IN THE SUPREME COURT OF THE STATE OF NEVADA

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

# APPELLANT/CROSS-RESPONDENT'S REPLY BRIEF


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## STATEMENT OF THE ISSUES

I. WHETHER THE DISTRICT COURT CORRECTLY FOUND THAT THERE WAS "NO MEETING OF THE MINDS" WITH RESPECT TO MODIFYING THE LANGUAGE OR TERMS OF THE PROPERTY SETTLEMENT AGREEMENT

II. WHETHER THE DISTRICT COURT ERRED IN FINDING THAT "PENSION RAISES" ARE THE SAME AS COST OF LIVING ADJUSTMENTS

III. WHETHER THE DISTRICT COURT CORRECTLY DETERMINED THAT BENCE'S CLAIMS WERE NOT BARRED BY THE DOCTRINE OF LACHES

IV. WHETHER THE DISTRICT COURT CORRECTLY FOUND THAT BENCE DID NOT "WAIVE" HER CLAIM TO THE RETIREMENT BENEFITS

V. WHETHER THE DISTRICT COURT CORRECTLY FOUND THAT BENCE IS ENTITLED TO HALF THE GROSS SUM OF THE RETIREMENT BENEFITS

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

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

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

## STATEMENT OF THE CASE

Respondent/Cross-Appellant, Robert M. Krone ("Robert") has not disputed the accuracy of the Statement of the Case in Appellant/Cross Respondent, Caryl-Bence Krone's ("Bence") Opening Brief, on which Bence is willing to rely.

## STATEMENT OF FACTS

Bence relies upon the Statement of Facts in her Opening Brief. The version proffered by Robert is not helpful to examination of the case, for several reasons. This appeal is based on matters of both fact and law, and any mischaracterizations as to the record have a heightened effect.

For example, from the very first sentence, Robert presents arguments and assumptions as "facts" about subjective matters such as intent. He states "The parties never intended 'pension raises' to mean increases due to cost of living adjustments (COLAs), and Robert did not pay them." RAB 3. This statement is not supported by the record.

The record does reflect that once Bence realized that Robert had received but was not sharing his pension increases from 1976 through 1979, she sent correspondence to Robert, and ultimately threatened litigation. 1 ROA 104-116. The record also shows that once he received a formal demand letter from Bence's then counsel, William W. Simpson, Esq. (1 ROA 117-119), Robert made up all past-due COLA increases and began paying Bence the correct amount (half of the COLA-increased retired pay). Those payments continued through mid-1981. 1 ROA 45.

In addition to submitting his opinion twenty years later as "fact," Robert mischaracterizes the record -- including his own words. The referenced correspondence between the parties in 1979 shows no doubt on the part of either of them that "pension increases" meant "cost of living adjustments" (Bence used the term "cost of living raises"), or that Robert owed them to Bence. *See* 1 ROA 113-14 (Bence to Robert), 115-16 (Robert to Bence, showing division of gross retirement, with all cost of living adjustments); 118-19 (Bence's attorney to Robert, showing calculated division of gross retirement, with all cost of living adjustments).

The Statement of facts proffered by Robert makes many other such representations -- without relevant citation to the record -- as to what the parties "felt" and what their "true motivations" were,

etc. *See*, *e.g.*, RAB at 3, 5. It is submitted that these characterizations (there is no evidence or findings in the record as to their truth or falsity) are useless to legal analysis of the facts of the case.

The selective partial omissions from quoted material also detract from the utility of Robert's proffered Statement of Facts. For example, quoting his own letter to Bence of November 30, 1981, Robert deleted the portion stating that he would ask the Nevada Court to modify the divorce decree "within a few weeks," and that there would be no reduction in payments until a court order was obtained allowing such a reduction. (1 ROA 122-123; AOB 4). Similarly, Robert asserts that "he confirmed the reduction in a letter of March 16, 1982" but fails to mention the first paragraph of the letter, which stated:

> The divorce decree change will be filed with the Clerk in Reno on March 24th after which a hearing date will be set. You will receive a copy of the Motion, Notice of Motion and Affidavit in the mail.

1 ROA 25. None of this was ever done.

The primary point of interest to Robert's proffered Statement of Facts is in what it does ***not*** say. The undersigned counts fourteen times that Robert refers to an alleged "oral agreement" between himself and Bence to reduce the payments to her,[1] but never once does he say when or where such an agreement was or could have been made. The only references he makes are to the written correspondence submitted to the lower court, which that court found to "speak for themselves." 2 ROA 343; RAB at 4-8.

In sum, Robert's "factual" recitation is largely composed of argument and his counsel's commentary on the evidence, but is not descriptive of the facts below, does not fairly summarize the

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[1] Robert uses the expressions "Bence affirmatively agreed," "they made their agreement," "their valid agreement," etc. *See* RAB at 4, 9, 10. Nowhere is there a citation to anything in the record either reciting the time, place, and terms of any such "agreement," or offering a copy of anything other than Robert's letter stating he was reducing the allotment, and Bence's letter thanking him for not cutting her off completely.

record, and is both incomplete and inaccurate. Accordingly, Bence requests that this Court refer to the Statement of the Facts in her Opening Brief in deciding this appeal.

As both parties have noted, Robert is actually the party appealing; Bence's cross-appeal concerns matters relating to the form, amount, and security for payment. For the sake of ease of review, this Reply will generally follow the organization of the Answering Brief.

## ARGUMENT

Before proceeding to discuss the arguments made by Robert, undersigned counsel makes two observations. First, Robert has entirely ignored the one Nevada appellate case directly on point -- *Duke v. Duke*, 98 Nev. 148, 643 P.2d 1205 (1982). He must do so, since the parties there were positioned identically to the parties to this case, and the holding squarely tells him that he loses.

The second is related to the first. Robert's attorney is quite capable and talented. The arguments he has to make on his client's behalf, however, are not actually intended to persuade; just putting them into print shows that they are hollow. They are intended to delay.

The Court is asked to note that the arguments Robert makes -- in fact his entire appeal -- are part of Robert's campaign to never actually pay to Bence what he owes her.[2] He has made it clear, in and out of court, throughout this litigation, that he will delay each step by every means available. When this appeal is over, he is expected to request rehearing, and as soon as that is denied, he will file for bankruptcy, and hope to keep that matter in litigation for another five years. In short, he hopes to fend off his ex-wife until she, or he, dies, with the judgment unsatisfied. It is respectfully requested that this Court take what steps are possible to prevent that result.

