IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

EVA OLVERA,

Appellant,

vs.

JOSE OLVERA,

Respondent.

S.C. DOCKET NO: 38233
D.C. CASE NO: D 005709

APPELLANT'S REPLY BRIEF

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STATEMENT OF THE CASE

Appellant, Eva Olvera relies upon the Statement of the Case as set out in Appellant's *Opening Brief* ("AOB"). The Court should not reference Jose's Statement of the Case, because of the apparently deliberate insertion of mis-statements therein.

Most notably, on the very first line, Jose asserts that this appeal is from the denial of a "request to modify a divorce decree." Respondent's Answering Brief ("RAB") at 2. There ***was*** no such request. The proceedings appealed from sought only ***enforcement*** of the 1979 *Decree* and 1988 *Order Amending Decree*, under the rubric directed by this Court – "clarification and enforcement." *See Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988).

Accordingly, Eva asks this Court to refer to the Statement of the Case in her Opening Brief in deciding this appeal.

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STATEMENT OF FACTS

Eva relies upon the Statement of Facts in the Opening Brief. The version proffered by Jose in his Answering Brief is not helpful to the examination of the legal merits of this case; its opening paragraph alleges the existence of "certain factual findings [that were] critical," but the ensuing 13 pages fail to point out any such "critical findings." While page one disputes the statement in the Opening Brief that there were no disputed issues of material fact, page two concedes that the "facts surrounding [the waiver of retirement benefits for disability benefits] are not in dispute." There simply were no matters disputed in testimony that are relevant to the outcome of this appeal.

Jose's invocation of *Toigo*[1] on page one of his brief is troubling. Jose asserts that even though he can't identify any disputed factual issues of relevance, the Court should infer some such dispute because there is no transcript from the hearing.[2] RAB at 1-3.

Almost the entirety of the hearing was argument by counsel (explaining their written submissions) and colloquy with the judge, none of which would be of assistance to this Court. Per NRAP 9 and 30(b), the matter of a transcript was discussed with opposing counsel in advance, and last January, we filed a Certificate in this Court indicating that no transcript was required because:

> Both counsel have been in agreement throughout that there are few disputes of fact of any kind, and it does not appear that there are any of any relevance to the outcome of the appeal. The great majority of time spent in court was spent in argument, and the argument recounted the written materials that are already part of the court record.

Jose made no counter-designation of any transcript alleged to be necessary to his argument, although he was invited to do so.[3]

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[1] *Toigo v. Toigo*, 109 Nev. 350, 849 P.2d 259 (1993), in which counsel was chastised for failure to provide a transcript while alleging that there were factual errors in the district court.

[2] This tactic has become known as the "boogie-woogie" argument, in family court litigation.

[3] By letter dated January 17, 2002, I recounted for opposing counsel the multiple times he had told me that there were no disputed issues of material fact, and suggested:

> If you believe that some portion of the testimony presented at the hearing (as opposed to our argument at length reiterating what we had already submitted in print) actually has some relevance to the determination of the legal questions before the Nevada Supreme Court, please advise as to what that is (who's testimony, and, if possible, what portion of that testimony). Obviously, I agree that any relevant factual material should be before the Court; I just don't know of any.
>
> As to the legal question you pose, I think that a fair reading would be that the opposing party could "supplement" even a request of zero testimony under NRAP 9, since any other reading would lead to an unreasonable invitation to gamesmanship that I do not believe was intended. So I think you

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Accordingly, we are willing to accept this Court's pronouncement in *Toigo* that: "In deciding cases, an appellate court must confine its consideration to the facts reflected in the record and the necessary and reasonable inferences that may be drawn therefrom . . . ." 109 Nev. at 350. Nothing further should be necessary to the legal conclusions to be reached in this case, and those "facts" asserted by Jose that are not in the record, and which he apparently made up, should be disregarded.[4]

The parties agree on all of the salient facts:

The parties married in 1957 and divorced in 1979, after 22 years of marriage. Jose was still on active duty in the military, and both parties were in good physical and emotional health. Jose had no disability, nor were there any indications of any service-related disability. Neither party raised any question regarding disability during the divorce proceedings, and the Court made no ruling concerning any possible future disability.

Shortly after the parties' divorce, Jose remarried; at the time of his retirement from the military in 1984 he had been married to his current wife for five years during military service.

When he retired from active military service in 1984, Jose was in good physical condition and with no disability rating by the military or the Veteran's Administration. He elected to participate in the SBP program upon retirement, and named his current wife as beneficiary; premiums for that benefit have come out of Jose's share of the military retirement benefits since that time.

In 1988, the District Court incorporated a domestic referee's report, amending the *Decree of Divorce* by clarifying Eva's interest in Jose's military retirement benefits as a specific percentage of the gross military retirement benefits, and providing that the military pay center was to make

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> could supplement our request for no transcript if you wanted, but, before doing so, I would appreciate some explanation of whether you have changed your mind as to what you told me earlier, or whether you think I misunderstood you, and what you think should be prepared. I have no problem with a phone call, but if we are having trouble clearly communicating on the matter, perhaps continuing in writing would be preferable. Please advise.

[4] Jose alleges Eva falsely claimed to have paid the SBP premiums, and that "upon cross-examination," Eva was revealed to have been "not candid" as to her knowledge of the program. RAB at 1, n.1. The cited pages of the record contain ***no*** false or inaccurate statements by Eva, and no finding that she was ever less than candid in the proceedings below. It just did not happen; Jose made up the allegation to bolster his argument on appeal, as discussed below in the section of this brief addressing the SBP issue.

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direct payment to Eva of her portion. Jose did not have a disability, nor was he eligible for a veteran's disability rating.

In 1993, Jose was diagnosed with cancer of the prostate. This diagnosis did not qualify him for a veteran's disability rating as the cancer was not considered service related.

In 1998, a V.A. doctor concluded that Jose's cancer had a relationship to his exposure to Agent Orange during his military service, which qualified him for a veteran's disability rating and benefits. Jose then applied for and began receiving these benefits in 1999. To obtain those (non-taxed) benefits payable entirely to him, he waived receipt of an equal sum of (taxable) retired pay, which was being split with Eva under the *Decree* of 1979 and *Order* of 1988.

