IN THE SUPREME COURT OF THE STATE OF NEVADA

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MARY K. WALTZ,	)	
	)	
Appellant,	)	S.C. CASE 24141
	)	D.C. CASE D 118403
vs.	)	
	)	
JOHN E. WALTZ,	)	
	)	
Respondent.	)	

APPELLANT'S OPENING BRIEF

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   A. Whether Certain Specific "Magic Words" are Required to Make an Alimony Award Irrevocable.

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   C. Whether, if the Decree was Ambiguous, it should be Interpreted in Accordance with the Evidence Submitted Below of the Intent of the Parties in Negotiating it.

II. Whether the district court erred in Effectively Ordering Repayment of Alimony Already Accrued and Paid to Mary.

STATEMENT OF THE CASE

Appeal from Order sustaining Objection to Domestic Relations Referee's Recommendations, Hon. Myron E. Leavitt, Eighth Judicial District Court, Clark County, Nevada.

A Domestic Relations Referee entered a Recommendation awarding arrears to Appellant in 1991. I ROA 27. No appeal was taken from the resulting Order reducing arrears to judgment.

In 1992, Respondent filed a motion seeking to hold Appellant in contempt. Appellant countered with a motion seeking contempt and further arrears against Respondent. An evidentiary hearing was held before the Domestic Relations Referee, who entered a Recommendation that the "alimony" provision in the Decree was intended to be a pension division, couched in alimony terms so as to allow for direct payments from the military pay center. I ROA 146-48. Respondent objected, and further hearings were held before Judge Leavitt, who entered an Order on November 17, 1992, sustaining the Objection and by the terms of the Order halting any further payments to Appellant, "undoing" the unappealed Order entered a year earlier, and entitling Respondent to request a retroactive repayment. II ROA 326-331. It is from this Order that Appellant is appealing.

Notice of Entry of the Order was served by mail on Appellant's counsel on November 20, 1992. II ROA 332. Notice of Appeal was filed on December 14, 1992. II ROA 342.

STATEMENT OF FACTS

Appellant MARY K. WALTZ ("Mary") and Respondent JOHN E. WALTZ ("John") were married April 10, 1978, and divorced July 27, 1989. I ROA 1, 5. John was member of the United States Air Force for over twenty years, and thus had a right to a military retirement. The marriage and service overlapped for a few months less than ten years, making a direct division of the pension as property unenforceable by means of direct collection from the military pay center. I ROA 84-85, 156-57. The parties had comparatively little property, and the military retirement was their most valuable asset. I ROA 1-2.

Mary hired attorney Robert LePome, Esq., who filed a complaint for divorce for her on June 21, 1989. I ROA 1. John was served, and subsequently hired attorney Michael Root, Esq. II ROA 235-36. Mr. LePome met with Mary and John, but broke off the discussion when he found out that John had hired Mr. Root, so that negotiations could be made through counsel as contemplated by the Supreme Court Rules. II ROA 259-260.

Mr. LePome then negotiated the retirement issue with Mr. Root. The attorneys discussed the problem with direct collection of a property award when the parties are married for less than ten years during active duty.[1] II ROA 262-64. The attorneys resolved the matter by agreeing to reduce Mary's time-share percentage of the pension ($217.00 per month) to $200.00 per month, but to characterize it as alimony for the purpose of allowing the military pay center to pay it directly to Mary. II ROA 263.

Mr. Root, representing John, not only understood the terms, but was actually the source of the proposal of making the sum $200.00 exactly and converting the form of the payment to

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[1] As noted in the proceedings below, the collection problem is due to a technicality of federal law arising from the conference committee compromise through which Congress passed the USFSPA in 1982. I ROA 156. The House and Senate versions of the Act were combined such that the substantive right of a spouse to collection for any term of military service during marriage was retained, but the right to seek direct collection of a spousal share when the order is phrased as a division of property (as opposed to an alimony award) was limited to spousal shares accruing for more than ten years. See 10 U.S.C. § 1408(d)(2). Hence, in cases like this one, in which the parties were married for even one day less than ten calendar years during active duty, a decree calling for payment of a sum to the former spouse as a property division will be ignored by the pay center, while an otherwise identical order phrased as "alimony" will be honored in full.

alimony. II ROA 269. That central term having been negotiated, Mr. Root's "services were no longer necessary," and John met with Mr. LePome in proper person on July 25, 1989, to negotiate minor items of personal property, down to the level of coffee cups. II ROA 269, 267, I ROA 13.

