AN INTRODUCTION TO PENSIONS

IN

NEVADA DIVORCE LAW

by

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October 15, 2004

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I. GENERAL INTRODUCTION – DEALING WITH PENSIONS AND RETIREMENT BENEFITS IN NEVADA DIVORCE CASES

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[1] As retirement benefits have become ubiquitous in divorce, many fine points regarding their division have arisen, and distinctions (intentional and otherwise) between and among public and private retirement plans have become apparent.

As division of such benefits became more common, some of those earning retirement benefits developed strategies by to resist, limit, or prevent the division of the benefits with their soon-to-be-former spouses, who promptly devised counter-strategies. The total amount of information required for a practitioner to successfully advocate the cause of a participant or spouse relating to retirement benefits seems to continuously increase. One text echoes the question asked by many lawyers: "Why are these documents (and the procedure I have to go through to get them accepted) so difficult?"[2]

The answer to that question is beyond the scope of these materials. It is hoped, however, that these materials will be of assistance in identifying both dangers and opportunities, and thus make dealing with retirement benefits in future divorce cases easier for the practitioner, and more valuable for the client.

A. Why Bother? Duty

There is little excuse today for divorce lawyers failing to deal with pension benefits. Pensions have been recognized as community property for many decades,[3] and that recognition was extended to unvested and unmatured pension benefits long ago.[4] Statutory and case law throughout the country now recognizes pension benefits as marital property

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[1] *See*, *e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) at xix-xx.

[2] Gale S. Finley, ASSIGNING RETIREMENT BENEFITS IN DIVORCE: A PRACTICAL GUIDE TO NEGOTIATING AND DRAFTING QDROS (ABA Family Law Section 1995). While she was speaking of private retirement plans, the same cry is heard from practitioners forced to negotiate the intricacies of Civil Service, military, or state government retirement plans.

[3] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re Marriage of Fithian*, 10 Cal. 3d 592, 517 P.2d 449 (1974) (recognizing the importance of military retirement benefits as a marital asset).

[4] *See In re Marriage of Brown*, 15 Cal.3d 838, 544 P.2d 561 (Cal. 1976); *Copeland v. Copeland*, 575 P.2d 99 (N.M. 1978); *In re Marriage of Luciano*, 104 Cal. App. 3d 956, 164 Cal. Rptr. 93 (Cal. Ct. App. 1980); *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

with near-uniformity. Rationales for that recognition usually include that the benefits accrued during marriage, that income during marriage was effectively reduced in exchange for the deferred pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is the ***far*** better practice to deal with pensions during the divorce itself, instead of deferring the matter to be dealt with "later." Some states do not clearly permit a spouse who does ***not*** receive a portion of pension benefits to bring a partition action at a later date to divide those benefits, and the Nevada law on the subject still contains some contradictions.[5]

B. Why Bother? Liability

While partition ***might*** be available to a shortchanged former spouse after divorce, that expectation is not much to rely upon. If the law of the relevant state (which may or may not be the state of divorce) does not provide a way to correct the omission of assets from the decree, the only mechanism for recovery for a divested spouse be a malpractice suit against her[6] attorney. The non-uniform and uncertain state of the law governing partition of omitted assets therefore makes it imperative for counsel to seek out and address all pension benefits during the divorce case itself, as a matter of prudent, if not defensive, practice.

Awards against attorneys in such malpractice cases can be significant; the potential liability is the value of the benefit lost to the shortchanged spouse. It has been made clear that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist.[7]

In short, paying adequate attention to discerning and addressing retirement benefits is not only advisable, but necessary, for anyone practicing family law.

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[5] *Cf., e.g.*, *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989) (no right at common law to divide an unadjudicated pension); *but see Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (parties are tenants in common of all unadjudicated assets). Cases now headed toward appellate resolution could be used by the Nevada Supreme Court to resolve the contradictions in our case law. This topic is discussed elsewhere in these materials in far greater detail.

[6] Theoretically, either spouse could perpetrate such fraud by omission upon the other, but virtually all known cases involved women seeking portions of their ex-husbands' pensions. Presumably, this is because, historically, more husbands than wives had careers that generated pensions. As have other authors in the field, I apologize in advance for the implied sexism, but it is more important, I think, to avoid the confusing verbiage or grammatical errors otherwise necessary to render the text gender-neutral.

[7] *See Smith v. Lewis*, 530 P.2d 589 (Cal. 1975)($100,000.00 malpractice award for failing to list and divide a military reservist retirement); *Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (Ct. App. 1977); *Medrano v. Miller*, 608 S.W.2d 781 (Tex. Civ. App. 1980); *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award where attorney did not know that he could seek division of military retirement after change in the law).

II. COURSE OVERVIEW

This introduction deals with some of the terminology and definitions necessary to explore the world of retirement benefits. It discusses the kinds of plans and benefits that will be addressed in the seminar, and how those plans are valued and distributed. The time rule is explored in some detail. Finally, Nevada's case law dealing with the subject is summarized, and the remaining open issues and notable points of those cases are discussed.[8]

Next, the Nevada Public Employees Retirement System is explored. Some peculiarities and sometimes-forgotten options are discussed, and checklists and model clause sets are provided to make completing those orders more efficient.