Even though the parties are in agreement as to all the facts that are relevant for disposition of this appeal, counsel might have been tempted to supply a transcript of the limited testimony at the hearing, despite the caution in NRAP 30(b), except that Eva simply could not afford any expense not absolutely necessary to the appeal.[5]

In sum, Jose does not seriously challenge the history of either the facts of this case or the law in this field, as set out in Eva's Opening Brief. The modest number of accurate "facts" discussed in the Answering Brief appear to be largely irrelevant to resolution of the actual legal issues or (as in the lengthy discussion of Jose's cancer diagnosis) primarily intended to ask the Court, out of sympathy, to disregard the law and overlook the fact that Jose has been taking large sums of Eva's money for the past four years. A few comments on the presentation of specific "facts" in the Answering Brief is warranted.

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[5] A primary source of Eva's income is the retirement benefits that Jose has redirected from her to himself; she is a member of the class of persons described by one commentator with some sympathy:

> Many former spouses must re-litigate property awards or request alimony in lieu of their diminished property award, at a great expense and emotional burden. . . . For every former spouse that seeks modification of a court order after a unilateral waiver of retired pay [for disability pay], there are countless spouses who cannot afford to reopen their divorce or are unaware of their right to fight for their share.

Mary J. Bradley, *Calling for a Truce on the Military Divorce Battlefield: A Proposal to Amend the USFSPA*, 168 Military. L. Rev. 40, 120-21 (June 2001). In recognition of that fact, I have accepted this case on appeal for 6% of my normal billing rate (i.e., $30.00 per hour). Eva simply could not afford any greater fee, and it would be unconscionable to allow the legal error manifest in the order appealed from to go uncorrected just because it was a poor person who received that erroneous ruling. In light of this situation, and since there were no material issues of disputed fact, the transcript showing that there were no such issues was deemed a luxury that Eva could not afford.

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Jose repeatedly takes matters out of chronological order, to give the false impression that later-occurring events could have "caused" events that preceded them. For example, he references the 1989 *Mansell* opinion on page five, as the explanation for what Judge Wendell did and did not specifically address during the court proceedings of 1987-88, which are addressed on page four.[6] *See Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).

Similarly, at page six, Jose argues that "Eva was aware of the content of the USFSPA" in 1988, but his reference is to the *Mansell* ***interpretation*** of that law in 1989, which contradicted the interpretation of the law that was current in Nevada and California until that opinion was published. *See* AOB 9, 19-21.

As a basic matter of temporal mechanics, neither Eva nor the divorce court could have "been aware" of things that had not yet happened, and later events could not cause earlier events. This error is so pervasive throughout the Answering Brief that this Court is urged to use great caution in referencing any portion of the "factual" statements set forth by Jose.

Some of the words used by Jose appear deliberately intended to cause the reader to reach false conclusions as to underlying facts. For example, on page nine, Jose asserts that his waiver of retired pay for disability pay was "mandatory." ***Every*** court that has examined the process, however, has noted that the waiver of retired pay for disability pay is an intentional, voluntary act by a retiree which, when taken post-divorce, has the effect of taking property that has already been awarded to the spouse away from that spouse, and redirecting it back to the retiree. *See*, *e.g.*, *Danielson v. Evans*, 36 P.3d 749 (Ariz. Ct. App. 2001) (reviewing multiple similar cases); *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001) (same).

Similarly, and also on page nine, Jose claims that Eva is "characterizing the court's award as encompassing all benefits." The divorce court's award, however, was "41.2% of all of his said military retirement benefits . . . . said 41.2% of JOSE OLVERA's gross military retirement benefits

[6] Every effort will be made in this brief to avoid the sort of commentary upon adverb choice and minor typographical errors that pepper the Answering Brief's treatment of the Opening Brief. While there are many such errors in the Answering Brief as well, this filing will only reference those that appear to address substantive matters.

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[to] be paid directly to [Eva] . . . ." App. at 49-50. The Opening Brief did not "characterize" the underlying award in any way – we ***quoted*** it.

In analogous mischaracterizations, Jose refers to non-existent "admissions" (page 10) and made-up "logical inferences" (page 12) – all without any citation to the record. Still, while Jose extends a number of arguments regarding the nature and meaning of the law, nowhere does he identify any disputed questions of material fact.

The point, which we will not further belabor, is that Jose's "Statement of Facts" is unreliable, inaccurate, and apparently consciously designed to falsely characterize both the underlying facts and the underlying law. Accordingly, Eva asks this Court to refer to the Statement of Facts in her Opening Brief in deciding this appeal.

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ARGUMENT

I. THE STANDARD OF REVIEW IS *DE NOVO*

The parties agree that the question of whether Jose should be permitted to take money from Eva by way of recharacterizing his military retirement benefits as "disability benefits" is a legal issue to be reviewed *de novo* by this Court. AOB at 15-16; RAB at 14-15. The parties further agree that the question of whether Eva should be named as the SBP beneficiary is a matter of whether the district court abused its discretion in denying her request. AOB at 15-16; RAB at 15.

Jose asserts, however, that as to a sub-issue on the retirement benefits, this Court should not review *de novo*, but should find itself restricted to a more deferential review. Specifically, he asserts that the "gross versus disposable" issue should be reviewed for abuse of discretion, arguing that the decree was ambiguous and the district court has the inherent right "to construe its judgments" as a "discretionary act." RAB at 15. Jose is wrong as to both arguments.

First, the *Decree* is not ambiguous. Every court in the United States that has squarely decided the question has held that language such as: "41.2% of all of his said military retirement benefits . . . . said 41.2% of JOSE OLVERA's gross military retirement benefits [to] be paid directly to [Eva]," App. at 49-50, can have only one "usual, natural, and ordinary meaning" – the entirety of retirement benefits attributable to length of military service, ***including*** any sums that the retiree later tries to exchange for other benefits in his name alone. *See*, *e.g.*, *Johnson*, *supra*, 37 S.W.3d at 896-97; *Krempin v. Krempin*, 83 Cal. Rptr. 2d 134, 70 Cal. App. 4th 1008 (Ct. App. 1999); *Matter of Marriage of Reinauer*, 946 S.W.2d 853, *opn. on reh'g* (Tex. Ct. App. 1997). Jose has not suggested the existence of any authority from anywhere holding otherwise.[7]

[7] Cleverly, Jose tries to recast the question as whether the 1979 *Decree* intended to "include disability benefits." *See* RAB at 7. Of course there ***were*** no "disability benefits" in 1979, or in 1988; it was only Jose's recharacterization of the retirement benefits 20 years later that first created a stream of "disability benefits," which was made out of the money that up to that point had been retirement benefits divided between Jose and Eva. Jose would have the question be whether the divorce court had explicitly divided disability benefits, but that question would make no sense since there were no disability benefits at issue; more properly, the inquiry is whether the *Decree of Divorce* or clarification *Order* conditioned Eva's interest in the military retirement benefits on anything, specifically on Jose's unforseen future disability rating and corresponding waivers of retired pay. There were no such conditions in the long-since final orders.