At the time of this last meeting with Mr. LePome, John gave to Mr. LePome a signed substitution of attorneys (to proper person) and signed the proposed decree and a waiver of appearance at the prove-up. I ROA 6-8, 13, 14, II ROA 264. Mr. LePome and John remember the course of this meeting differently, however.

Mr. LePome's notes, made at the time of the meeting, state that he and John went back over all the terms, expressly discussing the trade of $17.00 per month for the alimony form of the award, that the award was to be for the life of the parties, and that the reason for the substitution was to ensure that it was collectible. II ROA 264, 265, 266, 267, 269, 272.

Mr. LePome had no doubt whatsoever that by the time of divorce, he, Mr. Root, and John all understood and agreed that the deal made was for Mary to give up any other alimony claim and the property claim to the pension, in exchange for collection of $200.00 of her $217.00 interest, plus cost of living adjustments, until the death of one of the parties. II ROA 268-69. He also explained those terms to Mary. II ROA 229-230. Mary recalled that two years later when they spoke, John was perfectly aware that she was supposed to get payments for life and "was having a fit because I would get part of it." II ROA 292. She testified that while John admitted failing to make the required payments, he excused himself on the grounds that Mary had allegedly not complied with her obligation to pay certain back taxes. II ROA 293-94.

John, by contrast, admitted meeting with Mr. LePome both before hiring Mr. Root and after discharging him, but claimed that he did not ever discuss trading the retirement for an alimony provision, or knowing of the prove-up date, or signing off on the decree. II ROA 237-242. John changed his mind about having signed the decree when the trial court judge showed him his signature on the original. II ROA 242-43, 253-54.

John claimed to not recall having Mr. Root negotiate the case for him, or file an Answer on his behalf, and claimed that the discussions with Mr. Root about putting Mary's retirement share in alimony form were not "extensive." I ROA 11-12, II ROA 245, 244-46 John did recall going over the Complaint with Mr. LePome. II ROA 237. John denied understanding that the provision of the decree increasing the alimony award "on a pro rata basis with each cost of living adjustment of his military retirement" had anything whatsoever to do with his military retirement. II ROA 251-52.

Two days after John signed off on the stipulated decree and signed the waiver of notices, the case was set for uncontested prove-up, which proceeded uneventfully. I ROA 5-7, II ROA 350. Mary and Don Drake were married as scheduled on October 14, 1989. II ROA 222, 227, 263-64.

John admitted calling the home at which Mary and Don Drake lived on numerous occasions after the divorce, and that his calls were always intercepted by Don, but he denied ever being told that Don and Mary were married. II ROA 246-47. Don Drake testified that he spoke to John by phone at least a dozen times in the months following John and Mary's divorce, and that he expressly told John to leave her alone because "she was my wife now." II ROA 279-282.

The decree required John to initiate an allotment to pay Mary her $200.00 per month plus cost of living adjustments. I ROA 7. Unfortunately, John never made any of the payments contemplated by the Decree. Almost exactly two years later, Mary retained present counsel, who brought a motion to reduce arrears to judgment, serving John at his last address of record.[2] I ROA 15-24, II ROA 223. No Opposition was received, and on October 11, 1991, the Referee recommended reducing to judgment $6,392.93, plus $400.00 attorney's fees. It took many months, but ultimately a garnishment was initiated through the military pay center. I ROA 35, 152, II ROA 340.

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[2] There was a typo in the notice as mailed by the secretary, which read "2200 N. Torrey Springs Drive #1040" rather than "2200 N. Torrey Pines Drive #1040." While John denied receiving it, the certified mail went unclaimed but the regular mail was not returned. II ROA 253.

