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# **A PRIMER ON NEVADA PENSION LAW IN DIVORCE, PERS, AND NRS 125.155**

by

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1 **I. INTRODUCTION**

2 This PERS primer is largely extracted from an *Amicus Curiae* brief filed in the Nevada  
3 Supreme Court on behalf of the Family Law Section of the State Bar of Nevada in December, 2008,  
4 in *Hedlund v. Hedlund*, Case No. 48944. That case was concerned with interpretation of NRS  
5 125.155, and resulted in an unpublished order of reversal and remand. Those curious about the case  
6 and its disposition can view the original brief and final order at  
7 <http://www.willicklawgroup.com/appeals>.

8  
9 **II. LEGAL DOCTRINES INVOLVED**

10 **A. Pension Division Background and Terminology**

11 Most people in this country earning retirement benefits work for private employers. Most  
12 private employee-benefit plans, or “pension plans”<sup>1</sup> in the United States today are qualified under,  
13 and governed by, the Employee Retirement Income Security Act of 1974, known as “ERISA,”<sup>2</sup>  
14 codified at 29 U.S.C. § 1001 *et seq.* ERISA was substantially modified and refined in 1984 by the  
15 Retirement Equity Act (“REA”),<sup>3</sup> which provided that certain domestic relations orders, containing  
16 specific terms, must be accepted and honored by ERISA-qualified pension plans.

17 Virtually *any* judgment, decree, or order dealing with alimony or support for a spouse, former  
18 spouse, child, or other dependent made according to local domestic relations law is considered a  
19 domestic relations order, or “DRO” under ERISA/REA.<sup>4</sup> It becomes a *Qualified* Domestic Relations  
20 Order, or “QDRO,” and must be recognized and enforced by an ERISA plan, when it creates or  
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22 <sup>1</sup> A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered  
23 employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, “401(k)” plans, and some  
24 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.

25 <sup>2</sup> Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

26 <sup>3</sup> Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

27 <sup>4</sup> *See* 29 U.S.C. § 414(p)(1)(B). More specifically, it is a decree, judgment, or other order providing for  
28 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.

1 recognizes one of the listed classes of persons as an “Alternate Payee” with a right to receive all or  
2 any portion of the benefits normally payable to a participant in that plan, contains the various  
3 required terms for such an order, and omits anything that would *dis*-qualify it from qualifying.

4 Similar, specialized enforcement orders are required to address retirement benefits for a  
5 Nevada state public employee, under the Public Employees Retirement System (“PERS”). Those  
6 who put the Nevada PERS regulations together chose to (confusingly) use the same titles, etc., as  
7 are in the federal ERISA law, and even copied some of the statutory language from the far larger,  
8 and more complex, federal law. However, a state pension plan (such as PERS) does *not* fall within  
9 ERISA, and the federal statutes do *not* apply to the plan, or to the benefits. Instead, there is an  
10 entirely different set of (State) laws that govern distribution of PERS benefits, as discussed below.

11 Completely separate statutory schemes govern administration of retirement benefits of  
12 members of the United States Armed Forces. On June 26, 1981, the United States Supreme Court  
13 issued its opinion in *McCarty v. McCarty*.<sup>5</sup> The Court determined that state community property  
14 laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by  
15 federal law. The majority held that the apparent congressional intent was to make military retirement  
16 benefits a “personal entitlement” and thus the sole property of individual service members, so the  
17 benefits could not be considered as community property in a California divorce. The Court invited  
18 Congress to change the statutory scheme if divisibility of retired pay was desired.<sup>6</sup>

19 It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection  
20 Act (“USFSPA”) on September 8, 1982.<sup>7</sup> The declared goal of the USFSPA at the time of its  
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24 <sup>5</sup> *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

25 <sup>6</sup> 453 U.S. at 235-36, 101 S.Ct. at 2743.

26 <sup>7</sup> Also commonly known as the “Federal Uniformed Services Former Spouses Protection Act,” or FUSFSPA,  
27 or as “the Former Spouses Act,” or in some references simply as “the Act.” 10 U.S.C. § 1408 (amended every year or  
two since 1983).

