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**Byrd v. Byrd, 137 Nev. Adv. Op. 60 (Nev. Ct. App. Sept. 30, 2021).**

Winnie Wu

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CIVIL PROCEDURE: NRCP 60(b)(6) RELIEF, ALIMONY PAYMENTS FROM VETERANS' DISABILITY, AND APPEARANCES VIA AUDIOVISUAL TRANSMISSION

**Summary**

After her ex-husband, Grady Byrd, suddenly stopped making payments pursuant to their 2014 divorce decree, Caterina Byrd moved the district court to enforce same. During the proceedings, Grady revealed that he had waived his military retirement pay in exchange for veterans' disability benefits, and therefore Caterina was entitled to significantly less money than she had originally anticipated. Caterina moved the district court for NRCP 60(b)(6) relief, arguing that she would not have agreed to certain terms in the marital settlement agreement had she known Grady would waive his military retirement pay. The district court ordered an evidentiary hearing, and Grady's request to appear by audio-visual transmission was summarily denied.

The district court ultimately granted Caterina's NRCP 60(b)(6) request and modified the 2014 divorce decree to award Caterina lifetime alimony and additionally ordered Grady to pay Caterina directly from his veteran's disability benefits. Grady appealed the modification, and the Nevada Court of Appeals reversed the district court. The Court held that (1) NRCP 60(b)(6) relief was inappropriate because Caterina's request actually sounded in a different clause than Rule 60(b)(6); (2) federal law preempts state courts from distributing alimony directly from veterans' disability benefits; and (3) district courts must analyze the relevant SCR Part IX-B(B)(1)(6) factors and make a good cause finding when a party requests to appear via audio-visual transmission.

**Background**

The parties, Grady and Caterina, are ex-spouses who were granted a summary divorce by the district court in 2014. Grady now resides in the Philippines. The 2014 divorce decree incorporated the parties' marital settlement agreement ("MSA") which included the following relevant provisions: neither party is required to pay the other alimony, Grady is to pay Caterina \$1,500 per month for mortgage assistance until Caterina's financial situation changes; and Caterina is entitled to half of Grady's military retirement pay. Under these provisions, Grady paid Caterina \$3,000 per month (\$1,500 for mortgage assistance, \$1,500 of his monthly military retirement pay) from 2014 until 2018, when the payments suddenly stopped. As a result, Caterina moved for enforcement of the divorce decree in district court.

During motion practice, Grady argued that because he waived a portion of his military retirement pay to receive disability benefits, he now collects only \$128.40 a month in retirement pay, entitling Caterina to a mere \$64.20 per month as her community share. Caterina responded by counter-moving the district court to modify the 2014 divorce decree pursuant to NRCP 60(b)(6). In support of her argument, Caterina claims that Grady fraudulently induced her to sign the MSA waiving her rights to alimony by misrepresenting the value of his retirement pay at the time of divorce. The district court ordered an evidentiary hearing on the matter. The district court further ordered Grady to continue making payments under the MSA in the meantime.

Grady did not make the monthly payments. Ultimately, the district court ordered Grady to appear at a show cause hearing for failing to make the monthly payments, set at the same time as

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<sup>1</sup> By Winnie Wu.

the evidentiary hearing. Prior to the hearing, Grady requested permission to appear via audiovisual transmission, but the district court summarily denied his request without explanation. Grady did not personally appear for the combined show cause/evidentiary hearing.

After the evidentiary hearing, the district court granted Caterina's request for NRCP 60(b)(6) relief and modified the 2014 divorce decree, awarding Caterina lifetime alimony and ordering Grady to make monthly payments to Caterina directly from his veteran's disability benefits. The district court concluded that NRCP 60(b)(6) relief was appropriate because, *inter alia*, Grady breached his fiduciary duty to Caterina by misrepresenting his assets at the time of divorce. Grady appealed.

## **Discussion**

The Court of Appeals was presented with three issues: (1) whether NRCP 60(b)(6) relief was appropriate, (2) whether the district court had authority to order Grady to make alimony payments directly from his veteran's disability benefits, and (3) whether the district court abused its discretion by summarily denying Grady's request to appear via audiovisual transmission.