After the garnishment went into effect, John retained his present counsel, who filed a motion to hold Mary in contempt of court. I ROA 36. The motion alleged: (1) that John had not received certain personal property awarded him in the decree; (2) that Mary had not paid certain back taxes; and (3) that the monthly payments to Mary should be reduced on the basis that John could not afford to pay the sums specified in the decree, and because when he agreed to make the payments, he "was without counsel, and had no idea of his legal rights."[3] I ROA 36-56, 46-47.

Mary responded to each allegation, and brought a countermotion. I ROA 69. She provided John's signed receipt, proving that he received the personal property awarded to him. I ROA 70, 76. She provided evidence that the IRS had taken from Mary not just what she owed under the decree in back taxes, but thousands more. I ROA 71, 77-82. Finally, she set out in writing the history of the deal whereby Mary's retirement share was made payable through a reduced sum of permanent alimony, and pointed out that John lied about not having an attorney or being made aware of "his rights." I ROA 71-73, 84-85. Mary's Counterclaim was for further reductions of arrears to judgment, for a restraining order due to John's threats of violence, and for attorney's fees. I ROA 69-74. The matter came before then-Referee Terrance Marren on July 14, 1992. II ROA 353.

Faced with the above, John dropped his claims as to personal property. The tax, alimony, and restraining order issues were continued to August 4. II ROA 353. In the meantime, documents were collected and filed showing that the IRS had garnished from both parties. See I ROA 93-126. When Referee Marren examined all of the documents and heard testimony from the parties, he "suggested the parties consider calling this square for 1986, 1987 and 1988 on the IRS payment." II ROA 354. John agreed to do so in open court, thus dropping that issue as well. II ROA 354.

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[3] The motion was served on Mr. LePome, rather than the undersigned. I ROA 64, II ROA 351-55. There was some confusion and delay while the parties and attorneys were sorted out, but it is not believed that any of that is now in issue. See I ROA 66-68, II ROA 351-55.

Once the false issues were eliminated, the only remaining matters were the payment of the pension share by permanent alimony, the restraining order, and attorney's fees. After reviewing Mr. LePome's affidavit, and hearing from John and Mary, and both counsel, Referee Marren found as a matter of fact that the "alimony" provision was a consciously-chosen payment mechanism for instituting payments to Mary of her fair share of the pension, that it was therefore not variable based on need, and that it "was intended to be and is an irrevocable entitlement" belonging to Mary. I ROA 147-48, II ROA 354. The Referee found that John, having received the benefit of the bargain by the $17.00 per month reduction of Mary's presumptive time-rule right to her share of the pension, was not free to repudiate that bargain and relitigate it based on changed circumstances. I ROA 147-48, II ROA 354.

Since John had made no payments as required by the decree, substantial arrears had accrued. Referee Marren ameliorated the financial impact on John of the arrearage award by limiting monthly collection on unpaid arrears; he also granted the requested restraining order, and made it mutual. I ROA 147-48, II ROA 354. The Referee took the attorney's fee issue under advisement, later issuing a ruling that noted the $400.00 awarded to Mary in 1991, and denied any further award of fees to either party. I ROA 148, II ROA 351.

John objected to the Referee's Report, on the sole issue of the permanent alimony/pension division terms. I ROA 127. Essentially, John argued that the decree was phrased inadequately to provide for payments entitled "alimony" that could survive Mary's remarriage. I ROA 127-134.

Mary replied to the objection, again setting out the legal history leading up to the "ten year rule" direct payment problem, and how the original attorneys in this case coped with that problem by putting the form of payments in enforceable, alimony terms. I ROA 153-160. Mary noted that John could have called Mr. Root as a witness to contradict Mr. LePome's testimony as to the deal reached if that testimony was inaccurate, but that John chose not to; Mary also noted in passing John's inaction for years after he knew of Mary's remarriage to Don Drake. I ROA 156-160.

The district court judge elected to have a further evidentiary hearing, which was set for November 5, 1992. II ROA 356. The Referee's Report, Objection, and Reply framed the issues for the testimony at that hearing, the substance of which is recounted above. The district court judge took the matter under advisement. II ROA 357, 325.