1 passage was to “reverse *McCarty* by returning the retired pay issue to the states.”<sup>8</sup> By fits and starts,  
2 every State in the Union eventually permitted military retirement benefits to be divided as property.<sup>9</sup>

3 The primary purpose of the USFSPA was to define state court jurisdiction to consider and  
4 use military retired pay in fixing the property and support rights of parties to a divorce; the point here  
5 is that the federal statute was essentially an enabling act permitting States to address the subject, so  
6 treatment of retired pay was again made dependent on State divorce laws. There is no specific title  
7 required for a military pension division order.

8 Also outside the scope of ERISA are retirement benefits of federal Civil Service employees.  
9 Those benefits are administered by the Office of Personnel Management (“OPM”) under extensive  
10 separate federal regulations governing division of the CSRS<sup>10</sup> and FERS<sup>11</sup> defined benefit plans,<sup>12</sup>

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15 <sup>8</sup> “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981,  
16 the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision  
17 is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and  
18 other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or  
19 retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts  
20 applying community property, equitable distribution or other principles of marital property determination and  
21 distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least  
22 afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and  
23 the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep.  
24 No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1611. *See also*  
25 *Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh’g*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989)  
26 (some partial federal pre-emption may remain after passage of the USFSPA).

27 <sup>9</sup> Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. As of June 26, 1981, all community property  
28 States, and most equitable distribution States, treated military retired pay as marital property subject to division. The  
two last “title” states, Mississippi and West Virginia, have since then adopted equitable distribution schemes.

<sup>10</sup> “Civil Service Retirement System.”

<sup>11</sup> “Federal Employees Retirement System.”

<sup>12</sup> *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R.  
Parts 831 *et seq.*) The new regulations addressed the employee annuity (the pension), refunds of employee contributions,  
and survivor’s benefits, but not the Thrift Savings Plan (“TSP”), which was set up to work like a 401(k), and is  
administered separately.

1 and the TSP defined contribution plan.<sup>13</sup> An order dividing Civil Service retirement benefits is  
2 required by regulation to be titled “COAP,”<sup>14</sup> and an order dividing a TSP account is a “RBCO.”<sup>15</sup>

3 There are enormous variations among the technical requirements of the various administering  
4 bodies for valid orders dividing retirement plans, but after the cases of the 1980s, a few unifying  
5 principles were clarified.

6 First, the question of whether retirement benefits are divisible and, if so, how they should be  
7 divided, is a matter of State law. Federal principles such as due process, and equal protection, may  
8 bear on the divisibility of retirement benefits, and it may be necessary to comply with the technical  
9 requirements of a federal agency administering retirement benefits, but generally “Because domestic  
10 relations are preeminently matters of state law, we have consistently recognized that Congress, when  
11 it passes general legislation, rarely intends to displace state authority in this area. Thus we have held  
12 that we will not find preemption absent evidence that it is ‘positively required by direct  
13 enactment.’”<sup>16</sup>

14 It is for this reason that State divorce courts can, for example, order that a spouse of a military  
15 member is entitled to 100% of the retirement benefits, although disposable retired pay is defined by  
16 federal law as not more than 50% of such benefits.<sup>17</sup> It is why a court can order a retiree who has  
17 waived military retirement benefits for disability, as allowed under the federal retirement scheme,

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19 <sup>13</sup> Created by the 1986 statute creating FERS, the TSP is a defined contribution type of plan for federal  
20 employees. The TSP is expressly *excluded* from the regulations governing the CSRS and FERS retirement benefits.  
21 5 C.F.R. § 838.101(d). Instead, It is administered by a Board entirely separate from the OPM (the Federal Retirement  
22 Thrift Investment Board). 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

23 <sup>14</sup> “Court Order Acceptable for Processing.” 5 C.F.R. § 838.803.

24 <sup>15</sup> For “Retirement Benefits Court Order.”

25 <sup>16</sup> *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), quoting *Hisquierdo v. Hisquierdo*, 439  
26 U.S. 572, 581, 99 S. Ct. 802, 808, 59 L. Ed. 2d 1 (1979) (quoting *Wetmore v. Markoe*, 196 U.S. 68, 77, 25 S. Ct. 172,  
27 176, 49 L. Ed. 390 (1904)).