For the first issue, the Court notes as an initial matter that divorce decrees may only be modified "as provided by rule or statute."<sup>2</sup> The district court relied on NRCP 60(b)(6) to modify the 2014 divorce decree. NRCP 60(b)(1)–(5) allows a court to modify an order for any of the five enumerated reasons. NRCP(b)(6) provides relief for any *other* reason not enumerated in the previous five clauses. The Court explained that NRCP 60(b)(6) provides a limited, and "independent basis for relief that is mutually exclusive of the previous five clauses," only available in extraordinary circumstances.<sup>3</sup> Accordingly, if relief is available under any of the first five clauses of NRCP 60(b), then it cannot be given under NRCP 60(b)(6).<sup>4</sup>

Here, NRCP 60(b)(6) relief was improper because Caterina's argument for modifying the divorce decree sounded in NRCP 60(b)(1) or 60(b)(3), which cover fraud, misrepresentation, misconduct of an opposing party, mistake, or excusable neglect. Accordingly, Caterina's requested relief was not available under NRCP 60(b)(6). Additionally, motions for relief based on either NRCP 60(b)(1) or (3) must be brought within six months of service of the written notice of entry of judgment,<sup>5</sup> and Rule 60 time limits are generally applicable to divorce decrees.<sup>6</sup> The period had long passed for Caterina to timely seek relief from the 2014 divorce decree. Therefore, NRCP 60(b)(6) was not an available basis for relief, and the district court abused its discretion by modifying the 2014 divorce decree based on same.

Regarding the second issue, the Court concluded that federal law explicitly preempted the district court from ordering Grady to pay Caterina directly from his veteran's disability benefits. Federal law allows states to treat military retirement pay as divisible, community property.<sup>7</sup>

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<sup>2</sup> *Kramer v. Kramer*, 96 Nev. 759, 761, 616 P.2d 395, 397 (1980).

<sup>3</sup> *Buck v. Davis*, 580 U.S. \_\_\_, \_\_\_, 137 S. Ct. 759, 777 (2017); *see* 11 Charles Alan Wright, Arther R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2864 (3d ed. 2012); *see also* *Klapprott v. United States*, 335 U.S. 601, 613–15 (1949). For this proposition, the Court first notes that, because Rule 60(b)(6) is a recent addition to the Nevada Rules of Civil Procedure, it has not been interpreted by mandatory authority. Accordingly, the Court may look to federal cases for guidance. *McClendon v. Collins*, 132 Nev. 327, 330, 372 P.3d 492, 494 (2016).

<sup>4</sup> *Wright, Miller & Kane, supra*, § 2864.

<sup>5</sup> NEV. R. CIV. PRO. 60(c)(1).

<sup>6</sup> *See, e.g., Mizrachi v. Mizrachi*, 132 Nev. 666, 673, 385 P.3d 982, 986 (Ct. App. 2016); *see also Kramer*, 96 Nev. at 762–63, 616 P.2d at 397–98.

<sup>7</sup> *Howell v. Howell*, 581 U.S. \_\_\_, \_\_\_, 137 S. Ct. 1400, 1403 (2017) (citing 10 U.S.C. § 1408(c)(1)).

However, federal law preempts states from treating veterans' disability benefits, received as a result of waiving military retirement pay, as divisible, community property.<sup>8</sup> This is true regardless of when military retirement benefits are waived, whether prior or subsequent to the divorce.<sup>9</sup>

Accordingly, a state court cannot order one party to indemnify the other from disability benefits in order to offset the loss resulting from waived military retirement pay.<sup>10</sup> However, a state court is not precluded from ordering a party that incidentally receives disability benefits to make monthly payments. Rather, the inquiry is whether those payments are coming *directly from* the disability benefits.<sup>11</sup> Additionally, when a district court is calculating the need for alimony, it may take into account the possibility of reduced military pay by waiver.<sup>12</sup> Here, the district court specifically ordered Grady to reimburse Caterina from his veteran's disability benefits. This is explicitly preempted by federal law and is therefore invalid.