On November 17, 1992, the district court judge entered an order sustaining the objection. II ROA 326-330. The court made a number of findings of fact, including that the intention of drafting counsel was to insert in the decree an irrevocable alimony provision in place of Mary's right to her share of the pension, and the discussion of that intention between counsel. II ROA 327. The court also noted John's denials of discussing the matter with Mr. LePome, and of ever "agreeing" to divide the military retirement benefits. The court duly noted the conflicting testimony as to when John learned of Mary's remarriage, and the Referee's findings that Mary had a right to $217.00 per month as her share of the military retirement, and that the "alimony" provision for $200.00 was intended for the purpose of satisfying her right to those payments. II ROA 327-28.

The court found as a matter of law that it had inherent authority to construe its judgments and decrees, but found that such authority did not extend to decrees that were not ambiguous. II ROA 328. Noting that alimony is a creature of statute, the court found the decree to be "not ambiguous" because it stated that Mary was to receive "permanent alimony" (plus cost of living adjustments). II ROA 329. Finally, the court concluded that if it had been Mr. LePome's intention to permit the payments after remarriage, "it would have been a simple matter to include such a phrase in the decree," and that John, "a non-lawyer representing himself, merely relied upon the clear and unambiguous language in the decree." The court therefore sustained the objection, and further ordered that John was "not liable for any monthly alimony payments from and after Mary's subsequent remarriage." II ROA 329-330. This appeal followed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN REVERSING THE DOMESTIC RELATIONS REFEREE'S FINDING THAT THE WORD "PERMANENT" IN THE DECREE MEANT "IRREVOCABLE"

It should be noted at the outset that this Court is not bound by the construction of the decree used by the court below. This Court has repeatedly held that it will review matters of contract construction de novo upon appeal. See, e.g., Clark Co. Public Employees v. Pearson, 106 Nev. 587, 798 P.2d 136 (1990); Tore, Ltd. v. Church, 105 Nev. 183, 772 P.2d 1281 (1989) (parol evidence is admissible as to any terms on which written contract is silent and to which the evidence is not inconsistent).

The Court has extended this holding to agreements in marital cases. See, e.g., Sogg v. Nevada State Bank, 108 Nev. 308, 832 P.2d 781 (1992) (construing pre-nuptial agreement); Walsh v. Walsh, 103 Nev. 287, 738 P.2d 117 (1987); Murphy v. Murphy, 64 Nev. 440, 183 P.2d 632 (1947). In this case, it is uncontroverted that the stipulated decree was signed by Mary's counsel and by John personally, and was entered by uncontested prove-up after the attorneys for the parties met and settled the primary issue, and after John met with Mary's counsel in proper person to settle the final personal property issues. II ROA 264, 269. Thus, this Court is free to construe the stipulated decree de novo.

All evidence before the court below indicated that the words "permanent alimony" were intended to create an award to the wife that would terminate only in the event that one of the parties died. I ROA 84-85, II ROA 262-64, 265-66. No contrary evidence as to the meaning of the words used was introduced.

The court below found that the drafter of the decree, after negotiating with John's attorney, intended to place an irrevocable alimony award in the decree. II ROA 327. This finding was also made by the Domestic Relations Referee. I ROA 147. The court concluded that it could not give effect to that intention, however, on the basis that the use of the term "permanent alimony" in the decree rendered it unambiguously and automatically terminable upon remarriage. This conclusion was error.

A. There Are No Magic Words in the Controlling Statute; if it was Unambiguous, the Decree Awarded Alimony for Life to Mary

The district court apparently believed that the term "permanent alimony" necessarily meant "terminable upon remarriage" as a matter of law. This is not correct. NRS 125.150(5) states that:

> In the event of the death of either party or the subsequent remarriage of the spouse to whom specified periodic payments were to be made, all the payment required by the decree must cease, unless it was otherwise ordered by the court.

The term "permanent alimony" is not defined in the statute. To the degree that the phrase is not ambiguous, it meant just what it said, as Mr. LePome testified:

> There were also some other matters discussed and there was a resolution . . . that the collectibility part would be solved by making a permanent alimony. That is, forever . . . .

II ROA 263. As Mr. LePome set out in his affidavit, the negotiations with Mr. Root produced agreement as to "an amount of permanent alimony (non-modifiable except for cost-of-living increases)." I ROA 84.