28 <sup>17</sup> See, e.g., *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), cert. denied, 534 U.S. 1066 (2001); *Grier v.*  
*Grier*, 731 S.W.2d 931 (Tex. 1987) (USFSPA did not limit the amount of retirement benefits that could be apportioned  
under Texas community property law, but only the percentage subject to direct payment); *Deliduka v. Deliduka*, 347  
N.W.2d 52 (Minn. Ct. App. 1984).

1 to nevertheless personally pay to the former spouse the amount that is not directly payable by the  
2 federal pay center.<sup>18</sup>

3 Even in ERISA cases – arguably the single most highly pre-empted area of retirement  
4 benefits – Congress may require that various benefits of federal employees are or are not in  
5 existence, but it is for the States to determine who should get what benefits upon divorce.<sup>19</sup>

6 Second, the law governing division of retirement benefits is complex, and even many of those  
7 litigating retirement benefits cases, or forming legislation governing retirement benefit law, are often  
8 uninformed or confused as to what benefits exist, or how they are administered.

9 For example, in the legislative history of NRS 125.155 discussed below, most of those  
10 commenting seemed to understand the difference between defined benefit (pension) plans, and  
11 defined contribution (account balance) plans. But the history indicates that the Legislature was  
12 repeatedly told that the PERS plan was “unique” in refusing to actually make payments to a former  
13 spouse until the retiree actually retires. In fact, that is true of *every* plan that has only a “divided  
14 payment stream” form of benefit, rather than a “divided interest” form – including the military and  
15 Civil Service retirement plans governing millions of retirees.

16 All such plans prohibit the plan from paying anything to a former spouse until actual  
17 retirement. And in all such pension plans, orders requiring the payment to a former spouse upon  
18 eligibility of the employee to retire requires the worker to pay the former spouse directly, out of  
19 pocket, until actual retirement and payments from the retirement plan begin.

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25 <sup>18</sup> *Shelton v. Shelton*, 119 Nev. 492, 78 P.3d 507, 511 (Nev. 2003); *see also Krapf v. Krapf*, 786 N.E.2d 318,  
326 (Mass. 2003); *Hisgen v. Hisgen*, 554 N.W.2d 494, 498 (S.D. 1996); *Resare v. Resare*, 908 A.2d 1006 (R.I. 2006).

26 <sup>19</sup> “When Congress provided that a benefit should be available to ‘surviving spouses,’ *see, e.g.*, 29 U.S.C. §  
27 1055(a)(2), it expressly left to state law the determination of the *identity* of such surviving spouse.” *Torres v. Torres*,  
60 P.3d 798, 817 (Haw. 2003).

1 Courts, properly, tend to be deferential to the legislative branch in construing legislative  
2 enactments.<sup>20</sup> Circumspection should be heightened, however, where the record indicates that the  
3 legislature was mistaken as to matters relevant to its deliberations, or deliberately misinformed by  
4 those providing it information about the legal background of the proposal before it. And the history  
5 of PERS enactments reveals plenty of both mistake and deliberate misinformation.

6  
7 **B. Division of Pensions in Nevada Community Property Law**

8 Pensions have been recognized as community property by community property States for  
9 many decades,<sup>21</sup> and that recognition was extended to unvested<sup>22</sup> and unmatured<sup>23</sup> pension benefits  
10 long ago.<sup>24</sup> Statutory and case law throughout the country now recognizes pension benefits as  
11 marital property with near-uniformity.

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

16 There is little Nevada statutory law specifically directed to retirement benefits. Instead, they  
17 fall under the general definition of community property in NRS 123.220: “all property” acquired  
18

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20 <sup>20</sup> See *Edgington v. Edgington*, 119 Nev. 577, 80 P.3d 1282 (2003) (the legislative intent behind ambiguous  
21 terms must be ascertained from the statute’s terms, and its objectives and purpose, “in line with what reason and public  
22 policy” dictate).

23 <sup>21</sup> See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *Busby v. Busby*, 457 S.W.2d 551 (Tex. 1970); *In re*  
24 *Marriage of Fithian*, 517 P.2d 449 (Cal. 1974) (recognizing the importance of retirement benefits as a marital asset).

