce Decree*. Finally, the creation of the constructive trust is essential to the effectuation of justice, since there is no other procedural mechanism

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650 P.2d 803, 804-05 (1982) ("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").

Since unjust enrichment will occur in the absence of a constructive trust, such a trust is appropriate. *See In re Marriage of Daniels*, 186 Cal. App. 3d 1084, 1087 (1986) (constructive trust proper whenever military retiree obtains, by way of disability application, funds ordered paid to the former spouse).

V. THE DISTRICT COURT REFUSAL TO DEEM EVA AS BENEFICIARY OF THE SURVIVOR'S BENEFIT PLAN WAS ERROR

The United States Congress determined that as of November 14, 1986, a court with jurisdiction is explicitly empowered to order members to elect to provide SBP annuities to former spouses, irrespective of the date of divorce, or retirement.[47] The only limitation is that if the member refuses to submit the required paperwork, the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.[48]

The district court could have ordered Eva to be the named beneficiary of the SBP if it was convinced that she should have been named the beneficiary. Jose's own exhibits, supplied by the military, confirm this.[49] *See also Fowler v. Fowler*, 636 So. 2d 433 (Ala. Ct. App. 1994) (lower court erred in determining that it did not have discretion to award SBP, which was "marital property").

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through which to enforce the *Decree*, so a constructive trust is necessary, in the words of the *Locken* holding, "to the prevention of a continuing injustice" – Jose's monthly diversion to himself of Eva's property.

[47] Pub. L. No. 99-661 (Nov. 14, 1986).

[48] 10 U.S.C. § 1450(f)(3)(B).

[49] *See* App. 113, letter from DFAS, noting that if Eva's request to be deemed the survivor beneficiary is granted, she will incur proportionate financial responsibility for the benefit. It is worth noting that the letter was written in response to Jose's request to shortchange Eva further, by having Eva pay some or all of the cost of the survivor's benefit that Jose wanted to direct to his current wife.

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The district court declined to do so, however, reasoning that since Jose named his current wife as survivor beneficiary when he retired in 1984, and had paid premiums (by way of reductions in the military retired pay) since then, it would be inequitable to name Eva as the beneficiary now. App. 258. The court further reasoned that since Eva had counsel in 1988, and it was theoretically possible for her to have raised a claim to the SBP during those proceedings, her failure to do so then bars her ability to make the request now. App. 258-59.

This is the one discretionary (as opposed to strictly legal) decision made by the lower court, and we submit that the district court abused its discretion in refusing Eva's claim. The asset in dispute is Eva's attempt to protect an asset earned during the course of her marriage to Jose – ***her*** right to a benefit stream unaffected by decisions Jose makes, whether to marry, divorce, live, or die. *See In Re Payne*, 897 P.2d 888 (Colo. Ct. App. 1995) (affirming divorce court's adoption of "default" position by which premiums are deducted from gross before disposable pay is divided, rejecting the husband's position that the SBP should be funded solely by the wife because it is "a court-created asset for her benefit alone" and holding instead that the SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension").

This Court has recognized that survivorship interests accrued during marriage are a valuable property right that are part of the pension to be divided. *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992); *Wolff v. Wolff*, *supra*, 112 Nev. 1355, 929 P.2d 916 (1996). Where a valuable property right, is not mentioned in the decree, it can be subject of later motion practice in partition. *See*, *e.g., Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990); *Williams v. Waldman,* 108 Nev. 466, 836 P.2d 614 (1992); *Bank v. Wolff*, 66 Nev. 51, 202 P.2d 878 (1949); *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997); Willick, *Partition of Omitted Assets After Amie: Nevada Comes (Almost) Full Circle*, 7 Nev. Fam. L. Rep., Spr.1992, at 8.

In this case, Jose completed more than 80% of his military service while married to Eva. App. 122, text and note at n.2; App. 146 (timeline). Eva is the only person with a significant insurable interest in Jose's life relating to the military retirement benefits at issue. In *Wolff*, this

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Court held that "[u]pon divorce, the community interest that [husband] and [wife] had in [husband's] retirement became the separate property of each former spouse." 112 Nev. at 1362.

When these parties divorced, Jose was still on active duty, and had therefore not yet come to the time of making an election regarding the SBP. Under the military system, all benefits to Eva will stop if Jose predeceases her, but Jose has an ***automatic*** survivorship benefit on Eva's life at no cost to him. In other words, if she dies, Jose instantly regains 100% of Eva's portion of the military retirement benefits. If ***Jose*** dies, however, Eva not only gets no additional sums, but loses all payments of the sums that are her sole and separate property, unless the SBP is in effect, which secures up to a maximum of 55% of the gross benefits, and she is the named beneficiary. This is one of the ways in which the military retirement system is skewed in favor of the member spouse.