Indeed, the dictionary definition of "permanent alimony" is "an allowance for the support and maintenance of a spouse during his or her lifetime." Black's Law Dictionary 1026 (5th ed. 1979). Likewise, the definition of "permanent" is "continuing or enduring in the same state, status, place, or the like, without fundamental or marked change, not subject to fluctuation, or alteration, fixed or intended to be fixed; lasting, abiding; stable; not temporary or transient." Id. at 1025.

Courts across the country have used many definitions of "permanent alimony," but a consistent thread is that the phrase, when used to describe an agreed stream of payments from one party to the other, means that the payment stream is not to terminate or be altered during the lifetime of the parties. See, e.g., Soule v. Soule, 87 P. 205 (Cal. App. 1906) (permanent alimony is terminable unless instituted pursuant to agreement of parties that it should continue for life); Bart v. Bart, 35 A.2d 125 (Md. Ct. Spec. App. 1943) (permanent alimony is to continue during the parties joint lives, but court can increase or decrease award unless it is confirmation of agreement of parties).

Mr. LePome knew that Mary was scheduled to marry Don Drake immediately after the divorce from John, and he

> was very much aware of the fact that normally alimony would terminate upon remarriage, and that's why I put permanent. Maybe that wasn't the best choice of words, but those were the words that I chose because it was meant to be for life . . . . That's why I told [John] it would be permanent. It would survive remarriage.

II ROA 264, 266.

For alimony to survive remarriage, our statute merely requires that the court must "otherwise order." In this case, the decree terms were settled by stipulation between counsel, and explained to John by both his attorney, Mr. Root, and by Mr. LePome, on at least two separate occasions. II ROA 245, 249, 259-261, 268. While John, rather conveniently, could not "recall the particulars to the nitty-gritty on that conversation," he did recall that he "was given a choice, 217 or $200" and that the option of the alimony form "would be tax deductible for me and it was a lesser amount." II ROA 249, 237. Those terms agree with the choice as explained by Mr. LePome and as agreed to between the lawyers. I ROA 84-85, II ROA 263, 269.

The point is that if the term "permanent alimony" had a certain, unambiguous meaning depriving the court below of the power to construe the decree to determine the intent of the parties, that meaning is the one found in the dictionary and the alimony was ordered to be paid for the joint lives of the parties. Put simply, when the award in the decree was made "permanent," it did "otherwise order" within the meaning of NRS 125.150(5). By the addition of that term, the attorneys who stipulated to the award intended a lifetime, irrevocable, unmodifiable amount to be paid during the parties' joint lives.

B. The Agreement Reached Was Between Attorneys, not Between an Attorney and an Unrepresented Party

The district court found that John hired an attorney who filed an Answer on his behalf and negotiated terms with Mary's counsel. II ROA 327. The court apparently concluded,

however, that the decree was to be examined from the viewpoint of "John, a non-lawyer representing himself." II ROA 329.

John's discharge of his attorney after the agreement was reached is not a proper basis for invalidating the verbal stipulations entered into by former counsel. See Crabtree v. Crabtree, 527 P.2d 920 (Colo. Ct. App. 1974). It is not reasonable or equitable to give any preferential treatment to a party who hires an attorney to negotiate for him, and then terminates that attorney after terms are reached and the attorney is "no longer necessary." II ROA 269. To hold that a party is held to a lesser standard of knowledge if he releases his attorney before the prove up would be to encourage parties to fire their lawyers on the eve of divorce.

It can be inferred from John's testimony that he will now claim that Mr. Root exceeded his authority in stipulating to Mary's right to her spousal share of the pension, and by agreeing to enforce that right by means of payments denominated "permanent alimony" (in a lesser sum). II ROA 237, 269. Notice to the attorney is the same as notice to the party, and a party is bound by the stipulations and actions of his attorney. Aldabe v. Adams, 81 Nev. 280, 402 P.2d 34 (1965); Aldabe v. Aldabe, 84 Nev. 280, 402 P.2d 34 (1965); Rahn v. Searchlight Mercantile Co., 56 Nev. 289, 49 P.2d 353 (1935); Dechert v. Dechert, 46 Nev. 140, 205 P. 593 (1922).