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This Court has repeatedly held that when the language of a decree is not ambiguous, no "construction" is warranted, and the inherent power to construe decrees is not applicable. *See*, *e.g.*, *Love v. Love*, 114 Nev. 572, 959 P.2d 523 (1998) (the term "educational expenses" in marital settlement agreement was sufficiently unambiguous to encompass an order to pay private school tuition without the necessity of a hearing); *Kishner v. Kishner*, 93 Nev. 220, 562 P.2d 493 (1977); *Adams v. Adams*, 85 Nev. 50, 450 P.2d 146 (1969).[8]

Since there is no ambiguity in the meaning of the words used, the only question is the legal one of whether the award made by Judge Wendell could be enforced; that is a matter of law to be addressed *de novo*, not a matter of "discretion" to be evaluated for abuse.

The second reason Jose is wrong as to the standard of review is that the 1979 and 1988 orders were not issued by Judge ***Brown***, in Department J of the Family Division, but by Judge ***Wendell***, in Department VIII of the previously consolidated district court, and the decree was not, therefore, the district court's "own prior judgment" to construe, if construction ***was*** warranted. As pointed in *Danielson*:

> 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, *quoting from Anderson v. Anderson*, 522 N.W.2d 476, 478-79 (N.D. 1994); *see* AOB at 15.

Jose does not attempt to distinguish this holding, and he cites no contrary authority. *See* RAB at 15. Instead, as with most of the rest of his appellate argument, he does not so much ***contest*** the law cited as attempt to ignore it out of existence.

That tactic should be noted on review. The facts are that Eva is receiving far less money each month than the divorce court ordered, and Jose is receiving far more. There is no disputing that there are two causes of those under- and over-payments: Jose's election to recharacterize military retirement benefits as disability benefits, and the military pay center's direct payment to Eva of only a portion of "disposable pay," instead of a percentage of gross pay as ordered. The question of

[8] It is worth noting in passing that Jose cites this very case, while ignoring its relevant holding. RAB at 15.

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whether Jose owes money to Eva to compensate her for the sums that Judge Wendell ordered her to receive, but which he is getting instead, is a legal question to be decided by this Court on *de novo* review.

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

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

Jose entirely ignores the citations and arguments set out at pages 16-19 of the Opening Brief, and so apparently concedes that his diversion to himself of money ordered paid to Eva in 1979 and 1988 is in violation of the Nevada law of community property and finality of judgments. A failure to respond to assertions raised can be treated as confession of error. *Orme v. District Court*, 105 Nev. 712, 782 P.2d 1325 (1989); *Brion v. Union Plaza Corp.*, 104 Nev. 553, 763 P.2d 64 (1988); *see also State, Emp. Sec. Dep't v. Weber*, 100 Nev. 121, 123-24, 676 P.2d 1318 (1984) (advising counsel of sanctions for failure to refer to relevant authority).

Jose does not attempt to defend his diversion of Eva's share of the community property to himself under Nevada law, which clearly prohibits such an act. Instead, he has retreated to claiming that federal law permits him to take Eva's property in violation of state law, and there is nothing anyone can do about it. RAB at 25-28. As detailed in the Opening Brief, and below, federal law does ***not*** mandate the approval of the inequitable result, but before turning to the legal specifics, a few words are in order concerning the fact that Jose has attempted a technical defense to an odious inequity.

This Court has previously indicated that it will consider the reality of economic damage inflicted by one party upon another in considering what results are appropriate on appeal. *See Allen v. Allen*, 112 Nev. 1230, 1234, 925 P.2d 503 (1996) (where husband filed for bankruptcy in the middle of a divorce, and so had defrauded the wife out of her share of the community property, resulting order that was "inherently unfair" would be set aside).

The situation presented here is analogous. Like the husband in *Allen*, Jose does not even pretend that his actions below were defensible on any equitable ground, or permitted by Nevada

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divorce law; like Mr. Allen, he has chosen to "rely entirely on federal law as a defense," and claims that doing equity would "do indirectly what the court cannot do indirectly." *See* 112 Nev. at 1283; *cf*. RAB at 17-18. This Court need not, and should not, permit it, and when this Court finds, as it should, that federal law does not give Jose cover for his diversion of Eva's funds, the Court should recall the position he staked out when fashioning the relief to be accorded on remand.

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

On this topic, too, Jose has elected to ignore, rather than contest, the unanimous cases from around the country holding that where, as here, a pre-USFSPA and pre-*Mansell* decree divided military retirement benefits, it divided the gross sum of benefits, and a post-USFSPA order enforcing that decree is perfectly appropriate. *See*, *e.g.*, *Krempin*, *supra*; *In re Marriage of Stier*, 178 Cal. App. 3d 42, 223 Cal. Rptr. 599 (Ct. App. 1986) (where original divorce decree predated *McCarty*, the existence of a disability at any time is irrelevant); *Matter of Marriage of Reinauer*, 946 S.W.2d 853, *opn. on reh'g*, n.2 (Tex. Ct. App. 1997); *Walentowski v. Walentowski*, 672 P.2d 657 (N.M. 1983); AOB at 19-25.

Instead of attempting to address the case law, Jose attempts in this Court the trick he used below: confusing the question of finality of the 1979 *Decree* by comparing it with the situation of a divorce being entered ***today*** – after passage of the USFSPA, after the *Mansell* holding, and after Jose already started receiving disability benefits. RAB at 17-19.