Third, substantial information regarding the division of military retirement benefits and Civil Service benefits is detailed, including discussion of the statutory framework, the primary cases, and ancillary benefits under both programs.

We then turn to private retirement plans, governed by ERISA, and turn to the alphabet soup of the REA, QDROs, QJSAs, etc., from payment options to beneficiary selection. The intent of this section is to allow divorce practitioners to identify and address the issues that should be resolved during divorce litigation, to reduce the amount of ***post***-divorce litigation that often proves so expensive.

We vary from the "plan-by-plan" type of presentation to address the subject of death benefits, and disability benefits, which are addressed as two topics across all affected retirement plans, so that the variations among and between them can be compared and contrasted.

Taking a practical turn, we switch to discussion of discovery, tax, and motion practice matters with the intent of providing the practitioner with the tools to actual move these cases along.

The subject of partition actions, and a discussion of "fraud upon the court" cases, is sufficiently substantial that it deserves its own discussion, which is provided next, just before we give an overview of the approach taken by other community property states, which will hopefully provide some guidance to practitioners facing interstate or multi-state litigation of these topics. What conclusions can be reached from all this will be addressed.

Given the length of the materials, we encourage questions at any time during the presentation, or during any of the breaks.

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[8] One notable exception is the question of partition of omitted assets and matters relating to claims of fraud on the court, which were so substantial that they are discussed separately elsewhere in these materials.

III. DEFINITIONS & TERMINOLOGY

A. Kinds of Plans

Generally, retirement plans come in two varieties – defined ***benefit*** plans and defined ***contribution*** plans. The former is what is typically referred to as a "pension plan," especially in older cases.[9] The latter is often called a "retirement account" in court opinions.[10]

It would be unwise, of course, to just rely upon the terminology used by an opponent or a court in trying to identify the substance of the plan at issue. Additionally, many employees have ***both*** kinds of plans. For example, both Civil Service employees and military members earn both pension benefits, payable after retirement, ***and*** have the right to accrue benefits in a cash account ("thrift savings plan"). The practitioner must deal with both plans.

The practitioner should distinguish "benefits" from "value," and distinguish both of those terms from "contributions." The "value" of a pension interest may be expressed by valuation experts as the cost, at any given time, of acquiring an annuity that would pay equivalent benefits over the anticipated payout period. "Benefits," on the other hand, are what the retiree will ***actually receive***, usually phrased as a right to receive certain sums at a certain date, or on a certain schedule. "Contributions," whether from the employee, the employer, or both, do not necessarily have ***any*** correspondence to the ***benefits*** of a plan, or its ***value*** at any given time. Failure to perceive these distinctions can lead to gross over- or under-valuation of the assets at issue.

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[9] Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of $2,000.00 per month during his last years would get $1,000.00 per month (i.e., $2,000.00 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from defined benefit plans.

[10] Typically, the employee has an individual account made up of contributions made by the employee and/or the employer, invested in some fixed or variable account (such as stocks or other assets), plus investment gains, and minus investment losses. Many such plans contractually bind the employer to add some formula percentage of the amount the employee puts into the plan. *See* 29 U.S.C. § 1002(34). These plans come in many varieties, including profit-sharing plans (employer contributions vary according to company performance), stock bonus plans (the plan invests in the securities of the company itself), "401k" plans (employee chooses either taxable salary or nontaxable contribution to plan), and money purchase plans (like profit-sharing, but with a fixed employer contribution). The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

A "vested" pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment.[11] A "matured" pension is one in which a particular employee is eligible for present payments from a plan. In an ever-declining minority of jurisdictions, the lack of vestedness or maturity causes pensions to be considered "mere expectancies" or otherwise non-divisible, which virtually invites inequitable results. It is most important to consider these factors when involved in multi-jurisdictional cases including a state that might still have such a rule.

Most of the people in this country earning retirement benefits work for private employers. Most private employee-benefit plans, or "pension plans"[12] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA,"[13] codified at 29 U.S.C. § 1001 *et seq*. ERISA was substantially modified and refined in 1984 by the Retirement Equity Act ("REA"),[14] discussed in much greater detail elsewhere in these materials, which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans.

Virtually ***any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a domestic relations order, or "DRO" under ERISA/REA.[15] It becomes a ***Qualified*** Domestic Relations Order, or "QDRO," and must be recognized and enforced by an ERISA plan, when it creates or recognizes one of the listed classes of persons as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in that plan, contains the various required terms for such an order, and omits anything that would ***dis***-qualify it from qualifying. All of this is detailed in the ERISA section of these materials.

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[11] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of "vestedness" and "maturity" of retired pay).