In other words, it does not matter whether John told Mr. Root to offer the lifetime payments in exchange for relinquishment of the greater sum of pension payments. Mr. Root did so, and his authority to do so is conclusively presumed. II ROA 269; Dechert v. Dechert, supra; Aldabe v. Aldabe, supra.

It is worth noting at this juncture that John could easily have called Mr. Root to provide any contrary interpretation of the course of negotiations or the agreement reached, either in the proceedings before the Referee, or in the later hearings before the district court judge. Mary's moving papers invited him to do so. I ROA 157.

C. To the Extent the Divorce Decree Was Ambiguous, the Parties' Intention Controls

If the word "permanent alimony" did not have its plain meaning of "for life" as the term is defined, then the provision must be ambiguous, and the intention of the parties in using that term while waiving Mary's admitted time-share interest in the military pension must be examined. Tore, Ltd. v. Church, supra. Of course, the court has the power to construe its decrees. See Grenz v. Grenz, 78 Nev. 394, 374 P.2d 891 (1962); Murphy v. Murphy, supra.

As noted above, Mr. LePome testified, without contradiction, that the intention of the attorneys for both parties in reducing the size of the monthly award but making it "permanent alimony" was to ensure payments for life. John did not claim otherwise, but testified that he "could not remember" that the specific intention in using this language was explained to him. II ROA 249.

Mr. LePome was closely questioned on the point of what agreement he reached with Mr. Root, and how that was explained to John. He testified that it was John's attorney who proposed "the 200 settlement overall proposal and putting it in terms of alimony as to the noncollectible military retirement pension." II ROA 269. He further testified that when he met with John (as memorialized in his notes from the meeting), John shared this clear understanding of what his own attorney had proposed:

> Q. When [John] left your office after signing the proposed decree, did you have any doubts that he understood the -- well, let me rephrase it. What did you believe he understood at the time he left your office were the conditions under which this alimony would cease?
> A. Upon his death or upon her death. Just like the military pension which it was tied to by the COLAS.
> Q. Is that the way you explained it?
> A. Yes.
> Q. Are you satisfied that you did a sufficient canvass of Mr. Waltz that that was his understanding at the time?
> A. He appeared to understand what I was talking about.

II ROA 268-69.

If, as Mr. LePome testified and as the Referee found, the provision in question "was and is a pension provision," then the prior decisions of this Court hold that Mary's remarriage is irrelevant and the payments should continue. See Kishner v. Kishner, 93 Nev. 220, 222, 562 P.2d 493 (1977) ("It should be noted initially that we are not here concerned with a provision

in a judgment and decree of divorce which is, in whole or in part, a division of community property. In such a case, [the termination upon remarriage provision] does not apply").

A grant of lifetime payments in exchange for release of a right to property, are completely unaffected by the subsequent remarriage of the party receiving payments. Krick v. Krick, 76 Nev. 52, 348 P.2d 752 (1960). While not a model of artfulness, the decree in this case did exactly that, and the payments in exchange for the release of Mary's clear right to a share of the pension should be maintained for her life.

Recently, this Court has held that a divorce decree, found by the district court to be unambiguous, required construction on appeal to achieve an equitable result. In Walsh v. Walsh, 103 Nev. 287, 738 P.2d 117 (1987) the court below found that the phrase "one-half of [James'] pension with the United States Government" unambiguously entitled the former spouse to half of the pension earned after the divorce. This Court reversed, noting that "when read as a whole, the decree evinces a contrary intent." Id., 103 Nev. at 288.

The same procedure should be followed here. The decree gives away Mary's right to $217.00 per month, plus cost of living adjustments, on page 2, and on page 3 awards to her monthly payments, denominated "permanent alimony," in the sum of $200.00 per month, which was to be paid by military allotment, and which was to be adjusted in accordance with all future military cost of living adjustments. As in Walsh, when the decree is read as a whole, its intention is clearly to provide a measured benefit to the former spouse. In this case, that measured benefit was direct collection of a sum the former spouse otherwise could not directly collect from the military pay center.