We concede that if the circumstances set out in the preceding paragraph were present, a court could not divide disability benefits ***upon divorce*** today; that is the holding of *Mansell*. But that is also the ***only*** holding of *Mansell*, and as all relevant decisions have held, that decision is irrelevant to the question of whether a retiree like Jose should be ordered to compensate his former spouse when his ***post***-divorce recharacterization of benefits diverts money long since awarded to the spouse to his own pocket. *See*, *e.g.*, *Danielson*, *supra*; *In re Marriage of Strassner*, 895 S.W.2d 614 (Mo. Ct. App. 1995); *McNeel v. McNeel*, 818 P.2d 198, 200 (Ariz. Ct. App. 1991) (rejecting husband's

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attempt "to transform retirement benefits constituting community property to disability benefits constituting separate property").

As his position essentially forces him to do, Jose has refused to discuss, or even acknowledge the existence – of the specific "savings clause" provision of the USFSPA stating that an obligation such as the one set out in the 1979 and 1988 court orders "may be enforced by any means available under law" other than directly through the pay center. 10 U.S.C. § 1408(e)(6); *see* AOB at 5-6, 18. Jose cannot be allowed to ignore out of existence the statute, and the cases throughout the country referencing it, ***all*** of which hold that a pre-USFSPA decree dividing military retirement benefits is unaffected by any later federal statute or case interpreting that statute.[9]

The Court should note that Jose has refused to address the distinction raised in the Opening Brief between divorce decrees final ***before*** the USFSPA and *Mansell* existed, and those that became final thereafter. *See* AOB at 9-10 & n.17, 19-25, 26. To counsel's knowledge, there has never been ***any*** published opinion in which the divorce decree dividing military retirement benefits preceded the USFSPA, and the military member waived retirement benefits for disability benefits after divorce, in which the member was ***not*** ordered to reimburse the former spouse for all sums he diverted from her to himself. Jose has cited no such authority.

Jose has elected to ignore, rather than contest, the ***unanimous*** cases from around the country holding that where, as here, a pre-USFSPA and pre-*Mansell* decree divided the gross military retirement benefits, neither the USFSPA nor any case decided under it have any application, and the decree is to be enforced as written. *See*, *e.g.*, *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). Instead, while silently

[9] It is for this reason that Jose's repeated claim at the end of his brief that the 1988 order created an "ambiguity" – when it specified both a division of gross retirement benefits, and direct payments to Eva – is nonsense. The savings clause makes it clear that "nothing [in the statute] shall be construed to relieve a member of liability for . . . payments ordered by a court . . . . Any such unsatisfied obligation may be enforced by any means available under law." In other words, if Eva did not get the full sum ordered by way of direct payment from the military pay center, then Jose was obligated to pay the deficiency himself. He did not do so, and owes the entire sum of the difference between what was ordered, and what was paid. For the same reason, his attachment of Eva's 1987 affidavit (see RAB at 10-11) is irrelevant – she requested direct payment, and that was the purpose of the 1988 proceedings, but doing so in no way could or did detract from what was ordered in 1979.

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ignoring ***those*** cases, Jose asserts that the cases involving ***post***-*Mansell* divorces are "distinct" because in the post-*Mansell* era, decrees tend to contain indemnification language. *See* RAB at 24.

That brings us to Jose's request that this Court ignore its own decision in *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982), which he buries at the end of his brief, arguing that the decision is inapplicable on his assertion that "unlike the facts in *Duke*, the law enforced by the court was in existence at the time of the amendment to the decree." RAB at 28. He is wrong in every respect.

First, the federal case at issue in *Duke* was *McCarty v. McCarty*, 453 U.S. 210 (1981), which interpreted the federal statutory law in existence at the time the Dukes divorced. The federal court decision stated that the existing law did not permit the benefits to be divided as community property, and this Court phrased the issue, concisely as whether that pronouncement "should be given retroactive effect so as to disrupt a final, unappealed divorce decree" which had been rendered before that interpretation of the law was made. 98 Nev. at 148.

Here, as in *Duke*, the rights of the parties stemmed from a final, unappealed divorce decree that predated all the statutes and cases involved – in fact, the divorce decree in *Duke* was entered a year ***later*** than the *Decree* at issue in this case. Also as in *Duke*, a federal court case purporting to explain the meaning of a federal statute was issued long after the last court order became final and unappealed. Certainly, the 1988 clarifying order did nothing to make the 1979 *Decree* any "less final" than it had been, and neither party appealed the 1988 order. It was final long before *Mansell* was handed down in 1989.

McCarty stated that under existing law, the retirement benefits were not divisible; based on that authority, Forrest Duke wanted to stop payments required to his former spouse despite his final, unappealed decree. *Mansell* stated that under existing law, disability benefits were not divisible; based on that authority, Jose Olvera wants to stop payments required to his former spouse despite his final, unappealed decree. There is no difference, except that Jose ***created*** the "disability benefits" long after the divorce by electing to receive them and waiving the previously-divided retirement benefits.

The only way this Court could affirm the decision below in this case would be to overrule *Duke*. Since *Duke* is logical, legally correct, and in the mainstream of all other decisions in this field,

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no such overruling would be reasonable. Eva is entitled to exactly what her divorce decree states that she is entitled to, and the district court's refusal to enforce the 1979 *Decree* was reversible error.

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

This is the core of the legal issues. To Jose's credit, he acknowledges the existence of the decisions from around the United States that hold that a retiree recharacterizing benefits that were made the separate property of the former spouse is required to reimburse to her the sums he diverted; however, Jose could not resist the urge to use language minimizing the number and unanimity of those decisions. *See* RAB at 18-21.

In the Opening Brief, we stated that "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." AOB at 24. In the months that have passed since the Opening Brief was filed, the appellate courts of two additional states have lined up with that consensus; more, presumably, will do so after this brief is filed.

In *White v. White*, ___ S.E.2d ___ (No. COA01-1105, N.C. Ct. App., Sept. 3, 2002), the appellate court considered a case involving a 1989 divorce during the husband's active duty, and an order awarding the wife "one-half of the [husband's] pension accumulated [during the marriage]." Neither party appealed the divorce decree. After retirement, the husband applied for and received a VA disability award, and waived an equal amount of retired pay to obtain the tax-free disability payments, reducing the money flowing to the former spouse by about half. The court summarized these events as a means by which the retiree "unilaterally acted so as to diminish [the former spouse's] share of [the retiree's] monthly benefits while simultaneously maintaining his own monthly benefits, as well as increasing his after-tax income."