[12] A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, "401(k)" plans, and some employee stock ownership plans. It does ***not*** include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

[13] Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

[14] Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

[15] *See* 29 U.S.C. § 414(p)(1)(B). More specifically, it is a decree, judgment, or other order providing for payment of child support, spousal support, or marital or community property payment to a spouse, former spouse, child, or other dependent of a participant in a qualified retirement plan.

Similar, but different, specialized enforcement orders are required to address retirement benefits for a Nevada state public employee, under the Public Employees Retirement System ("PERS"). Those who put the Nevada PERS regulations together, however, chose to (confusingly) use the same titles, etc., as are in the federal ERISA law. However, a state pension plan (such as PERS) does ***not*** fall within ERISA, and the federal statutes do ***not*** apply to the plan, or to the benefits. Instead, there is an entirely different set of (state) laws that govern distribution of PERS benefits, which has its own checklist of necessary terms to include and exclude, and for which we have assembled a model clause set, detailed elsewhere in these materials.

The same situation applies to each other category of employee who works for any entity outside the scope of ERISA. A federal employee requires a Court Order Acceptable for Processing ("COAP"), approved by the Office of Personnel Management ("OPM"). A current or retired member of the Armed Forces needs certain specific language from other statutes, which can be stated in the in the decree, or a separate order, to be submitted to and approved by the Defense Finance and Accounting Service ("DFAS").[16]

Individual Retirement Accounts ("IRAs"), and "Keogh" plans are private retirement plans that do not really fit in with the other kinds of retirement benefits discussed above. Keoghs are essentially like other private retirement plans, but for sole proprietors, partnerships, or "S" corporations. Note that an IRA can be divided in a divorce action through a simple order in the decree, or other order; no QDRO or other special form of order is required. There are a variety of special tax rules, however, requiring direct roll-over without ever touching the recipients' hands in order to avoid incurring tax effects.

Social Security has been addressed in some detail by the Nevada Supreme Court, and those discussions are detailed elsewhere. At this juncture, it is enough to note that if a marriage lasts at least ten years, the former spouse is eligible for certain benefits under Social Security upon attaining retirement age, (if not remarried), based upon the spouse's own earnings, or those of the wage-earner spouse, whichever are greater. Such Social Security payments are statutory entitlements that do not reduce benefits paid to retirees.

There are other specialized retirement benefits not often seen in Nevada divorces. Foreign Service and CIA pensions have their own regulations similar to those for other federal employees, and giving a presumptive share of the retirement benefits to a spouse if the marriage lasted at least ten years, at least five of which overlapped service abroad. Railroad retirement has its own specialized rules, which provides a statutory benefit for divorced spouses who were married for at least ten years.[17] Tier I benefits are similar to Social

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[16] These orders, and transfers, must be done correctly, and with view toward avoiding accidentally triggering massive tax consequences, a topic that is addressed separately elsewhere in these materials.

[17] *See* 45 U.S.C. § 231(a).

Security, and different from military or Civil Service plans, in that payments to the spouse do ***not*** reduce the benefit being received by the retiree. Tier II benefits, however, are apparently divisible as community property, and the usual "zero sum game" approach applies to them, as with all regular retirement benefits.[18]

B. Valuation and Distribution of Plan Benefits

Obviously, defined contribution plans are the easier type to value at any given moment, and are simpler to divide. A common error, however, is the failure of counsel to take into account the time that will pass between the court proceeding and the physical division of the account. This can be done, easily, by either providing for sharing of the investment gains and losses until actual distribution, or by freezing the spousal share at a specific sum for transfer.

Obviously, either approach could be better, or worse, for either party, depending on how much time passes, and whether the account balance increases or decreases during that time. But in either case, it should be dealt with one way or the other in the decree (preferably) and in the order dividing the plan benefits (definitely) to avoid what could be considerable litigation as to which possible way to divide benefits was impliedly intended to be done.

There is one significant valuation problem for defined contribution plans that has not received nearly enough attention in the case law. If the marriage was not completely coextensive with the period of contributions, and there was any variation in the relative rate of contribution over time, a standard time-rule analysis (see below) to value the spousal share might not be appropriate. It would appear to be more precise – i.e., "fairer" – to trace the ***actual contributions*** to such an account from community and separate sources, and attributing interest and dividends over time accordingly.[19]

It may not be necessary to establish a value for defined ***benefit*** plans involved in divorce actions at all. If the Court is simply going to divide it by percentage, then determining the present value of the stream of future payments may be of only academic interest. Even if questions of alimony and lifestyle maintenance are before the court, only the dollar sum of the income stream, and not the actuarial value of the plan interest, would appear to be necessary.

For defined benefit plans, there are two primary means of distribution – the "if, as and when" distribution (whereby, basically, the spouse receives money when the participant receives money), and the valuation and offset method (sometimes called the "cash out" method). The

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[18] *See Belt v. Belt*, 398 N.W.2d 737 (N.D. 1987).