### I. THE DISTRICT COURT'S FINDING THAT THERE WAS NO MEETING OF THE MINDS WITH RESPECT TO MODIFYING THE LANGUAGE OR TERMS OF THE PROPERTY SETTLEMENT AGREEMENT SHOULD BE AFFIRMED

The Findings of Fact, Conclusions of Law and Decree of Divorce, entered on April 23, 1976, incorporated the property settlement agreement:

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[2] He freely concedes that he has no stay, but that he has chosen to ignore the order requiring payment of half of gross retired pay, and is paying only half of disposable pay, effectively taking another $300.00 per month of Bence's money. RAB 18; 2 ROA 451.

> That the property settlement agreement entered into by the parties herein on the ___ day of April, 1976, settling all of their property rights be, and the same hereby is approved, confirmed and ratified by the court.

1 ROA 3-4. The Property Settlement Agreement ("PSA") states:

> No alteration, abandonment, modification, conclusion, termination or waiver of any of the terms of this agreement shall be valid unless in writing and executed by both parties with the same formality as this agreement."

1 ROA 9-10. All of this language was drafted by Robert's attorney. The PSA was signed and acknowledged by both parties in the presence of a Notary Public. 1 ROA 10.

Robert cannot assert that "he and Bence" modified the PSA because he sent Bence a letter *informing* her that the law had changed and he no longer had to give her any money, no matter what the divorce decree said, but to be fair he would "only" cut the sum he was sending her to $620.00 (1 ROA 122), and by Bence's response to his letters thanking him for his "generosity." 1 ROA 127.

Robert knew that any modifications to the PSA would not be valid unless the changes were made in writing, executed, and acknowledged by both parties, with the same formality as the PSA. 1 ROA 9-10. His awareness of these requirements was clear from his letter in November 30, 1981:

> Therefore, I will be asking the Nevada Court to modify the divorce decree to reduce your alimony from the current $957/month to $620/month. . . . A warrant [*sic.*] advising of this court action will be delivered to you within the next few weeks. I will not change the amount until after the case is processed in the court and the change would be effective with the end of the month in which the Nevada court handles the case.

1 ROA 122. Similarly, his letter to Bence of March 16, 1982 states:

> The divorce decree change will be filed with the Clerk in Reno on March 24th after which a hearing date will be set. You will receive a copy of the Motion, Notice of Motion and Affidavit in the mail. . . . I will have a legal document prepared which establishes the alimony at the $620.00 amount. If the determination is made in March I would appreciate your returning the $337 overpayment in March.

1 ROA 125.

## A. **Robert Cannot Prevail Under Federal Law**

First, the opinion of a party as to the law is completely irrelevant to what the law is. There is a *very* lengthy string of cases stating that *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981), was not to apply retroactively, that no opinion in history had been accorded less retroactive application, and that the intent of the Uniform Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1982) ("USFSPA"), was to obliterate the application of the *McCarty* retroactively, currently, and prospectively. *See*, *e.g.*, *Duke v. Duke*, *supra*; *Casas v. Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987).

In *Duke*, this Court was direct and explicit:

> Nothing in *McCarty* . . . suggests that the Supreme Court intended its decision to apply retroactively to invalidate, or otherwise render unenforceable, prior valid and unappealed state court decrees. . . . *McCarty* does not alter the res judicata consequences of a divorce decree which was final before *McCarty* was filed.

98 Nev. at 149.

In one particularly notable case (referencing many such cases from throughout the country), the United States Claims court carefully examined a class action brought by three groups of former military members -- one of which was persons like Robert, who were divorced before *McCarty*, whose divorce decrees divided the military retirement benefits, and who sought to reduce or eliminate payments to their former spouses in light of *McCarty*. *See Fern v. United States*, 15 Cl. Ct. 580 (1988) (denying retiree's attempts to circumvent judgments in favor of their former spouses in all three categories of cases), *aff'd*, 908 F.2d 955 (Fed. Cir. 1990).

The federal Claims Court soundly rejected all such contentions, and the federal Circuit Court affirmed with equal unanimity. The decision was quite critical of persons such as Robert, who sought court intervention to deprive their spouses of their fair share of what was almost always the primary, if not the only marital asset. The opinion recounted the retirees' "odysseys through the state

and federal courts challenging state court decrees dividing their retired pay" and noting that the retirees "were unable, as a final matter, to convince any of these courts that division of their retirement pay was unconstitutional or legally improper." *Id.*, 15 Cl. Ct. at 592.

It should be noted that the class of retirees included several who, like Robert, had cut payments to their former spouses after hearing about *McCarty*.[3] Every reviewing court found that such a reduction was improper and impermissible. In short, the result that Robert is asking this Court to condone is not even legally *permissible* under the federal law designed to prevent exactly the sort of short-changing that Robert has been doing since 1982. It is long past time to put a stop to it. Robert cannot claim to have any sort of "reasonable reliance" on his monthly theft of Bence's share of the community property payments, and his self-righteous assertions of a right to such theft should be slapped down for the fraud that they are.

Robert argues "that the USFSPA was passed after Robert and Bence made their agreement," and that therefore their "agreement" is valid. RAB 9. As noted above, there never ***was*** any "agreement," making this argument meaningless. Just like all the other claimants in *Fern*, Robert simply cut off the money based on his personal view that the *McCarty* decision "overruled" his divorce decree.

Robert never even proceeded to court to test his view of the law. This Court has made it clear that if he ***had*** done so, his request to reduce the payments would have been denied. *See Duke*, *supra*. Robert is simply wrong in characterizing Bence's argument, below or in this Court, as imposing a duty of knowing that *McCarty* would be overruled. *See* RAB at 9. The point is that *McCarty* ***never*** had any effect on the parties' 1976 divorce decree, and Robert was wrong to reduce

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[3] Robert argues, mysteriously, that *Fern* is somehow less applicable because it was decided after Robert reduced the flow of money to Bence. RAB at 9. That is true of ***all*** the parties reviewed in the *Fern* decision; counsel is unable to discern any legal significance to Robert's argument.

his payments based on his reading of the opinion.[4] As discussed below, Bence was far too trusting in believing him, but she has already lost tens of thousands of dollars for her mistaken belief that "I can trust you to be honorable in this matter" and being "touched that you are willing to go on providing for me." 1 ROA 114, 127.

## B. Robert Cannot Prevail Under Nevada State Law

Robert avoids entirely the question of whether Robert's letters to Bence that he was reducing the money to her, and her thank you note for sending anything at all, did or ***could*** constitute an "agreement" that "is valid under state law." RAB 10; *see* 1 ROA 122-27. Since it is submitted that there was no "agreement to modify," the question of whether that agreement targeted a "merged" or "unmerged" decree is submitted to be irrelevant. Since Robert spends three full pages discussing that question, however (*see* RAB 10-13), it is addressed below.