Regarding the final issue of Grady's request to appear at the evidentiary hearing by audio-visual transmission; the Court held that the district court erred when it summarily denied Grady's request. District courts are to allow parties to appear by audio-visual means at "appropriate proceedings" pursuant to the Nevada Supreme Court Rules.<sup>13</sup> "Appropriate proceedings" may include evidentiary hearings if the court determines there is "good cause" for the party to appear via audiovisual transmission.<sup>14</sup> "Good cause" is determined by SCR Part IX-B(B)(1)(6), which lists a number of factors a district court can consider. Additionally, "[t]he Nevada Supreme Court Rules favor accommodation of audiovisual testimony upon a showing of good cause."<sup>15</sup> Accordingly, while a district court has discretion to determine "whether to grant a request to appear via audiovisual transmission, [it] must determine whether good cause exists based on all the relevant factors and in light of the policy in favor of allowing such appearances."<sup>16</sup>

Here, the district court considered Grady's documents in support of his request. However, it did not consider the relevant SCR Part IX-B(B)(1)(6) factors and did not make a good cause finding. Therefore, its summary denial of Grady's request to appear by audio-visual means was in error. However, the Court notes that SCR Part IX-B(B)(4)(2)(b) requires personal appearances for show cause hearings. In this case, the evidentiary hearing was set for the same time as the show cause hearing, requiring Grady's presence. However, Grady did not address this argument in his brief, and therefore the Court did not reach whether reversal on this issue was required, as it reversed on other grounds.<sup>17</sup>

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<sup>8</sup> *Id.* at \_\_\_, 137 S. Ct. at 1403 (citing 10 U.S.C. § 1408(a)(4)(B)); *Mansell v. Mansell*, 490 U.S. 581, 594–95 (1989).

<sup>9</sup> *Howell*, 518 U.S. at \_\_\_, 137 S. Ct. at 1405.

<sup>10</sup> *Id.*

<sup>11</sup> *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507 (2003) (holding that a divorce decree which required an ex-husband to make monthly payments was not preempted by federal law because he could satisfy the obligation from any one of his available assets without touching his disability pay).

<sup>12</sup> *Howell*, 518 U.S. at \_\_\_, 137 S. Ct. at 1406.

<sup>13</sup> SCR Part IX-B(B)(2) read in conjunction with SCR Part IX-B(B)(1)(5).

<sup>14</sup> SCR Part IX-B(B)(4)(1)(a).

<sup>15</sup> *LaBarbera v. Wynn Las Vegas, LLC*, 134 Nev. 393, 395, 422 P.3d 138, 140 (2018).

<sup>16</sup> *Id.*

<sup>17</sup> However, the Court notes that where a party is required to appear personally for a show cause hearing but seeks to appear via audiovisual transmission for other hearings, the district court may simply bifurcate the show cause hearing and continue it to a later date, while allowing the party to appear remotely for the substantive hearings.

## **Conclusion**

The Court held that where a request for relief under NRCP 60(b) sounds in one of the five enumerated clauses (Rule 60(b)(1) – (b)), then relief cannot be granted under NRCP 60(b)(6). NRCP 60(b)(6) relief is a limited, and independent, basis for relief, mutually exclusive of the previous five clauses, and available only in extraordinary circumstances. Therefore, NRCP 60(b)(6) relief was not available to Caterina as her request sounded in either Rule 60(b)(1) or (3), and the time to request relief under those clauses had passed. Consequently, the district court's order to modify the 2014 divorce decree pursuant to NRCP 60(b)(6) was reversed and remanded.

The Court also held that “under federal law, only a veteran’s net disposable retirement pay is divisible as community property, whereas his or her waived amount, taken in the form of disability pay, is not community property subject to division.” Accordingly, the district court’s order for Grady to pay Caterina directly out of his veteran’s disability benefits was in error.

Finally, the Court held that the district court abused its discretion by summarily denying Grady’s request to appear for the evidentiary hearing by audio-visual transmission without making a good cause finding by analyzing the relevant SCR Part IX-B(B)(1)(6) factors “in light of the policy favor of allowing such appearances.” However, as the evidentiary hearing was scheduled for the same time as a show cause hearing in which Grady was required to attend in person, the Court did not reverse on this issue.

Therefore, the Court reversed the district court’s order modifying the 2014 divorce decree and remanded the matter for further proceedings consistent with its opinion.