Other courts, facing analogous questions of interpretation, have held that the question of whether future payments provided for by agreement of the parties are alimony and support money or a property settlement depends upon the circumstances and upon the intent of the parties. See Messersmith v. Messersmith, 415 P.2d 82 (Wash. 1966). The label divorcing parties place on their agreement is not controlling as to whether the agreement constitutes a property settlement or a provision for alimony. See Ross v. Ross, 403 P.2d 19 (Or. 1965); Schaffer v. Schaffer, 643 P.2d 1300 (Or. Ct. App. 1982).

The concept of providing an alimony award to a spouse in various contexts as a replacement for property interests, or vice-versa, is a long-time fixture of Nevada divorce practice. See, e.g., Winn v. Winn, 86 Nev. 18, 467 P.2d 601 (1970) (granting wife $4,000.00 plus $100.00 per month alimony in lieu of division of property interests); Felis v. Felis, 48 Nev. 296, 229 P. 764 (1924) (substituting property for alimony). In this case, alimony was merely used as the payment mechanism to satisfy an admitted property interest, for the purpose of allowing the military pay center to honor the order.

An analogous situation was before this court in 1947. There, the military member spouse relied on the precise words of the parties' agreement, by the terms of which his one-day reversion to a lower rank deprived his former spouse of $50.00 per month for life. This Court examined the decree-incorporated agreement of the parties, and held that a property settlement agreement in a divorce should be construed fairly and reasonably, and not too strictly or technically. Murphy v. Murphy, 64 Nev. 440, 183 P.2d 632 (1947). The court went on to add that such agreements "are to be construed as meaning what it may reasonably be inferred the parties intended." Id., 64 Nev. at 453. The court added that:

> Other maxims and rules of construction might be applied. A maxim of equity, which in many cases is found to be conducive as an aid to the accomplishment of an equitable and rightful result in litigation is: "Equity regards the substance, and not the form." In the instant case the maxim seems peculiarly applicable, as actions for divorce involving support and maintenance for a wife or child, or both, are equitable in character.

Id., 64 Nev. at 454. The court held that the former spouse was entitled to the higher payments that in substance, rather than form, she should have been receiving.

The same result is proper in this case. In light of the unrefuted evidence as to the intention underlying the award to Mary, the reasonable thing to do is to give effect to the bargain reached by the attorneys who negotiated the reduction in Mary's monthly payments in exchange for direct payments from the military pay center. That result serves the public policy encouraging parties to reach stipulated settlement as to property settlement and alimony. See Higby v. Higby, 538 P.2d 493 (Colo. Ct. App. 1975). Giving effect to that intention is not barred by the letter -- or the spirit -- of Nevada's divorce laws, and would prevent the injustice

of giving an undeserved windfall to John by depriving Mary of her rightful time-share interest in the military pension. See Gemma v. Gemma, 105 Nev. 458, 778 P.2d 429 (1989); Fondi v. Fondi, 106 Nev. 856, 802 P.2d 1264 (1990).

II. THE DISTRICT COURT ERRED IN EFFECTIVELY ORDERING REPAYMENT OF ALIMONY PREVIOUSLY PAID TO MARY

The conclusion of the district court's order stated that "pursuant to NRS 125.150(3) John is not liable for any monthly alimony payments from and after Mary's subsequent remarriage." II ROA 330. As might be expected, John immediately made demand for all sums collected under the garnishment of the 1991 arrears judgment. I ROA 27-29.

The earlier order had reduced to judgment arrears that had accrued under the terms of the decree, which John had knowingly not paid by refusing to issue the allotment required by the decree. The 1991 order was not appealed from at that time, and was not before the court on objection from the Referee's Report in 1992. It was therefore not subject to attack in this case. See EDCR 5.84(c).

At least until the district court issued its order stating that the pension division was unenforceable because labelled "permanent alimony," Mary had an enforceable order, as demonstrated by the execution she was finally able to begin some two years after the payments were supposed to start. I ROA 35. Until November 17, 1992,[4] that order was enforceable, and sums were collected under it.