Robert argues that "Parties to a written contract may modify, waive, or make new terms to that contract regardless of the provisions in the contract to the contrary," citing one Utah and one New Mexico decision as authority. RAB 8. While Bence has no argument with that general principle of contract law, it is utterly irrelevant to this case. Here, the Decree of Divorce incorporated and ratified the PSA, which in accordance with a long string of case law, does not survive as an independent contract, but is merged into the decree. *See Ballin v. Ballin*, 78 Nev. 224, 371 P.2d 32 (1962); *Day v. Day*, 82 Nev. 317, 327-28, 417 P.2d 914 (1966) (Thompson, J.,

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[4] For the record, Robert is wrong in asserting at various times that Robert's reduction in payments was correct when he did it, and he is certainly wrong in his various un-supported assertions that Bence has "admitted" or "agreed" or in any other way stated that Robert was correct in keeping her money for himself. *See*, *e.g.*, *Duke*, *supra*; RAB at 9.

concurring); NRS 123.080(4).[5] The applicable principles in this case are not those of contract, but of domestic relations law.

Actually applicable is NRS 125.150(6), which states:

> If the court adjudicates the property rights of the parties, or an agreement by the parties settling their property rights has been approved by the court, whether or not the court has retained jurisdiction to modify them, the adjudication of property rights, and the agreements settling property rights, may nevertheless at any time thereafter be modified by the court upon written stipulation signed and acknowledged by the parties to the action, and in accordance with the terms thereof.

By statute, to modify the property terms of their Decree of Divorce, the parties must expressly enter into a formal stipulation, with acknowledged signatures, which must be formally entered by court order. *See Kramer v. Kramer*, 96 Nev. 759, 616 P.2d 395 (1980); *Lam v. Lam*, 86 Nev. 908, 910, 478 P.2d 146 (1970) ("by the terms of the amended statute, only a stipulation between the parties can do the job as respects their property differences").[6]

Since Robert has chosen to raise contract principles, it is worth pausing for a moment to note that as a matter of common sense, Robert's argument must fail. He asserts that Bence "agreed" to a "modification" of the Decree, with no consideration or benefit. Surely, he does not suggest that Bence willingly conspired with him to evade this Court's holding in *Duke* and cheat herself out of her half of the retirement benefits.

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[5] "If a contract executed by a husband and wife, or a copy thereof, be introduced in evidence as an exhibit in any divorce action, and the court shall by decree or judgment ratify or adopt or approve the contract by reference thereto, the decree shall have the same force and effect and legal consequences as though the contract were copied into the decree or attached thereto."

[6] As an aside, it should be noted that the legal requirement that signatures be "acknowledged" is a pre-requisite to validity, and not some mere technical requirement, and has been so recognized in an unbroken line of cases for over a hundred years. *See Hennon v. Streeter, et al.*, 55 Nev. 285, 31 P.2d 160 (1934); *Harrison v. Rice*, 89 Nev. 180, 180 n.4, 510 P.2d 633 (1973) (unacknowledged deed purporting to transfer community property "invalid for any purpose"); *Allen v. Hernon*, 74 Nev. 238, 242, 328 P.2d 301 (1958); *Mullikan v. Jones*, 71 Nev. 14, 18, 278 P.2d 876 (1955); *McGill v. Lewis*, 61 Nev. 28, 39, 116 P.2d 581 (1941); *State of Nevada, ex rel. Ford v. Hoover*, 5 Nev. 117 (1869).

When Bence was told she was entitled to nothing whatsoever, she expressed gratitude for getting the small sum that Robert deigned to send her. This was no "agreement" cognizable in law or reason, but a pronouncement by Robert of the way things were going to be, and a "thank you" for the crumb that he threw to her. Bence *agreed* to nothing, as shown on the face of the correspondence between the parties. 1 ROA 122-27. As noted above, *Duke v. Duke*, *supra*, specifically prevents one party to a pre-*McCarty* divorce from reducing the spousal share. Robert's argument that "federal law" somehow allowed him to do so is difficult to decipher, but wrong.[7] RAB 10.

Robert does correctly note that a portion of the PSA states: "it is agreed that this [PSA] and the provisions hereof shall be ratified and confirmed, but this agreement shall remain as a separate and independent contract." 1 ROA 9. From this he argues that the PSA should be treated, not as part of a divorce decree, but as a separate document, which Robert's letters and Bence's thank you somehow modified by "agreement." *See* RAB 11. Robert largely ignores the fact that the PSA also states on its face that modifications to it would not be valid unless the changes were made in writing, executed by both parties, acknowledged by both parties, and entered "with the same formality as this agreement." 1 ROA 9-10. He merely states that a court *could* choose to overlook such contract provisions if the circumstances required it. RAB 11-12.

In other words, Robert wants to pick one phrase out of the PSA, override the decisions of this Court in order to give it effect as a stand-alone contract instead of part of a divorce decree, and then use contract law principles, hinged on permissible *ignoring* of the very terms of that contract, to

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[7] Apparently confusing state and federal law, the legal history of a statute, and the facts of this case, Robert argues that a 1983 Nevada statute was designed for persons "like Bence, to bring an action," and that her failure to do so within the statute's six-month window "barred" her from "proceeding" now.

The statute, 1983 Nev. Stats. Ch. 301, § 1, at 740, has nothing to do with pre-*McCarty* divorces. As the author of the statute noted (and as recited in the record), the statute was the mechanism by which "Nevada joined the near-universal trend of allowing partition of benefits for those divorced during the 'gap' period [*between McCarty* and passage of the USFSPA]." 1 ROA 220. It applied *only* to those "who received a decree of divorce on or after June 21, 1981, and on or before January 31, 1983." Robert and Bence divorced five years earlier, and the statute by its own terms simply had no application to them whatsoever.

assert that his letters constituted an "agreement" that un-did the parties' formal property settlement agreement and decree of divorce, despite the language of the agreement itself that it could not be so changed. And he wants this Court to do all that in order to create his unjust enrichment at the expense of his ex-wife, from whom he has already taken about $120,000.00.

It is respectfully submitted that there are no special circumstances "requiring" such a result. Robert's argument is such a Byzantine monument to inequity that it neither can or should be given any further consideration, despite his attorney's conceded originality in even being able to come up with such an argument.

It is worth noting in passing that even *Robert's* own actions and behavior, from the time the Decree of Divorce was entered, showed without a doubt that he did not treat the PSA as "a separate contract," but part of a decree under authority of a divorce court. His letters of November 30, 1981, and March 16, 1982 (1 ROA 122 & 125), clearly show that he was aware that he had to return to "the divorce Court in Reno" if he wanted to ask to modify the Decree of Divorce. Moreover, Robert's *attorney* has already conceded that the PSA merged in the Decree of Divorce, when he told the Court "So I think it does merge, even though the parties never intended it to merge." 2 ROA 271.