[19] *See* Amado, *The Ubiquitous Time Rule -- A Responsa: An Argument for the Applicability of Tracing, Not the Time Rule, to Defined Contribution Plans*, 13 Family Law News, Sum. 1990, at 2 (California State Bar, Family Law Section Publication) (arguing that a ***tracing*** analysis would be superior for defined contribution plans (as opposed to the "time rule") because it is possible to discover the source of all funds in the account).

states are widely divergent. Some require one method whenever possible, and others require the other whenever possible; many states have no guidance, or direct their courts to use whatever method is believed "most likely to achieve justice" in the specific case. Nevada is clearly in the "if, as, and when" category, as detailed elsewhere.

Calculations, and projections, are necessary when the "cash out" approach is to be used. Because the value of a participant's interest in a defined benefit plan depends upon numerous factors, it is difficult to measure until after retirement. If the employee spouse is still working, assumptions must be made as to how many more years will be worked, whether (and how much) salary will increase, whether the employee might be fired or die before retirement, how long the employee will live ***after*** retirement, etc. Expert assistance is almost always required for these plans, since life tables, discount rates, actuarial accounting, etc., are required in arriving at a valuation. There are several approaches to such valuations.

C. The "Time Rule"

As a matter of law, it is possible to value the spousal share in at least two ways. The standard "time rule" formula[20] views the "community" years of effort ***qualitatively*** rather than quantitatively, reasoning that the early and later years of total service are equally necessary to the retirement benefits ultimately received. Nevada is clearly in the group of states with this view of the law.[21]

This view of the time rule essentially provides to the former spouse a "smaller slice of a larger pie" by getting a shrinking percentage of a retirement based upon post-divorce increases in the wage-earner's salary and years in service.[22]

Some critics complain that such a formula gives the non-employee former spouse an interest in the employee spouse's post-divorce earnings, at least where the divorce occurs while the employee is still working. They argue that the spousal share should be frozen at the earnings level at divorce. This approach, however, undervalues the spousal interest by giving no compensation for deferred receipt, and also contains a logic problem, at least in a community property analysis, of treating equally situated persons differently.

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[20] In which the spousal share is determined by taking the number of months of service during marriage as a numerator, and the total number of months of service as a denominator, and multiplying the resulting fraction by one-half (the spousal share) and then by the retirement benefits received.

[21] Such jurisdictions typically add a hedge; the trial court can reserve jurisdiction to determine, after retirement, whether the benefits proved to be much greater than expected because of extraordinary "effort and achievement" (as opposed to "ordinary promotions and cost of living increases"), in which case the court could recalculate the spousal interest. *See*, *e.g.*, *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[22] This topic is addressed in much greater detail in the discussion of military retirement benefits, as much of the case law has concerned military cases.

Specifically, the "time rule" approach appears to be the majority view in the states, and it comes closest to providing equity to successive spouses. Two consecutive spouses, during the first and last halves of a participant's career, would be treated equally under the qualitative approach, but very differently under any approach that freezes the spousal share at the level of compensation being received by the worker at the time of divorce.

An example might prove useful to illustrate this discussion. Presume a worker who was employed for exactly 20 years, and was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce from wife two. Presume he had started work at $20,000 per year, and had enjoyed 5% raises every year. That would make his historical earnings look like this:

Yearly Salary	Monthly Salary
$20,000.00	$1,666.67
$21,000.00	$1,750.00
$22,050.00	$1,837.50
$23,152.50	$1,929.38
$24,310.13	$2,025.84
$25,525.63	$2,127.14
$26,801.91	$2,233.49
$28,142.01	$2,345.17
$29,549.11	$2,462.43
$31,026.56	$2,585.55
$32,577.89	$2,714.82
$34,206.79	$2,850.57
$35,917.13	$2,993.09
$37,712.98	$3,142.75
$39,598.63	$3,299.89
$41,578.56	$3,464.88
$43,657.49	$3,638.12
$45,840.37	$3,820.03
$48,132.38	$4,011.03
$50,539.00	$4,211.58

If this hypothetical worker had the retirement plan suggested above in footnote 8, his average monthly salary during his last three years' employment would be $4,014.21, and the defined benefit formula suggested would make his retired pay $2,007.11.

Under the qualitative approach to the time rule embraced by Nevada and other states, the employee would receive half of this sum himself – $1,003.55. Each of his former spouses, having been married to him for exactly half the time the pension accrued, would receive half of this sum – $501.78. In other words:

Employee:	$1,003.55
Wife one (10 years):	$ 501.78
Wife two (10 years):	$ 501.78
Total:	$2,007.11

If the calculations were done in accordance with the position of the critics of the time rule set out above, in a strictly quantitative way, the results would be quite different. Wife one's share of the retirement would be calculated in accordance with rank and grade at the time of her divorce from the employee; in this case, she would get a pension share based the "high three" years at the ten year point, which was $2,464.38. The formula postulated above would produce a hypothetical retirement of $616.10. Wife one would receive half of that sum – $308.05, but not until after the actual retirement, ten years later.