In Day v. Day, 82 Nev. 317, 417 P.2d 914 (1966), this court denied retroactive effect to facts asserted by an obligor which he claimed entitled him to repayment from his former spouse. The Court held that "payments once accrued for either alimony or support of children become vested rights and cannot thereafter be modified or voided." Id., 82 Nev. at 320-21. Irrespective of this Court's decision on the prior issue, the payment terms of the decree, and the garnishment under the 1991 Order, were in effect up until the time the judge overturned

[4] No stay of Judge Leavitt's order was sought during appeal, so Mary has ceased all collection activities under the decree and the 1991 Order Reducing Arrears to Judgment until resolution of this appeal.

Referee Marren's Recommendation. All payments that accrued up until that time were vested, and the court below exceeded its authority in giving retroactive effect to its interpretation of the decree; that aspect of the district court's order should be reversed.

Even if this Court concludes that for some reason the Referee's Recommendation was in error, and the district court's determination is entitled to retroactive application, there can be no doubt that Mary had a good-faith belief that the order was for lifetime, unmodifiable, payments in compensation for her interest in the military retirement benefits. II ROA 226-27. Other courts, in examining this sort of question, have concluded that retroactive modification of support orders is not permissible, and no repayment of alimony can be ordered from the recipient to the obligor. See, e.g., Reid v. Reid, 429 S.E.2d 208 (Va. 1993) (no "restitution" of alimony permissible where award to wife reversed on appeal). As a matter of equity then, Mary should not be required to repay to John any sums collected by her under the terms of the order while it was valid.

III. CONCLUSION

Mary had a clear right to a portion of John's military retirement benefits, but a federal law technicality would have required her to get checks from John every month rather than from the military pay center. John's attorney suggested reducing the sum she was to receive from $217.00 to $200.00, offering in settlement his agreement to make the form of the award collectible from the military pay center by titling the payment stream "permanent alimony." Mary's attorney was aware that Mary was to marry Don Drake immediately after the divorce, and wrote the decree intending for the wording to be sufficient to keep payments flowing to her during her life.

All parties knew the terms of this arrangement very clearly. John consulted with his attorney after the terms were negotiated, and met directly with Mary's attorney who then explained them again.

After the divorce, however, John refused to sign the allotment papers that would have started the payment stream to Mary. In 1991, she got an order for the arrears that had

accrued. In 1992, she finally obtained actual collection of some of those arrears. Only then did John resurface, claiming falsely that Mary had refused to turn over property or pay taxes as required. When these arguments failed, he alleged that the payments to her must be stopped because they were called "permanent alimony" and Mary had remarried.

The Referee saw that the label "permanent alimony" was merely the mechanism chosen to allow actual collection of the amount awarded, and found that the parties' intention should be honored. Since the term was actually intended to permit enforcement of Mary's clear right to a share of the pension, the Referee found that the award was not based on need and should be enforced. On objection, however, the trial court found that he could not enforce the parties intention because the words used made the payment stream terminate automatically two months after it was to begin.

All evidence submitted in this action indicated that the words "permanent alimony" were intended to create an award to the wife that would terminate only in the event that one of the parties died. That is the plain meaning of the words used, and the divorce statutes do not require any further "magic language" to give effect to the parties' intentions. To the extent that the decree was unambiguous, it meant permanent and was not to terminate upon the happening of any events that might affect regular alimony obligations.

To the extent that the decree was ambiguous, the meaning ascribed by the attorneys who agreed to the form of the award should control it. No additional consideration should be given to John just because he chose to discharge his attorney after the terms were negotiated and just before the prove-up.

There is no reasonable reading of the decree as a whole other than the one that shows Mary giving up a larger sum of property payments in order to be assured of actual collection of a lesser sum by having it labelled "alimony." Any reading that would permit the result reached by the district court would do violence to equity and frustrate the intentions of the parties in negotiating this settlement, without serving any legitimate public policy.

In any event, the district court did not have the 1991 order, long since final and unappealed, before it, and could not nullify that order. Sums accrued prior to the courts ruling

were vested in Mary and could not be voided. Certainly, no repayment of sums actually collected under the prior orders could be required in law or equity.

Appellant respectfully prays that this Court issue an Opinion reversing the district court's sustaining of the objection to the Referee's Recommendation, and explicitly permit continuing payments to Mary, during her life, of her fair share of the pension benefits earned during marriage through the enforcement mechanism of "permanent alimony" as originally suggested by John's attorney.

Respectfully submitted,
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