Finally, if this Court ***was*** inclined to apply contract principles to the PSA, then it should take note of the large and apparently unanimous line of case from around the country stating that an agreement by the parties to divide military retirement benefits "equally" will be upheld, even when the military member receives a portion of those benefits as disability payments that federal law otherwise exempts from court-ordered division. *See*, *e.g.*, *Hisgen v. Hisgen*, ___ N.W.2d ___ (S.D., No. 19394-a-JKK, Oct. 9, 1996), 23 FLR 1040 (BNA Nov. 26, 1996) (where agreement provided that wife was to get half of retirement, member was required to split amount he received in disability); *In re Strassner*, ___ S.W.2d ___ (No. 65448, Mo. Ct. App., Mar. 14, 1995), 21 FLR 1246 (BNA Apr. 4, 1995) (same); *Owen v. Owen*, 419 S.E.2d 267 (Va. Ct. App. 1992) (property

settlement provided for half of gross retirement pay plus COLAs; member's subsequent disability retirement and reduction in retired pay to wife required husband to pay subtracted sums to wife and did not violate *Mansell* in any way); *McHugh v. McHugh*, 861 P.2d 113 (Idaho Ct. App. 1993) (same); *Dexter v. Dexter*, ___ A.2d ___ (MD Crt. Spec. App., No. 1764 Set. Term 1994, July 5, 1995), 21 FLR 1435 (BNA July 25, 1995) (using a "benefit-of-the-bargain" approach, divorced wife of member who waived retirement benefits for VA disability benefits was entitled to an arrearage order for the sums she would have received but for his unilateral waiver); *Abernathy v. Abernathy*, No. 95-310, ___ So. 2d ___ (Fla. Ct. App., Mar. 1, 1996) (court may enforce settlement agreement calling for division of military retired pay, even if husband, post-divorce, applies for and receives veteran's disability benefits, since the parties had agreed to split the benefits).

In sum, both federal and state law disallow any supposed "agreement" whereby, after Bence fought hard for years for her rightful share of community property, she gave up that property. Any assertion that she "agreed" to any such thing defies the record, law, equity, and reason.

The lower court's holding that there was "no meeting of the minds" with respect to modifying any of the language or terms of the PSA should be affirmed. It is the gentlest possible label that could be affixed to what is actually Robert's obvious attempt to perpetrate a fraud.

## II. THE DISTRICT COURT'S FINDING THAT "PENSION RAISES" ARE THE SAME AS COST OF LIVING ADJUSTMENTS SHOULD BE AFFIRMED

There is no legitimate question of what the PSA meant when it said "Husband and Wife shall participate equally in future pension raises derived from the United States Armed Forces Retirement Pension Program." 1 ROA 8. Robert was already retired when the parties divorced, and the only "raises" that had ***ever*** accrued to the pension were the normal, periodic cost of living adjustments that have been made to military retirement benefits since at least 1958. That is the only kind of

"raises" these parties or their attorneys had ever heard of, and it is obviously what they were talking about dividing. The court below saw through Robert's attempt to misinterpret the clear meaning of the language his own attorney drafted. The original Order After Hearing stated:

> Therefore, the language from the 1976 Property Settlement Agreement specifically including "future pension raises" is analogous to the current term "Cost of Living Adjustments" (COLAs).

2 ROA 352. In its later Decision, the Court below explained its ruling:

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

2 ROA 447. The lower court further stated:

> Case law provides that a document, and here we refer to the Property Settlement Agreement, not the "Decree" must be interpreted in the light most favorable to the party who did not draft said Agreement, Dickenson v. The State of Nevada, Nevada Department of Wildlife, 110 Nev. 934, 877 P.2d 1059 (1994). This document appears to have been drafted by Robert's counsel. If Robert intended such a differentiation in these terms, he had the burden at the time of drafting to provide definitions or examples of "pension raises." Robert also would have been required to specifically omit "Cost of Living Increases." Such did not occur.

2 ROA 448.

Robert states, incorrectly and without citation to the record, that the undersigned "argued below that COLAs were not in existence at the time of the PSA, and that is why the PSA uses 'pension raises' instead of COLA." RAB 14.

Bence's counsel did argue -- correctly -- that the regulations setting out the preferred language for divorce decrees were not written until seven years after Robert's divorce attorney wrote the property settlement agreement. *See* 32 C.F.R. § 63.6; 1 ROA 45, n.1. It was not until passage of the USFSPA in 1983 that divorce lawyers gave any thought at all to the technical language

governing the military pay system -- such as "cost of living adjustments" -- and the language used was changed just to accommodate such divorce orders.[8]

Again, Robert's argument is most notable for what it *excludes*. He offers up his own recollection today of what he thought the term "future pension raises" meant in 1976. He did ***not*** offer an affidavit of the drafting attorney, although challenged below to do so. He certainly offered no evidence of what *Bence*, or her attorney, thought the term meant. Even if Robert's non-credible musing that the language used was a "mistake," it certainly was not "mutual."

Similarly, Robert declines to even address the ruling of the lower court that since Robert's attorney drafted the provision, any possible ambiguity should be construed against him. *See* RAB at 13-14; *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992). Presumably, the point is conceded.

It is respectfully submitted that the lower court correctly ruled that the term "pension raises" was unambiguous as used, given its time and place. 2 ROA 447-48. If, on review, this Court perceives any possible ambiguity, it is submitted that any ambiguity should be construed against Robert, and that the best evidence of the parties' intent are their words and actions at the time.

Robert failed to pay Bence any COLA increases from 1976 to 1979. 1 ROA 45. Bence protested, and informed Robert that he owed her close to $1,600.00 and that his allotment needed to be changed to $750.00, based upon the COLA increases he had received. 1 ROA 104-105. Bence hired an attorney, who sent a demand to Robert on April 20, 1979, for all past due COLA increases. 1 ROA 117-18. An accommodation was reached and Robert made up all past-due COLA increases

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[8] The undersigned has been active in this field for over ten years, has written myriad articles, participated in the federal amendments to the USFSPA in 1990, has written a book on this subject to be printed by the ABA, and has reviewed thousands of military divorce cases from all over the country issued from the 1950s to the present. Robert has cited nothing, and the undersigned is aware of nothing, indicating that the term "COLA" was in "common use" in divorces ***anywhere***, nevertheless Nevada, in 1976. *Cf.* RAB at 14.

and began paying Bence the amount that ***he*** claimed to be a correct total of one-half of the COLA-increased gross military retirement pay. 1 ROA 45. Those payments continued until August, 1981, when Robert informed Bence that he no longer had to provide her with any share of his pension, and unilaterally reduced Bence's payments to $620.00 per month. 1 ROA 49-50.