The smaller share going to wife one would leave more for wife two and the employee who, on these facts, would split it as follows:

Employee:	$1,100.41
Wife one (10 years):	$ 308.05
Wife two (10 years):	$ 598.65
Total:	$2,007.11

Perhaps the clearest expositions of the reasoning behind the two approaches are found in those cases in which a reviewing court splits as to which interpretation is most correct. The Iowa Supreme Court faced such a conflict in the case of *In re Benson*.[23] The trial court had used a time-rule approach, with the wife's percentage to be applied to the sum the husband actually received, whenever he actually retired.

The appellate court restated the question as being the time of valuation, with the choices being the sum the husband ***would have*** been able to receive if he had retired at divorce, or the sum payable at retirement. The court acknowledged that the longer the husband worked after divorce, the smaller the wife's portion became. The court accepted the wife's position that to "lock in" the value of the wife's interest to the value at divorce, while delaying payment to actual retirement, prevented the wife from "earning a reasonable return on her interest."

Quoting at length from a law review article analyzing the mathematics of the situation, the court found that acceptance of the husband's argument would have allowed him to collect

[23] 545 N.W.2d 252 (Iowa 1996).

the entirety of the accumulating "earnings" on the marital property accumulated by both parties. Three judges dissented.[24]

Most of those who propose a "freeze at divorce" approach either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant's first eligibility for retirement.[25] It is not possible to fully and fairly evaluate the impact of a "freeze at divorce" proposal ***without*** examining that question as well.[26] Again, the topic is treated at much greater depth in the military section of the materials, since so many of the cases have involved military retirement.

IV. NEVADA LAW RELATING TO RETIREMENT BENEFITS

There is little Nevada statutory law specifically directed to retirement benefits; instead, they fall under the general definition of community property in NRS 123.220, as "all property" acquired after marriage, with certain exceptions, and they are divided under NRS 125.150, which directs a presumptively equal distribution of community property.

Chapter 286 of the Nevada Revised Statutes provides the framework for the State of Nevada Public Employees Retirement System (PERS) pension benefits, which is discussed in greater

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[24] The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid to her at the employee's first eligibility for retirement, "freezing" it at that point and letting the husband enjoy all accumulations after that time. Presumably, this is because that possibility was not litigated at the trial level. That is the result in most or all community property states, however, and case law has made it clear that a spouse choosing to accept retirement benefits at first eligibility has no interest in any credits accruing thereafter, having made an "irrevocable election." *See In re Harris*, ___ P.2d ___ (Wash. Ct. App., No. 45364-5-I, July 30, 2001), and the citations set out in the following footnote.

[25] Several state courts have held that the interest of a former spouse in military retired pay is realized at ***vesting*** (i.e., after 20 years of creditable service), theoretically entitling the spouse to collect a portion of what the member ***could*** get at that time irrespective of whether the member actually retires. *See In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990). As phrased by the California court in *Luciano, supra*, 164 Cal. Rptr. at 95: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."

[26] I have independently verified the mathematical effects of the various approaches taken by the state courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, I estimate that a "rank at divorce" proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first wife who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

detail in the PERS section of these materials. NRS 125.155, enacted in 1995, establishes a set of special rules for valuation, distribution, and survivorship interests that is applicable only to PERS retirement benefits in divorce.

Nevada case law has long held that property acquired during marriage is presumed to be community property, and that the presumption can only be overcome by clear and convincing evidence.[27] The first Nevada case explicitly noting that retirement benefits earned during a marriage are divisible community property was apparently *Ellett v. Ellett*.[28]

In *Forrest v. Forrest*,[29] relying on the line of California opinions dividing the gross sum of all retirement benefits,[30] the Nevada Supreme 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."[31] In other words, the Court held that all forms of retirement benefits, whether or not vested, and whether or not matured, are community property subject to division.

In *Walsh v. Walsh*,[32] the divorce decree had stated only that the wife was awarded "half of the retirement benefits," even though the husband clearly had accrued a portion of the retirement benefits before marriage. The Court construed the decree as meaning half of the retirement benefits earned ***during*** marriage.

In *Heim v. Heim*,[33] the Nevada Supreme Court simply noted without comment the equal division of a Michigan state retirement fund in a Nevada divorce court.[34] This was legally significant only because it constituted a quasi-community property approach to division of

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[27] *See*, *e.g.*, *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

[28] 94 Nev. 34, 573 P.2d 1179 (1978).

[29] 99 Nev. 602, 668 P.2d 275 (1983).

[30] *See In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976).

[31] 99 Nev. at 607, 668 P.2d at 279.

[32] 103 Nev. 287, 738 P.2d 117 (1987).

[33] 104 Nev. 605, 763 P.2d 678 (1988).

[34] *Id*. at n.1.

that retirement, without acknowledgment of doing so, and arguably in contradiction of precedent.[35]

In *O'Hara v. State ex rel. Pub. Emp. Ret. Bd.*,[36] the employee spouse was a Nevada State employee and PERS participant who had chosen the maximum monthly annuity, which provided no survivor's benefits. She died shortly after retirement, and her widower sued the retirement board, seeking to alter the benefit option selection to include a survivorship benefit for himself. Finding that the "community property interests of a nonemployee spouse do not limit the employee's freedom to agree to terms of retirement benefits," the court ruled that the employee may choose any available options so long as "the community property interest of the nonemployee spouse is not defeated."