25 <sup>22</sup> A “vested” pension is one that, having been earned and accrued, is beyond the power of the issuing authority  
26 to withdraw. See *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of “vestedness” and “maturity”  
27 of retired pay).

28 <sup>23</sup> *Id.* A “matured” pension is one in which a particular employee is eligible for present payments from a plan.

<sup>24</sup> See *In re Marriage of Brown*, 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).



1 after marriage, with certain exceptions. All such property is divided under NRS 125.150 – the key  
2 statute governing division of property upon divorce – which mandates an equal distribution of  
3 community property, in the absence written reasons for finding a “compelling reason” to make an  
4 unequal disposition.<sup>25</sup>

5 Nevada case law has long held that property acquired during marriage is presumed to be  
6 community property, and that the presumption can only be overcome by clear and convincing  
7 evidence.<sup>26</sup> The first Nevada case explicitly noting that retirement benefits earned during a marriage  
8 are divisible community property was apparently *Ellett v. Ellett*.<sup>27</sup>

9 In *Forrest v. Forrest*,<sup>28</sup> relying on the line of California opinions dividing the gross sum of  
10 all retirement benefits,<sup>29</sup> the Nevada Supreme Court held that “retirement benefits are divisible as  
11 community property to the extent that they are based on services performed during the marriage,  
12 whether or not the benefits are presently payable.”<sup>30</sup> In other words, the Court held that all forms of  
13 retirement benefits, whether or not vested, and whether or not matured, are community property  
14 subject to division.<sup>31</sup>

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17 <sup>25</sup> NRS 125.150(1)(b). As discussed below, the statute also contains an exception to the statutory mandate of  
18 equal division where “otherwise provided” by either a premarital agreement or NRS 125.155.

19 <sup>26</sup> See, e.g., *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

20 <sup>27</sup> *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

21 <sup>28</sup> *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

22 <sup>29</sup> See *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976).

23 <sup>30</sup> *Forrest*, 99 Nev. at 607, 668 P.2d at 279.

24 <sup>31</sup> Throughout the legislative history of NRS 125.155, everyone involved seemed oblivious of the existence or  
25 holding of *Forrest*. The various witnesses – and legislators – indicated enormous confusion about the meaning of  
26 “vestedness” of retirement benefits, and seemed to have no knowledge that if unvested retirement benefits are divided,  
27 no money is paid to a former spouse until and unless the worker becomes eligible to receive benefits. Rather, they  
28 appeared to be addressing the non-existent “problem” that a spouse could be paid a portion of a retirement benefit that  
is never earned. Unless parties make an arm’s length deal to cash out a potential spousal interest under *Sertic*, no such  
“problem” should even be possible.

1 In *Walsh v. Walsh*,<sup>32</sup> the divorce decree had stated only that the wife was awarded “half of  
2 the retirement benefits,” even though the husband clearly had accrued a portion of the retirement  
3 benefits before marriage. The Court construed the decree as meaning half of the retirement benefits  
4 earned *during* marriage.

5 *O’Hara v. State ex rel. Pub. Emp. Ret. Bd.*<sup>33</sup> was not a divorce case. It involved a married  
6 Nevada PERS participant who chose the maximum monthly annuity, providing no survivor’s  
7 benefits, upon retirement. She died shortly after retirement, and her widower sued the retirement  
8 board, seeking to alter the benefit option selection to include a survivorship benefit for himself. In  
9 the context of an ongoing marriage, the Nevada Supreme Court found that the “community property  
10 interests of a nonemployee spouse do not limit the employee’s freedom to agree to terms of  
11 retirement benefits,” and ruled that the employee may choose any available options so long as “the  
12 community property interest of the nonemployee spouse is not defeated.”

13 The next year, in *Gemma v. Gemma*,<sup>34</sup> the Nevada Supreme Court turned to the issues of  
14 PERS retirement benefits in the context of divorce. The Court reiterated that Nevada law permits  
15 the division of unvested retirement benefits, and discussed the two possible methods of distributing  
16 a spouse’s share of those benefits, by way of determining the present value of the pension and  
17 awarding half to each spouse (requiring a cash out of the nonemployee spouse’s share), or by a “time  
18 rule” division of the benefits themselves, stating that the latter is preferred.