The parties both knew that "pension raises" as used in their 1976 divorce decree meant COLAs. Robert cannot claim that he "did not anticipate that he would pay a portion of his cost of living expenses" (RAB 13), when he had been paying Bence one-half of those increases from 1979 through 1981. The lower court's finding that "pension raises" means "COLAs" should be affirmed.

## III. THE DISTRICT COURT CORRECTLY DETERMINED THAT BENCE'S CLAIMS WERE NOT BARRED BY THE DOCTRINE OF LACHES

Robert claims that because he told Bence (falsely) that he did not *have* to pay her anything, and she expressed gratitude for the scraps he threw her, Bence is somehow unable to get relief when she finally caught on to him.

Of course, that is not the law. Any temptation to view the parties' Decree of Divorce as "just a contract," with any doubt as to whether Robert can seize the "present, existing, and equal interest" that the law provided to her, would be countered by the instructions of this Court:

> The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created.

*Topaz Mutual Co. v. Marsh*, 108 Nev. 845, 853, 839 P.2d 606 (1992). *See* NRS 123.225; *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

In making his claim to a "laches" defense in equity, Robert argues that it is "unbelievable" that Bence did not know about the USFSPA, which gave her the right to her full share of the military retirement benefits, upon its passage in 1983. RAB 15. If *she* "must have known, then ***he*** must have known -- it was ***Robert*** who received the newsletter of "The Retired Officer's Association," which

started its coverage of the efforts that led to the USFSPA in the very issue he photocopied and sent to Bence. *See* 1 ROA 123 (describing H.R. 3039). Therefore it must be concluded that ***Robert DID*** know full well that he was committing a fraud each month when he shorted Bence's share of the retired pay.

In accordance with *Topaz*, this admission alone would seem sufficient to bar Robert from ***any*** equitable defense. For reasons he does not make clear, however, Robert asks this Court to disregard his knowledge that what he told Bence was false, and that he was committing an ongoing fraud, in analyzing the "equities" of this case. *See* RAB at 9, 14-15.[9] Robert kept for himself money he owed Bence under law, under his own agreement, and under court order, and he was in possession of information that he did so wrongfully. He is a thief, and should be treated as a thief; he has no claim to equity. *See Milender v. Marcum*, 110 Nev. 972, 879 P.2d 748 (1994) (former husband's argument sought to effectively transfer legal ownership of the former wife's property to him, which was an attempt to "engage the judicial process in an elevation of greed and an affront to equity; this we shall not do").

This Court has many times considered "laches" claims, and has consistently held that the doctrine does not have application *especially* when the statute of limitations has not run and when (as in this case) an inequitable windfall would result from applying the doctrine. *See*, *e.g.*, *Home Savings v. Bigelow*, 105 Nev. 494, 779 P.2d 85 (1989). Here, Bence's trust in Robert's "honor" have already cost her several years of benefits that have passed beyond the reach of the statute of limitations and which she will never be able to recover.

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[9] Robert's argument that "Whether or not Robert knew and informed Bence that the state of the law in April 1982 did not remain constant is immaterial" (RAB 9) is almost breathtakingly arrogant coming from a party who demands "equity."

As to the past six years of benefits, Robert has stated no legally cognizable ground why his ex-wife is not entitled to the time-rule portion of the retirement benefits ***awarded to her in the divorce decree***, like every other former spouse in Nevada. Instead, Robert says only that he wants Bence's share of the community property money awarded to her in 1976 for himself, and wants this Court to help him steal it.[10] That is not a legally relevant argument. *See Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987) (retirement benefits earned during marriage are community property); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

Therefore, the court below did not err, and its order should be affirmed, as Bence's claims were not barred by the equitable doctrine of laches.

## IV. THE DISTRICT COURT CORRECTLY FOUND THAT BENCE DID NOT "WAIVE" HER CLAIM TO THE RETIREMENT BENEFITS

Robert asserts that Bence "waived" her right to her rightful share of the military retirement benefits (RAB 16), despite the divorce decree to the contrary, and her efforts to collect what is due her over the years. Robert correctly states the definition; "waiver" is the "intentional relinquishment of a known right."[11]

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[10] This section of Robert's argument also contains some particularly irritating mis-statements of fact. He asserts that he should receive favorable treatment because Bence "waited until Robert retired . . . before she sought additional funds." RAB 6, 15. Robert swore below, however, that he knew Bence was seeking information to allow this legal action in the Spring of 1993, and that while he "could have remained on the faculty until age 70, . . . I had no desire to do so" and retired the following July. 1 ROA 82, 84-85. In other words, Bence did not pursue this claim after Robert retired; he deliberately chose to retire early after learning of this claim.

[11] While Robert does not make the point, the doctrine can be applied in domestic relations cases. In *Parkinson v. Parkinson*, 106 Nev. 481, 796 P.2d 229 (1990), this Court found that waiver may be implied from conduct which is "inconsistent with any other intention" than to waive a right, but that waiver may not be asserted as a defense if the waiver was the result of fraud or duress. *Id., citing Mahban v. MGM Grand Hotels*, 100 Nev. 593, 596, 601 P.2d 421, 423 (1984); *Albins v. Elovitz*, 791 P.2d 366, 369 (Ariz. Ct. App. 1990).

Robert states, without a reference to the record, that "Bence expressly agreed to waive her rights under the PSA." RAB 16. Undersigned counsel cannot find any such express waiver anywhere in the two volumes of record. Robert has not in any way established *any* kind of waiver, only an expression of gratitude from Bence for not being left *entirely* destitute. 1 ROA 127. That was not a "waiver" any more than it was an "agreement" to be cheated. Only Robert took action (to cut Bence's payments); her failure to haul him back into court in 1982 was a waiver of nothing. It is submitted that Bence's thank you note (based on Robert's mis-information) is not a "voluntary relinquishment" of *anything*.

The information Robert gave to Bence (that she was no longer "entitled" to her share of the community property) (1 ROA 122-23) was a lie, and Robert knew it to be a lie either when he wrote it, or at latest within a year of asserting it, and each and every month that he has kept her money since then. This was fraud, and *cannot* be the basis for a finding of waiver, even if there ***had*** been some credible evidence that Bence had "voluntarily" relinquished her right to her share of the community property. There is no evidence in the record that Bence ever ***intended*** to receive less than her legal share of the retirement benefits.

If the court somehow finds any technical merit to Robert's argument, he should be found to be equitably estopped from raising any such argument. *See United Brotherhood v. Dahnke*, 102 Nev. 20, 714 P.2d 177 (1986) ("equitable estoppel operates to prevent the assertion of legal rights that in equity and good conscience should be unavailable because of a party's conduct"); *Mahban v. MGM Grand Hotels*, 100 Nev. 593, 691 P.2d 421 (1984), and cases cited therein. Robert, who has been wrongfully taking most of Bence's court-ordered property each month for the past 14 years, is in no position to invoke equity, and the facts set out in the record would not support such a claim even if he had a technical right to make it. This is a matter of law, since the facts are not disputed.