The next year, in *Gemma v. Gemma*,[37] the Court reviewed a case involving the retirement benefits of a Highway Patrol officer and PERS participant. The Court reiterated that Nevada law permits the division of unvested retirement benefits, and discussed the two possible methods of distributing a spouse's share of those benefits, by way of determining the present value of the pension and awarding half to each spouse, or by a "time rule" division of the benefits themselves, stating that the latter is preferred.

Addressing the possibility that the employee spouse might continue employment past the date on which he could retire, thereby delaying payment to the former spouse of the spousal share of the benefits, the Court adopted the holdings and reasoning of two California cases: "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition solely within the employee spouse's control."[38] The Court further specified that a trial court can reserve jurisdiction to adjust such an award in the event that the employee by "extraordinary efforts" (as opposed to normal promotions and cost of living increases) greatly increases the value of the retirement benefits after divorce.[39]

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[35] *See Braddock v. Braddock*, 91 Nev. 735, 542 P.2d 1060 (1975) (Nevada follows the "pure borrowed law" approach, whereby our court determines the divisibility of assets according to the law of the state in which those assets accrued, rather than a "quasi-community property" approach whereby all assets divided are treated as if they were accrued in Nevada).

[36] 104 Nev. 642, 764 P.2d 489 (1988).

[37] 105 Nev. 458, 778 P.2d 429 (1989).

[38] *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), *quoting from In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980) *and In re Marriage of Gillmore*, 629 P.2d 1, 5 (Cal. 1981).

[39] 105 Nev. at 462-63, 778 P.2d at 431-32.

In *Powers v. Powers*,[40] a three-to-one majority of the Nevada Supreme Court sided with California authorities in acknowledging that a "disability pension" generally has two components – retirement and disability – and that while the latter is sole and separate, the retirement component of a disability pension is divisible community property. *Powers* is notable because the disabled worker had not yet qualified for payment of ***any*** regular retirement benefits when he was retired for disability, indicating that ***any*** disability award stemming from employment has ***some*** retirement component that can be traced out and counted as community property.

In *Fondi v. Fondi*,[41] the Court considered the divorce of a Judge from a legal secretary. The trial court had calculated the marital percentage of the amount the Judge ***would have*** received from PERS if he retired on the date of divorce. On appeal, that holding was reversed, and the Court clarified its holding in *Gemma* to specify not only application of the time rule, but also use of the "wait and see" approach, under which the community has an interest in the pension benefits ***ultimately received***, not just the pension accrued as of the date of divorce. Further, the Court clarified that the burden is on the ***employee*** spouse to prove that post-divorce extraordinary efforts were made in order to change the mathematical analysis, instead of any burden being on the non-employee spouse to show that no such efforts were made. The Court distinguished the legal division of the benefits, which occurs at divorce, from actual ***collection*** of benefits by the spouse, which is to take place at the employee's eligibility for retirement.

In *Carlson v. Carlson*,[42] the Nevada Supreme Court reversed the district court's refusal to set aside a property distribution under NRCP 60(b), where a private pension had been greatly undervalued in the original divorce proceedings. During marriage, the parties had chosen a form of retirement benefit with a survivorship option, but the divorce decree was defective as a QDRO under ERISA to cause survivor's benefits to be paid to the spouse as a "surviving spouse." On remand, the court therefore directed that the trial court amend the decree to constitute a QDRO to provide those survivorship benefits to the spouse.

In *Carrell v. Carrell*,[43] the Nevada Supreme Court reversed a district court decree characterizing a portion of the husband's share of pensions as "spousal support" instead of property. Citing *Walsh*, *supra*, and NRS 125.150(5)&(7), the Court explained that retirement benefits earned during marriage are community property, and so are not subject to future modifications, whereas spousal support can be modified upon a showing of changed circumstances, remarriage, or death.

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[40] 105 Nev. 514, 779 P.2d 91 (1989).

[41] 106 Nev. 856, 802 P.2d 1264 (1990).

[42] 108 Nev. 358, 832 P.2d 380 (1992).

[43] 108 Nev. 670, 836 P.2d 1243 (1992).

In *Waltz v. Waltz*,[44] the divorce decree had awarded the entire military retirement to the husband, but ordered him to pay to the former spouse, by military allotment, the sum of $200.00 plus cost of living adjustments, as "permanent alimony." The facts showed that the military service overlapped the marriage by just less than ten years, precluding direct payment of a property award through the military pay center under the USFSPA. The Court noted that NRS 125.150(5) provides that specified periodic payments to a former spouse must cease unless "it was otherwise ordered by the court," and found that in the context of this case, the parties' use of the phrase "permanent alimony," in conjunction with the COLA clause, showed their intent to link it to the military retired pay. In conjunction with the testimony below as to intent, the Court was led to the conclusion that the divorce court had "otherwise ordered" within the meaning of the statute. The Court reiterated that payments to a former spouse do not terminate upon her remarriage when the payments are clearly a property settlement, even if denominated "permanent alimony," as here.