The former spouse filed a motion seeking an order requiring the retiree to make up the sums that had been diverted; the motion was refused by a trial court which held that "federal law continues to preempt state law on the issue of dividing upon divorce military retirement pay that has been waived to receive disability benefits."

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The appellate court reversed, noting that the conclusion of law was to be reviewed *de novo*, and constituted reversible error because ordering reimbursement to a former spouse under such circumstances is not a matter in which Congress has "positively required by direct enactment" that state law be pre-empted. In fact, the appellate court went further, commenting that despite the retiree's claims and the trial court's conclusion, "the holding in *Mansell* was actually quite narrow" and had nothing to do with the former spouse's claim for reimbursement of the diverted sums.

The appellate court directed the lower court to modify the spouse's percentage of the remaining benefits as necessary "to effectuate the terms of the original [divorce decree]" and order payment of accrued arrearages, holding that "neither *Mansell* nor the FSPA prohibits a state court from amending a qualifying order to increase a non-military spouse's share of a military spouse's retirement pay where the military spouse has, subsequent to the original qualifying order, elected to receive disability benefits in place of retired pay."

Similarly, *Janovic v. Janovic*, 814 So. 2d 1096 (Fla. Ct. App. 2002), involved a 1999 divorce that divided military retirement benefits. Less than a year after divorce, the former husband was discharged from the Navy and waived a portion of his retirement benefits in favor of receiving VA disability benefits; the former spouse filed a motion to enforce the final judgment and equitable distribution or, in the alternative, for reimbursement for all sums that had been awarded to her but his actions diverted to him. *Id*. at 1098. The trial court ordered reimbursement.

The husband appealed, claiming that the wife was only entitled to a share of "disposable retired pay," and his application for disability had eliminated the disposable pay and created "disability pay," which he alone was entitled to receive. The reviewing court affirmed the order requiring reimbursement. Since it was a post-*Mansell* divorce, the decree had included an indemnification provision[10] because of the "higher standard of clarity" required of decrees after *Mansell* to be certain of the divorce court's intent.

[10] The specific language reviewed by the court was the form paragraph I created for courts to use in decrees entered after *Mansell* to eliminate any ambiguity upon appellate review. It was published by the ABA as a guide for drafting attorneys in the form of "Military Retirement Benefit Standard Clauses." *See* 18 Family Advocate No. 1 (Summer, 1995) (*Family Law Clauses: The Financial Case*) at 30.

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The court rejected the retiree's argument that ordering reimbursement violated *Mansell*, stating that it merely enforced the parties' property settlement agreement rather than dividing disability benefits. The court noted that such enforcement of the intent at the time of the dissolution was appropriate whether or ***not*** the original order contained a specific indemnification provision. *Id*. at 1100, *citing Longanecker v. Longanecker*, 782 So. 2d 406, 408 (Fla. Ct. App. 2001).

Explaining, the court stated that courts maintain jurisdiction to enforce final divorce judgments, and that when a party "only seeks to receive what is contemplated by the property settlement agreement incorporated into the final dissolution judgment, the relief sought is enforcement rather than modification," and equivalent reimbursement payments are proper as part of an enforcement action where one spouse takes an action which defeats the distribution intended in the divorce order. 814 So. 2d at 1101; *see also Longanecker*, *supra*, 782 So. 2d at 407-08, n3. Finally, the appellate court noted that "[t]he equity of the result reached . . . is undeniable." 814 So. 2d at 1101.

In other words, a retiree who recharacterizes retired pay as disability pay and so diverts money awarded to his former spouse back to himself, is required to reimburse the former spouse for all sums diverted, according to the highest courts to consider the question in California, Arizona, New Mexico, Texas, Utah, Kansas, Florida, Alaska, New Jersey, Virginia, Idaho, Maryland, Missouri, Tennessee, Washington, and, most recently, North Carolina.

Against the weight of that authority, Jose argues for application of a single divided decision from the intermediate appellate court of Kansas, which is inapplicable on its face since it concerned a ***post***-*Mansell* divorce which lacked any indication that indemnification was intended.[11] RAB at 25; AOB at 37-39.

In other words, the "split of authority" claimed by Jose at page 24 simply does not exist. Likewise, the district court was confused in finding such a "split of authority" – the two cases referenced in the order both state that reimbursement is owed when the retiree diverts the former

[11] The *Johnson* decision mentioned in the quoted text on page 24 was the same case that, when reversed on appeal, put Tennessee into the nearly-unanimous fold of cases requiring retirees who recharacterize benefits to reimburse their former spouses for all sums diverted. *Johnson v. Johnson*, 37 S.W.3d 892 (Tenn. 2001).

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spouse's property award back to himself. *See* App. 257. Specifically, *Harris v. Harris*, 991 P.2d 262, 265 (Ariz. Ct. App. 1999), held:

> [W]e viewed the amount allocated to the wife by the trial court as her "vested interest" in the divisible marital asset portion of the husband's retirement pay and concluded that the husband, therefore, could not "frustrate" the trial court's decree by "voluntarily waiving retirement benefits which the court had vested in [the] wife" by his unilateral post-decree conduct.

There is no contradiction in *In Re: Marriage of Reinauer*, 946 S.W.2d 853, 860-61 (Tex. App. 1997), which held:

> Reinauer averred that the judgment from which this appeal was taken improperly modified the 1979 decree. That is, the trial court allegedly lacked jurisdiction to declare, approximately sixteen years later, that the interest of his ex-wife, Margaret Cowan, in the retirement benefits be calculated in reference to his "gross retirement pay received monthly," including "cost of living increases." . . .
>
> A trial court has the inherent power to issue orders "necessary to carry . . . [a prior] judgment into execution in a manner which [is] consistent with the provisions and finality of the judgment." *Schwartz v. Jefferson*, 520 S.W.2d 881, 888 (Tex. 1975). . . .
>
> Here, in dividing the community estate in 1979, the trial court ordered that one-half of the "community interest" in Reinauer's "retirement pay" be paid to Cowan. . . . In other words, as long as Reinauer receives retirement pay from the military, that is, pay in the form of compensation accruing due to his years of service with the military, Cowan is entitled to her fractional portion of the *entirety*. Moreover, as that pay rises and falls her fractional interest remains the same (though the amount actually received may rise and fall); this is so as long as the rise or fall is attributable to an increase or decrease in the compensation accruing Reinauer due to his years of service. To read the provision differently would be tantamount to ignoring the literal language of the court.