In *Wolff*, this Court held that trial courts are required to balance the property and debts attributable to both spouses in making awards. 112 Nev. at 1360-61. It is impossible under the current federal set-up to precisely balance the prospective benefits and burdens imposed by the survivorship scheme – Jose will always have a "better deal" than Eva could possibly get because of the nature of the SBP program. The closest that our courts can do is elect to have the parties proportionally bear the cost of the only survivorship benefit that ***has*** any cost (the one to the spouse), by naming the former spouse with an insurable interest as the deemed beneficiary, and leaving in place the "default" provision of the regulations regarding payment of the premiums. *See In Re Payne*, *supra*.

Thus, as a matter of community property law, Eva should have been deemed the surviving spouse as permitted under federal law. The trial court's refusal to do so on the equitable grounds that Jose has been paying premiums for years expecting his later wife to get the benefits was erroneous. The total sum of premiums he has paid is only a small ***fraction*** of the sum that Jose has short-changed Eva during that same period, so it could just as easily be said that Eva has paid the entirety of the premium so far. In fact, it would be surprising if the entire cost of the SBP to date was even equal to the sum that the statute of limitations now makes it impossible for Eva to recover for arrearages that Jose has pocketed. If there is to be a weighing of equities, then the sum that Jose has taken and kept from Eva cannot be ignored when weighing costs.

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It is also submitted that it makes no difference that Eva's request is sixteen years after Jose's election to take the benefit. Jose's current spouse has no significant underlying claim to the asset at issue, as both the pension and its associated survivorship interest were ***marital assets*** (and the ***only*** retirement benefits) created during the marriage of Jose ***and Eva***. Jose's current spouse would only have a claim to the portion of the survivorship benefit accrued and attributable to the time she was married to Jose while he was in service, which at the most would be five years. App. 146.

The trial court only gained the power to name Eva as SBP beneficiary in 1986, and as noted above, there is no evidence in the record that Eva, her attorney, or the judge had any idea that there had been such a change in the law as of the time of the 1988 proceedings. Military members might be expected to learn of such changes by notifications sent to them by the military, and through retired military publications, but there is no evidence that if Jose knew that the court had gained the ability to name Eva as the deemed beneficiary, he ever gave her any notice of that fact.

Since the district court ignored the question of insurable interests, did not properly consider balancing the benefits and burdens of the retirement benefits distributed, and ignored Eva's community property interest in the survivorship benefits, which vested in her individually upon divorce, it is submitted that the district court abused its discretion in refusing to deem Eva the survivor beneficiary of the SBP.

CONCLUSION

Eva was granted a vested right to a portion of Jose's military retirement benefits as her sole and separate share of the community property in 1979. That order was clarified in 1988. Eva has not received what was ordered. Judge Wendell did not exceed his jurisdiction in 1979, and no federal or other bar exists prohibiting enforcement of the decree, as clarified.

The district court's finding that Judge Wendell had exceeded his jurisdiction in rendering the decree was clearly erroneous, and the district court erred in refusing to enforce that decree by requiring Jose to compensate Eva for her property, which he has been diverting and retaining since 1998, and by refusing to order Jose to pay over to Eva the percentage of the gross retirement benefits paid to him instead of to her, in violation of that final and unappealed decree.

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As every other community property state in the country has held, the member cannot be permitted by whatever means to transform his former spouse's community property share of the retirement, post divorce, into his separate property. Thus, this court should reverse the order of the district court refusing to enforce the *Amended Decree*, and remand with directions for entry of order requiring Jose to compensate Eva for all sums ordered paid to her, but which are instead being paid to him.

Further, the district court abused its discretion by refusing to recognize Eva's community property rights and insurable interest, and refusing to deem Eva as the beneficiary of the SBP derived from the retirement benefits. That order should be reversed and remanded for entry of an order requiring Eva to be deemed the beneficiary of the SBP.

Respectfully submitted,

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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 _____, 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 _____ day of _____, 2002, I deposited in the United States Mails, postage prepaid, at Las Vegas, Nevada, a true and correct copy of the **APPELLANT'S OPENING BRIEF**, addressed to:

RADFORD J. SMITH, CHARTERED
Radford J. Smith, Esquire.
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That there is regular communication between the place of mailing and the places so addressed.

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