The District Court made no error in refusing to invent a "waiver" by Bence of her court-ordered share of the retirement benefits, and the order should therefore be affirmed.

## V. THE DISTRICT COURT CORRECTLY FOUND THAT BENCE IS ENTITLED TO HALF THE GROSS SUM OF THE RETIREMENT BENEFITS

For the first time, Robert asserts that the amount he calculated and paid under the parties' April 23, 1976, Property Settlement Agreement was based upon one-half of his "disposable" pay. RAB 16. This belies both Bence's belief, and Robert's own sworn testimony in the court below. There, Robert submitted a sworn statement that "The amount of $620 was one-half of my gross USAF pension in 1976. Disposable pension should have been used but was not." 1 ROA 80.

Further, in 1979, when Bence's lawyer demanded half the gross, per the decree, Robert talked Bence out of hauling him back into court by supplying calculations allegedly showing that she ***was receiving*** half the gross pension, and protesting:

> I have not and do not plan to short change her and have stated before in letters to her of this fact. Why did she wait 3 years to bring this to my attention ??? . . . her letters where each time she states a different amount owed. Anyone would be confused. But I will concede to this later amount of $756.34. It is all on the way you figure it out.

1 ROA 115-120.

Perhaps showing most why Robert's argument ***cannot*** be correct, the term "disposable pay" did not ***exist*** until after 1983 -- seven years after Robert started making payments. For all cases decided before the Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408 (1982), when community property states divided "the pension" or "the retirement" or "the military retired pay," what they were dividing was the **gross** sum of the benefits. The huge number of cases so stating are summarized in the opinions of the California and Texas Supreme Courts in *Casas v.*

*Thompson*, 720 P.2d 921 (Cal. 1986), *cert. denied*, 479 U.S. 1012 (1987) and *Cameron v. Cameron*, 641 S.W.2d 210 (Tex. 1982); *see also Seeley v. Seeley*, 690 S.W.2d 626 (Tex. Civ. App. 1985).

A few years ago, the Texas Supreme Court had an opportunity to comment on what the divorce courts of the community property states, particularly those of Texas, were dividing prior to *McCarty* and the USFSPA. The court specifically approved the reasoning and result reached by the California Supreme Court in *Casas*, *supra*, and concluded that **gross retired pay** was properly divided in such divorces before *McCarty*, and after passage of the USFSPA:

> Before . . . *McCarty* . . . Texas courts apportioned the community property interest in retirement benefits earned during marriage according to the formula established in *Taggert v. Taggert*, 552 S.W.2d 422 (Tex. 1977) and *Cearley v. Cearley*, 544 S.W.2d 661 (Tex. 1976) [time rule division of the gross sum of benefits]. . . .

*Grier v. Grier*, 731 S.W.2d 931, 932-33 (Tex. 1987). The court went on to note the provision of 10 U.S.C. § 1408(e)(6) that provided that amounts might be awarded by state court orders that exceeded what could be collected directly from the military pay center under the USFSPA:

> Nothing in this section shall be construed to relieve a member of liability for the payment of alimony, child support, or other payments required by a court order on the grounds that payments made out of disposable retired or retainer pay under this section have been made in the maximum amount permitted [under the Act].

*Grier*, *supra*, at 731 S.W.2d at 933.

Nevada does not have a case directly on point on this question, but all holdings from this Court to date have been completely in accord with those from California and Texas. In *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983), relying expressly on the line of California opinions dividing the gross sum of all retirement benefits, this Court held that "retirement benefits are divisible as community property to the extent that they are based on services performed during the marriage, whether or not the benefits are presently payable." 99 Nev. at 607. *See also Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988).

It is not believed that there is **any** Nevada authority stating that less than the gross sum of community property belongs to the parties equally and so is to be divided upon divorce, unless it falls into one of the narrow exceptions set out in NRS 123.130. *See*, *e.g.*, *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994) (under the community property scheme, a spouse has a present, vested one-half interest in the other spouse's earnings under NRS 123.130, 123.220, and 123.225); *Kerley v. Kerley*, 111 Nev. ___, ___ P.2d ___ (Adv. Opn. No. 40, Apr. 27, 1995); *Byrd v. Lanahan*, 105 Nev. 707, 783 P.2d 426 (1989) (NRS 123.230 and NRS 123.250 means that each spouse may dispose of one-half of the total of all community property).

It is worth noting that Robert cites no authority of ***any*** kind from ***any*** jurisdiction or the record to support his claim that Robert ever was supposed to, or did, pay a portion of "disposable pay," as that term was first defined in 1983. RAB at 16-17. He never even tries to explain how these parties could have even ***tried*** to do so seven years before Congress passed the legislation that invented the term "disposable pay."[12] It is worth noting that, on appeal, he has given up on the misplaced reliance he put below on *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989).[13]

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[12] Robert's complete failure to cite relevant authority, relating to the courts dividing "disposable pay" prior to 1981, is not only an admission that his argument is not "meritorious," but is itself adequate grounds for disregarding his contentions. *See 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).

[13] *See*, *e.g.*, 2 ROA 365. In 1989, the United States Supreme Court decided in *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989), that state court divorces could divide only **disposable** retired pay. In *Mansell* itself, the court upon remand refused to allow the ruling in that case to affect the pre-existing division of dollars between the parties. *In re Marriage of Mansell*, 265 Cal. Rptr. 227 (Ct. App. 1989), *on remand from* 490 U.S. 581, 109 S. Ct. 2023 (1989).

This logic was followed by the other state and federal courts examining pre-*Mansell* divorces. *See Berry v. Berry*, 786 S.W.2d 672 (Tex. 1990); *Toupal v. Toupal*, 790 P.2d 1055 (N.M. 1990); *Maxwell v. Maxwell*, No. 890252-CA, (Utah Ct. App., July 7, 1990), 16 FLR 1500 (Sept. 4, 1990); *MacMeeken v. MacMeeken*, Nos. 89-0015 & 88-41417-7 (D. Kan., July 31, 1990); 16 FLR 1488, Aug. 28, 1990).