The cases do not indicate any "split in authority." *Harris* discusses a post-divorce application for disability pay, while *Reinauer* discusses the power of the court to clarify prior orders of the court. Both are fully applicable here; the order appealed from is indefensible under the cases cited, and Jose has suggested no authority that might support it.[12]

Apparently understanding that he has no substantial legal authority for his position, Jose's brief reverted to an assortment of tactics, including a deliberate effort to confuse current divorce cases with those involving post-divorce recharacterizations, RAB at 18-19, 21, 27; addressing minor, irrelevant factual differences from case to case as if they affected the legal holdings, RAB 19, 23;

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[12] Up to this time, there has not been a reference work analyzing all of the waiver-of-retirement-for-disability cases in one place and in an analytical, educational format. Undersigned counsel was asked to rectify that omission by way of a seminar paper, to be delivered at the Legal Education Institute conference to be held in January, 2003, at Aspen, Colorado. Since it has not yet been formally published, a copy of the seminar paper is attached as Exhibit 1. While much of the case law reviewed in the paper is (of course) the same as that discussed in the parties' briefs, the analytical format of the paper, which breaks the cases down by type and time, may be of use to the Court.

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and even outright insult directed at the many courts which have not condoned the inequity he seeks, labeling their decisions "logical sleight of hand designed to ignore the federal scheme" and "preconceived results" intending to make "an indirect division of veteran's disability pay." RAB at 18-20.

Jose's insulting of the integrity of the appellate courts of most of the United States is not helpful to this Court's legal analysis. In fact, the courts that have explicitly considered the "doing indirectly what you couldn't do directly" argument (that he champions and the family court judge relied upon) have rejected it out of hand. *See* RAB 18; App. 257; *cf.*, *e.g.*, *Danielson*,[13] *supra*; *White*, *supra* (rebuffing as outrageous the allegation that ordering reimbursement violated "the spirit of *Mansell*"); AOB at 23. There is no federal policy encouraging or condoning unjust enrichment and the post-decree victimization of former spouses.[14]

One erroneous analysis urged by Jose concerns the measure of damages; he suggests that he should not be made to compensate Eva precisely for the sum he has diverted from her to himself, and cites one case for that proposition, *Clauson v. Clauson*, 831 P.2d 1257 (Alaska 1992). RAB at 20-21. That case, however, involved a remand under which the lower court was to "redistribute other assets" in order to "do equity upon divorce," and the lower court was thus required to consider the "circumstances of the parties" in shaping every aspect of its award, as all divorce courts are charged with doing. *See*, *e.g.*, NRS 125.150 (same policy directions for property and alimony in Nevada).

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[13] What is startling about Jose's argument is that he repeats, word for word, ***precisely*** the arguments specifically rejected as baseless by the appellate court in *Danielson*. *Compare* RAB at 23, lines 25-28, *with Danielson*, *supra*, 36 P.3d at 756. His asserted distinction of that case is meaningless. A "vested" benefit is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay). As the *Danielson* court pointed out, at the moment of divorce, Eva's interest in the retirement benefits became just as vested as did Jose's, in the sense that both were protected by law from any attempt by the other to purloin from him or her the interest in the benefit stream awarded by the divorce court. *Id*.

[14] One California appellate court perhaps best explained why it would not imply a requirement of reaching an inequitable and unfair result from federal statutes that do not require it. Holding that to the degree direct enforcement of a divorce decree was prevented by a military member's application for a disability pay award, the member received any sums that had already been awarded to the spouse as a resulting trustee, and was required to pay them over to her, the court expressed its confidence that the federal courts would approve, stating that: "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*, 186 Cal. App. 3d 1084, 1092-1093 (Ct. App. 1986). Nevada has precisely the same underlying law and policy, *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), and this Court should express the same confidence that federal law does not require it to create an inequity.

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In all of the many cases requiring reimbursement by the retiree that discuss the measure of damages, the sum ordered is identical to the sum that was diverted. A typical explanation was that of the court in *Dexter v. Dexter*, 661 A.2d 171 (Md. Ct. Spec. App. 1995), which the court categorized as "breach-of-contract damages," through which the former spouse was entitled to the benefit of her bargain with the retiree under which she would receive 47.5% of his military retirement benefits. The retiree later elected disability benefits, reducing the sums paid to the former spouse as her share of the longevity benefits. The trial court rendered judgment "for past sums that would have been received had appellant not unilaterally violated the terms of the agreement by waiving and rejecting the retirement benefits after they had accrued and vested and were being received by both parties." *Id*. at 175.

The appellate court affirmed, noting that it was not "operation of federal law" but the retiree's "rejection, by waiver, of the retirement benefits" that had led to the former spouse's losses, and that a "pensioned party may not hinder the ability of the party's spouse to receive the payments she has bargained for, by voluntarily rejecting, waiving, or terminating the pension benefits." *Id*. at 175-77. Based on those factors, the court held that "the measure of past damages is the amount the receiving spouse would have received had appellant not committed the breach," and specifically held that nothing in *Mansell* applied in any way to such an order for the payment of reimbursement damages. *Id*.

Perhaps most disingenuous of the distractions from the law Jose attempts to raise to rationalize the decision below is his extended discussion of Social Security law. RAB at 21-23, 29.

No court, anywhere, has ***ever*** held that there is any analogy or similarity between the federal statutes he discusses. The few courts discussing anything near the question have made a point of mentioning that (unlike Social Security benefits) parties are ***free*** to contract to divide disability benefits if they wish, which agreements are fully enforceable.[15] *See*, *e.g.*, *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989) (opinion on remand); *MacMeeken*, *supra*; *Hisgen v. Hisgen*, 554

[15] Jose's unsupported assertion that "even if Jose and Eva had agreed to the division of disability benefits as part of their decree, that agreement could not be enforced," RAB at 23, is false on its face under every decision that has ever reached that question.

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N.W.2d 494 (S.D. 1996); *White*, *supra* (at n.1); *see also Silva v. Silva*, 680 F. Supp. 1479 (D. Colo. 1988) (rejecting retiree's claim of a federal interest overriding state court judgment); *cf. Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997) (Social Security benefits not divisible by agreement of parties or court order, since they are part of federal entitlement scheme in which spouses are accorded an independent interest, and not a retirement system).