19 Addressing the possibility that the employee spouse might continue employment past the date  
20 on which he could retire, thereby delaying payment to the former spouse of the spousal share of the  
21 benefits, the Court adopted the holdings and reasoning of two widely-cited California cases: “The  
22 employee spouse cannot by election defeat the nonemployee spouse’s interest in the community  
23

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24  
25 <sup>32</sup> *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987).

26 <sup>33</sup> *O’Hara v. State ex rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 764 P.2d 489 (1988).

27 <sup>34</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

1 property by relying on a condition solely within the employee spouse’s control.”<sup>35</sup> The Court further  
2 specified that a trial court could reserve jurisdiction to adjust such an award in the event that the  
3 employee by “extraordinary efforts” (as opposed to normal promotions and cost of living increases)  
4 greatly increases the value of the retirement benefits after divorce.<sup>36</sup>

5 Almost exactly a year after *Gemma*, the Court considered the divorce of a Judge from a legal  
6 secretary in *Fondi v. Fondi*.<sup>37</sup> The trial court had calculated the marital percentage of the amount the  
7 Judge **would have** received from PERS if he retired on the date of divorce. On appeal, that holding  
8 was reversed, and the Court clarified its holding in *Gemma* to specify not only application of the time  
9 rule, but also use of the “wait and see” approach, under which the community has an interest in the  
10 pension benefits **ultimately received**, not just the pension accrued as of the date of divorce.

11 Further, the Court clarified in *Fondi* that the burden is on the employee spouse to prove that  
12 post-divorce extraordinary efforts were made in order to change the mathematical analysis, instead  
13 of the burden being on the non-employee spouse to show that no such efforts were made. The Court  
14 distinguished the legal division of the benefits, which occurs at divorce, from actual **collection** of  
15 benefits by the spouse, which is to take place at the employee’s eligibility for retirement.

16 In *Carlson v. Carlson*,<sup>38</sup> the Nevada Supreme Court ordered the set aside of a property  
17 distribution under NRCP 60(b), where a private pension had been greatly undervalued in the original  
18 divorce proceedings. During marriage, the parties had chosen a form of retirement benefit with a  
19 survivorship option, but the divorce decree did not qualify under ERISA to cause survivor’s benefits  
20 to be paid to the spouse. On remand, the court therefore directed that the trial court amend the  
21 decree to constitute a QDRO to provide those survivorship benefits to the former spouse.

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22  
23 <sup>35</sup> *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), quoting from *In re Marriage of Luciano*,  
24 164 Cal. Rptr. 93, 95 (Ct. App. 1980) and *In re Marriage of Gillmore*, 629 P.2d 1, 5 (Cal. 1981). As noted above,  
*Gillmore* was approvingly cited and relied upon by the Nevada Supreme Court since 1983 in *Forrest*.

25 <sup>36</sup> 105 Nev. at 462-63, 778 P.2d at 431-32.

26 <sup>37</sup> *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

27 <sup>38</sup> *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992).

1 The same year, in *Carrell v. Carrell*,<sup>39</sup> the Nevada Supreme Court reversed a district court  
2 decree characterizing a portion of the husband’s share of pensions as “spousal support” instead of  
3 property. Citing *Walsh, supra*, and NRS 125.150(5)&(7), the Court explained that retirement  
4 benefits earned during marriage are community property, and so are not subject to future  
5 modifications, whereas spousal support can be modified upon a showing of changed circumstances,  
6 remarriage, or death.

7 In *Waltz v. Waltz*,<sup>40</sup> the divorce decree had awarded the entire military retirement to the  
8 husband, but ordered him to pay to the former spouse, by military allotment, the sum of \$200 plus  
9 cost of living adjustments, as “permanent alimony.” This had been done because the military pay  
10 system did not allow direct payments to a spouse with an overlap of military service and marriage  
11 of less than ten years. The decree had been formulated to make sure the spouse actually received her  
12 property award, under the rubric of “permanent alimony” as allowed by NRS 125.150(5).