In *Sertic v. Sertic*,[45] the trial court had ordered immediate distribution of the value of the wife's share of the Civil Service Retirement System (CSRS) pension. The Nevada Supreme Court found that a trial court would only ***not*** err in making such an order if certain conditions were met: (1) the present value could be determined with reasonable certainty; (2) there were sufficient existing funds to distribute the retiree's interest; and (3) both parties agreed that the distribution would be the final distribution regardless of what might occur in the future. The Court ruled that the district court had erred in determining the present value, and it could not be determined from the record whether the parties had agreed that the trial distribution would be final, so the case had to be reversed.

The Court further clarified that "actual division" under the "wait and see" approach (which may be done at trial) is ***not*** the same as present ***distribution*** of the pension asset itself. Further, for the first time the Court clearly stated that the normal distribution of a spousal share of a retirement is to be upon the employee spouse's first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker ***did*** retire at that time.

Wolff v. Wolff[46] was another PERS case involving a Highway Patrol officer. The community had a 54% interest in the retirement, and the husband became eligible to retire three months after divorce, but elected to keep working. The district court had calculated that the community share of the retirement was worth $1,155.12 per month, and ordered the husband to pay that sum to the wife from his salary until he actually retired. The lower court also apparently held that an "equivalency" must "reflect [the husband's] obligation to transfer his vested community property interest in [the wife's] social security benefits" and must

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[44] 110 Nev. 605, 877 P.2d 501 (1994).

[45] 111 Nev. 1192, 901 P.2d 148 (1995).

[46] 112 Nev. 1355, 929 P.2d 916 (1996).

"reflect" that the husband was paying taxes on his current salary. The district court concluded that the amount of the wife's community share of the husband's retirement, when he was entitled to receive it, would never be less than $578.00, and so awarded $450.00 per month in "Limited Temporary Spousal Support" until the husband retired, as a "reasonable equivalency," further ordered that the payments would not terminate upon her remarriage or her death, and ordered that the support was taxable to her and deductible to him.

The Nevada Supreme Court, citing *Walsh v. Walsh*[47] and *Carrell v. Carrell*,[48] held that pension payments cannot be classified as temporary spousal support, because such support is subject to possible future modification.

Next, the Court confirmed the district court's valuation of the spousal share, but held that the lower court's explanation of the gap between $450.00 to $577.56 (as reflective of "the taxable consequences" of the payments) was inadequate. The Court found the reduction "arbitrary" and held that it violated the equal distribution presumption of NRS 125.150(1)(b).

The Court rejected the husband's attack on *Gemma*, which he had argued was "fatally flawed" for non-recognition of the "passive appreciation of the sole and separate portion" of the retirement during the marriage. The Court explicitly reaffirmed its holdings in *Gemma*, *Sertic*, and *Fondi*.

The Court specifically affirmed the lower court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests, citing 15A Am. Jur. 2d *Community Property* § 101 (1976), so that even if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.[49]

The Court rejected the husband's request for consideration of the wife's accrual of social security benefits, quoting language that the benefits are not "a form of deferred compensation, and therefore not . . . community property subject to division between the spouses." The Court held that "social security benefits, or the payments used to derive those benefits, cannot be divided in a property settlement agreement."

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[47] 103 Nev. 287, 738 P.2d 117 (1987).

[48] 108 Nev. 670, 836 P.2d 1243 (1992).

[49] As discussed in some detail in the PERS section of the death benefits portion of these materials, PERS refuses to enforce this holding.

The Court went on: "Further, they cannot be given any consideration in 'offsetting' one spouse's community property interest in the other spouse's retirement benefits."[50] The Court rejected the trial court's denial that the reduced monthly payments to the wife were an offset for the social security benefits:

> Calling a duck a horse does not change the fact that it is still a duck. "Considering" [the wife's] social security benefits does not change the fact that this is still an offset, and therefore, error.

The Court cited several cases holding that social security benefits cannot be considered, distributed, or offset in marital property divisions. Reversing the reduction in the wife's monthly share as based in part on such a prohibited consideration, the Court affirmed the holding below that each party's social security benefit was separate property.

Shelton v. Shelton, 119 Nev. ___, 78 P.3d 507 (Adv. Opn. No. 55, Oct. 29, 2003), *cert. denied*, 124 S. Ct. 1716 (2004), involved a stipulated decree calling for the former spouse to receive a certain sum of money out of the military retirement benefits each month. After divorce, the Nevada Supreme Court followed a "contracts" approach that has been applied in Virginia and Louisiana, in deciding that a military retiree "cannot escape his contractual obligation by voluntarily choosing to forfeit his retirement pay," and that the former spouse was therefore entitled to continue receiving what she would have received but for the waiver of retirement for disability pay. The Court stated its intent to interpret the parties' ambiguous and contradictory settlement so as to yield "a fair and reasonable result, as opposed to a harsh and unfair result," noting that the husband appeared to have ample other assets than his military retired pay with which to satisfy his payment obligation, and that even if he did not, federal law was no bar to enforcement of his agreement to use his disability payments to satisfy his obligation.