Startlingly – and without citation to any relevant authority – Jose asserts that Nevada community property law is somehow different than the law of all other community property states. RAB at 23, lines 3-4. It is from this unspecified "difference" that Jose derives his claim of immunity to the reimbursement ordered by all ***other*** community property states when the retiree diverts the former spouse's separate property benefit stream back to himself.

Counsel is aware of no such "difference" between Nevada's community property scheme and that of the other community property states; no such critical "difference" has ever been found by Nevada's delegates to the Council of Community Property States. *See*, *e.g.*, *Characterization, Valuation and Division of Intangible Assets* (Council of Community Property States & State Bar of Washington; Annual Symposium, Seattle, Washington, 2001). As Jose has not specified what that "difference" is, or how it can be construed to justify his unjust enrichment at Eva's expense, it is respectfully suggested that no such "difference" exists.

Similarly, the dozens of cases referenced above that have examined decrees dividing "the gross sum of benefits" or "all of the retirement benefits" have focused on the plain meaning of the language used, and efforts such as Jose's to place the emphasis on the word "retirement" (so that when he recharacterizes the benefits, they are no longer "retirement" but "become disability"), have been uniformly rejected. *See* RAB at 26-27; *cf. Danielson*, *supra*; *Johnson*, *supra*. Jose simply cannot ignore the words "gross" and "all" out of the court orders at issue. *See* App. at 49-50.

Jose is obligated to restore to Eva, dollar for dollar, all sums he has diverted from her to himself by reason of his recharacterization of her share of the retirement benefits as disability payments going to himself. The district court's order to the contrary, App. 257, should be reversed

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and remanded for entry of an order of immediate reimbursement, plus interest on each deficiency from the time it accrued.[16]

IV. 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[17]

As noted above, any possible ambiguity in the language used in the 1979 *Divorce Decree* was resolved by the 1988 order of Judge Wendell clarifying that the *Decree* intended to divide "all" of the military retirement benefits – the gross sum of retirement benefits payable as a result of Jose's military service. As the cases set out above specified, that language is unambiguous, and has only one natural meaning. *See Matter of Marriage of Reinauer*, *supra*; *Johnson*, *supra*; *Krempin*, *supra*.

The text above has addressed the various points, and various ways, in which Jose attempts to mislead the Court into concluding that there was something wrong with the 1979 *Decree*, as clarified and enforced in the 1988 order. As every case addressing the point has unanimously concluded, a 1979 divorce court order, clarified to show that the gross sum was intended to be divided, is to be honored and enforced. There is no contradictory authority.

The district court's order finding a federal bar to enforcement of that order, App. 257, is plain error; it should be reversed and remanded for calculation of the sum due, with interest as to every deficiency as to which the statute of limitations had not run when Eva filed her motion to enforce the judgment.

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[16] On remand, all associated orders should be likewise reversed. Specifically, Jose was granted a $1,000.00 offset against a sanction that had been imposed, representing an award to him of an attorney fee as "prevailing party" on the retirement issue. App. 259. That award should be reversed.

[17] To explain what might look like a counting error, there were ten years of arrears that accrued from 1988 to 1998, and another four years that have passed since then.

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

In three separate sections, Jose defends the family court's refusal to name Eva beneficiary of the SBP benefits payable upon Jose's death. RAB at 12-14, 16-17, 30. The family court had found that Jose "relied upon" the SBP for his estate plan. App. 258.

Neither the court below, nor Jose in his Answering Brief, however, addressed the matters set out in the Opening Brief – only Eva has any significant insurable interest in the ***underlying benefits themselves***, since they accrued during her marriage to Jose, and while Jose has an automatic survivor interest in Eva's life, she has been denied a corresponding survivor interest in his, in violation of this Court's holding in *Wolff v. Wolff*, 112 Nev. 1355, 1360-61, 929 P.2d 916 (1996). Jose's failure to address those points could be taken as a confession of error, *Weber*, *supra*, but we will address the points that Jose ***did*** raise in opposition.

His primary argument, echoing the finding of the district court, is that since Eva knew there was such a thing as an SBP program in 1988, her failure to ask for benefits then somehow estops her from making the request to be named beneficiary once she knew it was possible to do so. App. 258-59; RAB at 13-14.

Knowing that there is such a thing as an "SBP," or a Cadillac, is an entirely different thing than knowing that you have the right to claim ***ownership*** of either. There is no evidence of any kind that Eva ever knew that she had a right to make a claim to be SBP beneficiary any time before she made that claim through present counsel. The district court found that since Eva was represented by counsel in 1988, she is held to have had full knowledge of every possible legal claim she might have made (whether anyone actually knew of them or not). App. at 258-59.

Counsel is unaware of authority that would support that ruling, and Jose does not suggest the existence of any such authority in his brief. The general proposition of "estoppel" does not make sense under these circumstances. *See*, *e.g.*, *Gramanz v. Gramanz*, 113 Nev. 1, 930 P.2d 753 (1997) (where both parties explicitly knew property to exist at time of divorce, later suit to redistribute property was nevertheless proper where parties were mistaken about the ***value*** of the property in

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question). Certainly, if a mistake as to ***value*** can justify a later action, then a mistake as to a potential right to bring a claim of ownership at all can justify such an action.

The point is illustrated by Jose's own filing. Jose claims that his lack of knowledge that Eva had a right to be named as beneficiary made him "ignorant of the true state of facts," but labels ***Eva's*** identical lack of knowledge of her right to make a claim irrelevant because she was "presumed" to know of that right by virtue of hiring a lawyer. RAB at 17. The double standard seems apparent on its face.

Jose fails to show that Eva was ever aware that she was entitled to the SBP prior to 2000. The record indicates that neither she nor anyone else was aware of that fact. It is respectfully submitted that "estoppel" is not a valid or intellectually honest rubric for this decision. *See Anderson v. Anderson*, 107 Nev. 570, 816 P.2d 463 (1991) (noting necessary element of intent to mislead other party for equitable estoppel to be found); *Southern Nev. Memorial Hosp. v. Department of Human Resources*, 101 Nev. 387, 705 P.2d 139 (1985); *Lubritz v. Circus Circus Hotels*, 101 Nev. 109, 693 P.2d 1261 (1985).