13 In *Sertic v. Sertic*,<sup>41</sup> the trial court had ordered immediate distribution of the value of the  
14 wife’s share of the Civil Service Retirement System (CSRS) pension. The Nevada Supreme Court  
15 reversed, stating that providing the spouse with anything other than a time-rule distribution could  
16 only be done upon certain special findings not present in that case.

17 The Court further clarified that “actual division” under the “wait and see” approach (which  
18 may be done at trial) is *not* the same as present *distribution* of the pension asset itself. Further, the  
19 Court more clearly stated that the normal distribution of a spousal share of a retirement is to be upon  
20 the employee spouse’s first eligibility for retirement, and that if a worker does not retire at first  
21 eligibility, the worker must pay the spouse whatever the spouse would have received if the worker  
22 *did* retire at that time.<sup>42</sup>

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23  
24 <sup>39</sup> *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992).

25 <sup>40</sup> *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

26 <sup>41</sup> *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

27 <sup>42</sup> Inexplicably, the legislative history of NRS 125.155 is devoid of any mention of this case, or its reasoning.

1 *Wolff v. Wolff*<sup>43</sup> was another PERS case involving a Highway Patrol officer. The employee  
2 spouse became eligible to retire three months after divorce, but elected to keep working. The district  
3 court had calculated the spousal share of the retirement and ordered the husband to pay that sum to  
4 the wife from his salary until he actually retired. The lower court also tried to “reflect” that the  
5 husband was paying taxes on his current salary, and so awarded a couple hundred dollars less per  
6 month in “Limited Temporary Spousal Support” until the husband retired, as a “reasonable  
7 equivalency.”

8 Citing *Walsh*<sup>44</sup> and *Carrell*,<sup>45</sup> the Nevada Supreme Court held that pension payments cannot  
9 be classified as temporary spousal support, because such support is subject to possible future  
10 modification. The Court found the lower court’s lowering of payments to reflect “the taxable  
11 consequences” of the payments was “arbitrary” and held that it violated the equal distribution  
12 presumption of NRS 125.150(1)(b).

13 The Nevada Supreme Court rejected the husband’s attack on *Gemma*, which he had argued  
14 was “fatally flawed” for non-recognition of the “passive appreciation of the sole and separate  
15 portion” of the retirement during the marriage, and explicitly reaffirmed its holdings in *Gemma*,  
16 *Sertic*, and *Fondi*. The Court specifically affirmed the lower court’s order that the wife’s share  
17 would **not** revert to the husband if she predeceased him, but would instead continue being paid to  
18 her estate, explaining that the community interest was divided upon divorce to two sole and separate  
19 interests,<sup>46</sup> so that even if her estate was not listed as an alternate payee as defined in NRS  
20 286.6703(4), the estate was entitled to the payments that she would have received if alive.<sup>47</sup>

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23 <sup>43</sup> 112 Nev. 1355, 929 P.2d 916 (1996).

24 <sup>44</sup> 103 Nev. 287, 738 P.2d 117 (1987).

25 <sup>45</sup> 108 Nev. 670, 836 P.2d 1243 (1992).

26 <sup>46</sup> Citing 15A Am. Jur. 2d *Community Property* § 101 (1976).

27 <sup>47</sup> As discussed below, PERS refuses to enforce this holding.



1 employees operate under separate rules, however. Police and fire-fighters also can retire at age 65  
2 with five years of service, but they become eligible to retire at age 55 with ten years of service, or  
3 age 50 with 20 years of service, or at any age with 25 years of service.<sup>52</sup>

4 Like many other retirement systems, PERS includes provisions for cost of living adjustments  
5 over time. Unlike most other systems, however, the COLA provisions can be (and usually are) fixed,  
6 unrelated to inflation, actual cost of living, or any other economic information. PERS provides for  
7 post-retirement cost of living adjustments, based upon the lesser of the CPI average or at 2% per year  
8 after three full years, 3% per year after six years, 3.5% per year after nine years, 4% per year after  
9 12 years, and 5% per year after 14 years.<sup>53</sup>

10 There are several options under PERS for the form of monthly benefits, securing various  
11 levels of survivorship payments for beneficiaries.