The same day, the Court issued a decision in *Olvera v. Olvera* (No. 38233, Oct. 29, 2003), by way of an unpublished *Order of Remand*. This is unfortunate, because *Olvera* was a more common factual situation than was *Shelton*, and therefore would have been more useful as precedent. The divorce decree required payments to the former spouse, who received them for many years until the member elected to receive disability benefits, 25 years post-divorce, eliminating the spousal share. Reversing the district court, the Court ordered the member to make up all sums that his election caused to be diverted from the former spouse to him.

V. NOTABLE POINTS AND ISSUES UNDER NEVADA CASE LAW RELATING TO RETIREMENT BENEFITS

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[50] *Citing Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1978).

Nevada's cases stating that retirement benefits are divisible irrespective of whether or not the retirement benefits are vested (i.e., the employee has met the necessary conditions under which the employer may not refuse to provide the benefits) or matured (i.e., presently payable) places Nevada law in the clear majority of states, and in line with the modern trend of authority.

The Nevada Supreme Court's decision in *Wolff*, *supra*, in which it held that Social Security benefits could not be considered directly or indirectly in dividing other property, appears to call into question the Court's prior holding in *Anderson v. Anderson*,[51] where it used the husband's receipt of twice as much per month in Social Security than the wife received as support for the unequal division of marital assets.

There are several unanswered questions awaiting resolution in the area of the treatment of retirement benefits under Nevada's community property law. For example, NRS 125.155, which became effective on July 5, 1995, carves out PERS retirements exclusively as permissively immune from division until actual retirement of the participant spouse, if the trial court so orders. Yet, six weeks after that effective date, the Nevada Supreme Court in *Sertic*, *supra*, specifically ordered that ***all*** spousal shares of retirement benefits are to be distributed to the spouses upon first eligibility for retirement. This would appear to present both an equal protection issue, and a question as to which mandate takes priority.

The decision in *Wolff* raised other issues. The Nevada Supreme Court has required what PERS prohibits. In *Wolff*, the Court explicitly affirmed the trial court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate. The Court held that an Alternate Payee's portion of the retirement benefits is permanently transferred to the Alternate Payee, and is to be paid to the Alternate Payee's estate if the Alternate Payee should predecease the Member. PERS, however, rejects orders complying with the mandate in *Wolff*, making the issue one for future appellate resolution.

As a practical matter, it is not possible to both distribute a spousal share of a retirement upon eligibility despite the wage-earner's continued employment, ***and*** to base the spousal share paid on the amount that the wage-earner ultimately receives. This leaves the trial courts with no practical means of accomplishing these conflicting directives except to make the best projection possible at the time of divorce, and have the parties return to court when the employee eventually retires to adjust the distributable spousal share.

There is also some question of what is meant by "first eligibility" – the time when payments to the former spouse are to begin. Under the Nevada PERS statutes, for example, an employee can choose to take early retirement almost any time after vesting, paying a 4%

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[51] 107 Nev. 570, 816 P.2d 463 (1991).

penalty for each year before regular retirement age that the benefits are accepted.[52] It could be argued that this makes every vested PERS participant "eligible" for retirement benefits, and thus every former spouse eligible for immediate payments (at a sum taking into effect the penalty, of course), but logic indicates that the case law will be interpreted as referring to the earliest date of ***regular*** retirement under the plan (i.e., the time at which an employee can retire without penalty).

It would appear that there is a conflict between the holdings of *Gemma* and *Fondi* on the one hand ("the employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition solely within the employee spouse's control") and the 1988 holding in *O'Hara* on the other (the "community property interests of a nonemployee spouse do not limit the employee's freedom to agree to terms of retirement benefits").

There are a great many options and elections that an employee can make that would "by election defeat the nonemployee spouse's interest in the community property." The question is whether the purpose of *Gemma* and *Fondi* will be enforced by prohibiting employee elections that devalue spousal interests. It appears that reconciling the conflict between an employee spouse's right to choose plan options and the substantive right to full collection by a non-employee spouse will require a further case. In the meantime, the safest course for counsel is to specify as much as possible regarding plan elections under at the time of divorce.

V. CONCLUSION

Pension and retirement plans have become ubiquitous; practitioners cannot afford to ***not*** know a great deal of the detail required to provide for the adequate disposition upon divorce of what is probably the first or second most valuable asset of the marriage.

It has become increasingly important for domestic relations practitioners to learn all aspects of the relevant plans and the circumstances of the parties during divorce. Practitioners should develop appropriate valuations and proposed distributions for those assets during the divorce itself, with thought and written contingencies for the attendant tax, survivorship, and related issues. Only then can counsel intelligently negotiate – or litigate – their clients' interests in such retirement benefits.

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[52] *See* NRS 286.510.