What these cases mean is that *Mansell* had ***no*** retroactive effect to restrict pre-*Mansell* decrees to a division of disposable retired pay. It is not believed that there are any contrary decisions from any jurisdiction, and certainly none from any community property state or any jurisdiction relevant to this case. It is worth noting that Congress effectively repealed the *Mansell* interpretation just one year after that case was decided, by altering the definition of "disposable retired pay" to essentially equal gross pay. In states such as Texas, California, and Nevada, the only divorces for which the "disposable only" restrictions of

Since Nevada, California, and Texas courts divided gross in 1977, and the courts of all those states have confirmed that such early divorces are **not** to be reconsidered in light of the 1981 *McCarty* case, the 1982 USFSPA that reversed *McCarty*, **or** the 1989 *Mansell* case, there is simply no question that gross military retirement benefits are what was, and is, to be divided in this case.

Undersigned counsel anticipated (unfortunately, correctly), that Robert might seek to take a double-bite at the apple, after Judge Fine already *gave* him credit for paying taxes "for both he and Bence" when he kept nearly all the money and paid income taxes on it. *See* AOB at 12 & nn. 8-9; 2 ROA 451. Some background is necessary to complete the point.

After the Uniform Services Former Spouses Protection Act was enacted in 1982, and until it was amended as of February 4, 1991, the military pay centers automatically withheld taxes from the gross retired pay, divided the post-tax amount between the member and the former spouse, and sent a check for a portion of the remainder to each party, irrespective of what the Court dividing the benefits intended.

At the end of each year, the member was eligible to claim a tax credit for amounts withheld on sums ultimately paid to the former spouse, and the former spouse had a tax liability for whatever amounts she received. Courts in community property states then had to order the member to make up the difference by way of direct payment, to actually bring the court order into effect.

Reports by the General Accounting Office and Congressional Research Service in 1984 and 1989 found that court orders attempting to divide military retirement benefits on a "50/50" basis actually effected a split of "55.4%/44.6%" to "58.4%/41.6%" -- always in favor of the former military member -- after the impact of tax withholdings was considered. CRS Report For Congress: "Military Benefits for Former Spouses: Legislation and Policy Issues," March 20, 1989.

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*Mansell* are even relevant are those for which the decree was entered between 1989 and 1991.

This was often exacerbated by retirees who tried to evade court orders by having income over-withheld from their military pay, in order to reduce the remaining "disposable" pay under the old formula. Robert submitted an Exhibit in the lower court (2 ROA 407), which proves his attempts to do exactly that -- evade the lower court's order by increasing his tax withholdings, thus reducing the military retirement benefits divisible between himself and Bence.

Such efforts by members to cheat their former spouses have been a problem since the USFSPA was passed. *See* Comptroller General Opinion Decision B-213895 (April 25, 1984). These cases continue to crop up around the country. *See*, *e.g.*, *Walborn v. Walborn (Young)*, ___ P.2d ___ (Idaho, No. 21410, Nov. 7, 1995), 22 FLR 1035 (BNA Nov. 21, 1995) (military retiree should not have been allowed to have income taxes withheld from his military retirement at a rate greater than his projected effective tax rate, agreeing with earlier comptroller general ruling). The existence of such cases was part of the reasoning behind the 1990 change to the USFSPA.[14]

With that background in mind, it can be seen why the lower court found:

> Robert is not obligated to pay money that he did not receive. He has been receiving income and paying taxes for both he and Bence. Bence is to receive one-half of the monies Robert received. Counsel for Robert makes a persuasive argument in that Robert can't give back that which he never received. The Court held at the prior hearing that from that date forward, Bence would receive one-half of the gross amount attributable to member spouse, Robert. Bence will be responsible for paying her individual taxes on these funds.

2 ROA 451. In other words, Robert prevailed below on this matter, to the extent that the six years worth of arrears will be calculated using one-half of the retirement money he received (and failed to pay Bence). Bence has stated that this ruling is acceptable, so long as Robert does not try to

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[14] Statement of Marshal S. Willick, Chairman, Subcommittee on Federal and Military Pension Legislation, Committee on Federal Legislation and Procedures, Section of Family Law, on Behalf of the American Bar Association, Before the Subcommittee on Military Personnel and Compensation, Committee on Armed Services, U.S. House of Representatives, concerning the Uniformed Services Former Spouses Protection Act, April 4, 1990, at 13-17.

double-dip by claiming ***another*** tax credit for the sums Bence receives; the effect to both parties would be the same under the lower court's order as it would have been if Bence got her half of the gross, and then had to pay taxes on it herself, but is much simpler to accomplish.[15] AOB 12.

Robert is simply wrong when he says that this is "raised for the first time" and "was not raised below." RAB 17 & n.1. It is a large part of what was argued on remand, and the lower court's order requiring Robert to pay in arrears only half of the sum Robert "actually received" was entered at the request of Robert's counsel. 2 ROA 451; 290-92.

Beginning in June, 1994, the Court Ordered Robert to pay Bence one-half of his gross retired pay, stating:

> This Court having considered all of the papers on file, most specifically, the Property Settlement Agreement executed by the parties in 1976, finds that the further evidence is not required, that the Documents at issue speak for themselves. . . .

2 ROA 343. No "oral agreement" was ever alleged. Below, Robert contended that the correspondence in the record constituted the "agreement" by which Bence gave away her right to her half of the retired pay.

The lower court's findings and order should be affirmed. Half means half, and the parties should each get half the benefits, and pay taxes on their half of the benefits, as the original decree of divorce provided and as the lower court has ordered. It is respectfully submitted that this is the only rational construction of the language that could be honestly made.

This concludes matters relating to Robert's appeal. The remaining sections, numbered to follow the Answering Brief, actually address issues in Bence's Opening Brief.

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[15] During oral argument, Bence's Counsel argued this point stating "The tax implications are nonexistent and we can dance on the head of a pin as long as we want it won't make any difference." 2 ROA 291. It is also a matter of common sense that Bence would have no tax consequence on the arrears to be paid by Robert, since that is the very reason the court below found that he is not "obligated to pay money that he didn't receive." The Court noted "He has been receiving income and paying taxes for both he and Bence." 2 ROA 451; *see also* 2 ROA 290-92.

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

Robert has not disputed that the lower court erred by failing to reduce to judgment a specific sum of arrears. Robert's failure to even address this issue proves that he agrees with Bence's argument. In fact, both parties agreed, in the *Joint Motion for Remand for Further Instructions*, filed with this Court on July 13, 1995, that the calculation of arrearages is an issue that should have been decided prior to any meaningful decision by this Court upon review.

Therefore, this issue should be remanded to the District Court, with clear instructions to have the court below enter a sum certain based on exact information to be supplied by Robert the completed within a specified time, or for counsel's calculations to stand.

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

Robert contends that the district court addressed "Robert's ability to pay any arrears" on two occasions and that the Court reviewed his Affidavit of Financial Condition. RAB 18. Yet, Robert fails to refer to any part of the record when making his contention. The court below addressed this issue once, when it stated:

> The issue is how to provide an equitable result for both parties. Bence claims that unless the amount of the obligation is increased she will never be fully compensated. However, the Court cannot force Robert to pay money he does not have. Therefore, the amount to be paid by Robert to Bence will not exceed that which was previously ordered with the understanding that one-half of all future pension raises or cost of living increases will be automatically added to the gross amount Bence receives.