One allegation made by Jose as to the proceedings below is simply false and thus requires specific comment (this was briefly mentioned in footnote 4, *supra*). He asserts that "In her initial motions, Eva contended that she had paid all of the premiums for the SBP benefits." RAB 1, n.1. His citation to the record is to App. 258. Jose never indicates in what pleading that "contention" was supposedly made, because it wasn't. The cited page of the Appendix is to the district court's order, which contains no mention of any such contention by Eva.

The closest thing to such a topic in the record is found in Eva's *Reply to Opposition* filed January 22, 2001, which states, correctly:

> First, Jose claims he has been paying the monthly premiums on the SBP for 16 years. This is most probably true on its face. Of course, the total cost in question 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, in fact, has paid the entirety of the premium so far. In fact, it would be surprising if the entire cost of the SBP to date were even equal to the sum that the statute of limitations now makes it impossible for Eva to recover for arrearages that Jose has pocketed. So he gets no brownie points for having paid the premiums.

App. 131, lines 22-28; *see* AOB at 43. We do not believe the quoted language is in any way unclear, and will chalk up counsel's misrepresentation of the record to a bit of (overly) zealous advocacy.

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The point, however, is that just the amount Jose has failed to pay to Eva that is cut off by the statute of limitations is greater than the SBP premiums at issue in this case,[18] so in any weighing of equities, indeed there would be no "unfairness" in Eva being named the SBP beneficiary, since she has already been shortchanged (and Jose has been wrongfully enriched) a greater sum than the entirety of the premiums paid for that future benefit.

Jose is simply wrong in his attempted distinction of *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990). Jose asserts that the "omitted asset" in *Amie* "existed during the marriage," RAB at 16, but the case actually concerned the proceeds of a lawsuit for lost wages brought by her former husband during the marriage, but not collected until after divorce. The only thing that existed during the marriage was the ***potential*** realization of a divisible asset.

Similarly here, as Jose points out, he was still on active duty when the parties divorced in 1979. The SBP did not exist, except as a potential future asset, the right to which accrued during the marriage, but which had not yet matured at the time of divorce. RAB at 16. It was not until Jose retired in 1984 and Congress expressly permitted state courts to name former spouses as SBP beneficiaries in 1986 that Eva could have asked to be named as beneficiary. Accordingly, the SBP beneficiary designation here was as "omitted" as the possible future lawsuit proceeds in *Amie*.

In *Amie*, this Court found that the wife's equitable action for partition of a portion of the suit for back wages did not violate any of the "policies and purposes of the doctrine of res judicata," so there was "no reason in fairness and justice that she should not be allowed to proceed to have this property partitioned in accordance with *Wolff*." 106 Nev. at 543, 796 P.2d at 235. Similarly here, those "policies and purposes" would not be contravened by the claim at issue.

That is not to say that there are not equities on both sides, since Jose expressed the desire to leave the benefit stream to his present wife. We are also forced to concede that the question is one of discretion. However, since Jose's present wife has no substantial underlying community property rights to the retirement benefits themselves, we believe that Eva's right to secure her separate

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[18] The maximum SBP premium is 6.5% of the retired pay, while we estimate the "gross versus disposable" differential that Jose has failed to pay to Eva for the past 14 years at about 10% of the total retired pay (her 41.2% of the tax, which we estimate at about 25%). On remand, we will ask that Jose be compelled to provide all information necessary for a precise calculation of arrearages.

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property income stream should be considered a superior right, and that the district court's failure to name Eva as the SBP beneficiary therefore constituted an abuse of discretion.

On appeal, Jose derides us for not addressing the matter at greater length. RAB at 30. We do not believe that doing so would add anything to the choice before this Court. The facts are relatively straightforward, and the policy choice for this Court has to do with whether it places greater importance on affirming family court discretionary calls when there are considerations on both sides, or in ensuring that the benefits and burdens distributed on divorce are equal, and those with a separate property insurable interest in a stream of retirement benefits are to be given priority in securing that interest. We think, on balance, the choice made constitutes an abuse of discretion, in part because the decision made was not made for "appropriate reasons." *See Gepford v. Gepford*, 116 Nev. 1033, 13 P.3d 47 (2000) (enunciating standard of review).

CONCLUSION

This is not an appeal from a divorce decree; these parties have been divorced for 23 years. The question is what should be done about Jose's post-divorce recharacterization of benefits that has taken Eva's property away from her and put it in Jose's pocket. Eva is not asking the court to make any order which will divide – or attempt to divide – Jose's disability benefits. To the best of Eva's knowledge, there is no legal basis upon which it could do so. Neither does she contend that Jose did not have the right, as it relates directly to him and the Veteran's Administration, to apply for and receive disability pay.

Rather, it is her contention that Jose did not have the right as between the parties to take unilateral action to wipe out her court-ordered share of his longevity benefits without reimbursing her for whatever sums of her separate property his voluntary act caused to be redirected from her to him. Every known decision of every appellate court in the United States that has reached the question has stated that when a divorce decree entered before *McCarty*, before the USFSPA, and before *Mansell* divided military retirement benefits, that division is to be enforced irrespective of the retiree's post-divorce application for disability benefits, by way of ordering the retiree to reimburse the former spouse for all sums that he diverted.

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Similarly, the family court judge had no legal basis for refusing to enforce the divorce court's long-since final and unappealed division of the gross sum of the retirement benefits, which was res judicata. The family court's failure to enter an award for those arrearages remaining within the statute of limitations was error.

This Court should reverse the order of the district court, and remand with directions for entry of an order fully compensating Eva for all sums ordered paid to her, but which are instead being paid to Jose, with interest from the date of each arrearage.

Finally, the district court abused its discretion by refusing to recognize Eva's superior community property rights and insurable interest in the SBP, and refusing to deem Eva as the beneficiary of that plan. 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.

LAW OFFICE OF MARSHAL S. WILLICK, P.C.

_____
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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 REPLY BRIEF**, addressed to:

RADFORD J. SMITH, CHARTERED
Radford J. Smith, Esquire.
64 North Pecos Road, Suite 700
Henderson, Nevada 89074
Attorney for Respondent

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

_____
An Employee of the
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