2 ROA 452. The only information the court had in determining what Robert could or could not pay was Robert's Affidavit of Financial Condition, which clearly shows his monthly income of $6,621.33, without even considering his wife's income. 2 ROA 331. Clearly, Robert has the means to pay Bence an increased amount toward the arrears.

The Court's attention is directed to the three and one-half pages in Bence's Opening Brief, relating to Robert's Affidavit of Financial Condition and how Robert conveniently double-counted his monthly expenses and added his one-time expenses into his monthly expense figure. AOB 15-18. Again, Robert's brief speaks loudest by silence -- he does not even attempt to deny that his affidavit was fraudulent, or that the cases cited by Bence apply. This Court has held that a party submitting a false or misleading financial affidavit is not entitled to any court rulings based thereon, and that judgments must be paid off "on a reasonable basis." *See Perri v. Gubler*, 105 Nev. 687, 782 P.2d 1312 (1989); *Kennedy v. Kennedy*, 98 Nev. 319, 646 P.2d 1226 (1982).

Since the arrears can ***never*** be paid off at the rate of $250.00 per month ordered by the lower court (2 ROA 345, 452), the payments must be increased to give meaning to the judgment. Robert's failure to cite relevant authority (or even address Bence's authorities), confesses error on this point, and that Robert's contentions should be disregarded by this Court. *See Orme v. District Court*, 105 Nev. 712, 782 P.2d 1325 (1989); *State, Emp. Sec. Dep't v. Weber*, *supra*.

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

Robert asserts that Bence raised the issue of a bond for the first time on appeal. RAB 18. His assertion is false. This issue was raised in and addressed by the court below. Bence requested that the lower court increase the rate of the arrearage payment, and/or require Robert to post sufficient security to ensure that the judgment will be paid in the event of his death. 2 ROA 417. The lower court responded to Bence's request, stating: "Additionally, Bence will have the option of making a claim against Robert's estate in the event that the entire arrearage is not paid off at the time of Robert's death." 2 ROA 452. The problem is that the lower court failed to make any provision to ensure that there would even ***be*** such an estate.

Robert also admits that he has not been granted a relief from stay pursuant to NRCP 62. RAB 18. This is true. Unfortunately, Robert does not need a stay to stymie enforcement of the judgment rendered below, as it is impossible for Bence to collect any money since the judgment for arrears has not been stated as a specific amount. Certainly, Robert is in no position to flaunt his disregard of an un-stayed order as grounds for asking for relief.

As noted in the Opening Brief, in order for a judgment to be ***collectible***, it is necessary for it to be stated as a dollar sum certain. *See* citations and argument at pages 11-14 of the Opening Brief. Robert claims that requiring him to provide security is "outside the realm of possibility." But he who lives by the sword must die by the sword; since Robert claims that the courts have discretion to determine the method of paying a judgment (RAB 18), he must concede that our courts have inherent authority to secure those judgments.

In *Sobelman v. Sobelman*, 541 So. 2d 1153 (Fla. 1989), the court stressed the need to protect the receiving party when arrearages are owed, and held that the lower court was authorized to order the obligated party to purchase a life insurance policy or post a bond, or to otherwise secure such award with any other assets which may be suitable for that purpose. It is the principle, not the procedural details of Florida domestics law, that is important here. Whether they are support or other arrearages is irrelevant. *See*, *e.g.*, *Ehrenzweig v. Ehrenzweig*, 89 Misc. 2d 211, 390 N.Y.S.2d 976 (N.Y. Sup. Ct. 1977) (bond required as security for outstanding arrears and previously awarded **counsel fees**).

Frankly, it would be far better if the judgment was simply paid, so Bence could have at least the money Robert has taken from her that remains within the statute of limitations. If that sum is not immediately to be paid, however, the lower court should be instructed on remand to require the immediate posting of a bond or other security on the judgment. It is incumbent on the court below to ensure that collection of the judgment can be made, sooner or later.

## CONCLUSION

Robert is, and always has been, obligated to share the gross military retirement benefits with Bence. Several years of shorted payments are beyond the statute of limitations and can never be recovered. Bence was foolish enough to trust Robert not to cheat her, and the tens of thousands of dollars that can never be recovered from him are adequate punishment for her lack of suspicion. There was never an "agreement" of any kind, oral or written, to modify the property settlement agreement or decree of divorce. As soon as Bence discovered that she was being cheated each month out of what is rightfully due to her, she sought counsel and brought her action. She is still being cheated each month, as Robert is ignoring the order below to divide the gross sum of the pension. By his own fraud, and the law set down by this Court, there is no "equitable" doctrine that Robert can invoke to assist him in continuing to defraud his ex-wife each month. The doctrines of laches and waiver simply do not apply.

The Decree of Divorce, which approved, confirmed and ratified the parties' PSA, was written years before the word "COLA" was commonly used, and prior to the passage of the USFSPA -- by Robert's lawyer. The PSA was written in conformity with the standards of the time and place in which it was written. Robert's painfully self-serving recapitulations about his personal intent (as opposed to that of the two drafting attorneys) in 1976 is simply irrelevant, even if his assertions could be true (which seems highly unlikely).

The lower court did not err when it found that the Decree, PSA, and the parties' letters, speak for themselves. Therefore, the court's orders stating that the decree term "future pension raises" has the same meaning as the current term of art "Cost of Living Adjustments," and that Bence is entitled to one-half of Robert's gross retirement pay, should be affirmed.

The lower court already limited the arrearages calculation according to what Robert "actually received" for the six year statue of limitations period, and Bence has expressed her willingness to

accept that sum (so long as Robert does not try, as indicated in his Answering Brief, to cheat her yet *again* by trying to claim a tax credit). This issue is therefore, moot.

Bence has the right to justice -- to actually recover what has been stolen from her -- within her expected lifetime. Therefore, this Court should remand the case to the lower court with instructions to immediately reduce to judgment a specific sum of arrears, to compel payments on arrears sufficient to pay off the arrearage judgment and interest in a reasonable period of time, and to compel Robert to provide security until such time as that payment is made in full.

DATED this _____ day of __________, 1996.

Respectfully submitted:

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_____________________________________

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**ATTORNEY'S CERTIFICATE OF COMPLIANCE**

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this _____ day of __________, 1996.

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***CERTIFICATE OF MAILING***

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

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Attorney for Respondent/Cross-Appellant

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

______________________________________

Employee of Marshal S. Willick, Esq.