12 In 1993, the Nevada Legislature approved AB 555, which basically emulated language in the  
13 ERISA/REA rules governing Qualified Domestic Relations Orders for private retirement plans. The  
14 new provisions required court orders dividing PERS benefits to be signed by a district court judge  
15 or supreme court justice, and explicitly provided for enforcement on behalf of an “alternate payee,”  
16 who may be a spouse, former spouse, child, or other dependent of a member or retired employee.<sup>54</sup>

17 As discussed above, the ERISA statutory scheme is very large and complex, and the adoption  
18 of individual phrases and pieces of ERISA terminology carried with it a large potential of confusing  
19 the field and leading to unintended consequences.<sup>55</sup> The five requirements in the statutory  
20 amendment<sup>56</sup> for an order to be enforced by PERS were:

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21  
22 <sup>52</sup> NRS 286.510(2).

23 <sup>53</sup> See NRS 286.575; 286.5756.

24 <sup>54</sup> NRS 286.6703(4).

25 <sup>55</sup> ERISA, the federal law that created “QDROs,” is by its own terms inapplicable to any governmental plans,  
26 including civil service, military, or State retirement plans. 29 U.S.C. §§ 1003(b)(1) & 1051. By using QDRO-like  
language in State statutes governing PERS, the law invites practitioners to confuse the two statutory schemes.

27 <sup>56</sup> Enacted as NRS 286.6703(3)(a)-(e).

1           1.       It must clearly specify the names, Social Security numbers, and last known  
2 mailing addresses, if any, of the member and the alternate payee.<sup>57</sup>

3           2.       It must clearly specify the amount, percentage, or manner of determining the  
4 amount of the allowance or benefit of the member or retired employee that must be  
5 paid by the system to each alternate payee.

6           3.       It must specifically direct the system to pay an allowance or benefit to the  
7 alternate payee.

8           4.       It must not require the system to provide an allowance or benefit or option not  
9 otherwise provided under the statutes governing PERS.

10          5.       It must not “require payment of an allowance or benefit to an alternate payee  
11 before the retirement of a member or the distribution to or withdrawal of  
12 contributions by a member.”

13           There was extremely little debate or examination of the detail of the PERS amendments;  
14 what little there is shows that the PERS representatives were quite hostile to “the courts legislating  
15 divorce law on the pension plans.”<sup>58</sup>

16           At a later hearing, Mr. Pyne was pressed for what he meant, and he responded that “the  
17 purpose of the legislation is to reemphasize to the courts that before the retirement system will  
18 comply with a court order with respect to dividing a [member’s] benefits with his or her divorced  
19 spouse, the court order shall comply with the provisions and terms of the retirement act.”<sup>59</sup> He  
20 further specified that the “purpose of the legislation is to protect the system and members of the  
21 system from these types of orders which fall outside the scope of the act.”<sup>60</sup>

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22  
23           <sup>57</sup> By later amendment, the Social Security number requirement was eliminated.

24           <sup>58</sup> See colloquy between Assemblyman McGaughey and Mr. Pyne from PERS, in Minutes of Assembly  
25 Committee on Government Affairs, May 11, 1993, considering AB 555.

26           <sup>59</sup> Testimony of George Pyne from PERS, in Minutes of Senate Finance Committee, June 2, 1993, considering  
27 AB 555.

28           <sup>60</sup> *Id.*



1 He went on to explain, apparently, that the purpose of the legislation was not to change  
2 divorce law, but only how PERS could and should act when served with an order, testifying that  
3 “section 1 . . . is the heart of the legislation because the court orders could not require the system to  
4 provide an allowance, benefit, or option not otherwise provided under that chapter and cannot require  
5 the payment of an allowance or benefit to an alternate payee before the retirement of a member, or  
6 the distribution to, or withdrawal of, contributions by a member.”<sup>61</sup>

7 The members of the Senate Finance Committee seemed to be asking whether the orders  
8 would be invalid or just not have to be honored by the retirement system. Mr. Tom Ray, Deputy  
9 Attorney General, tried to provide an answer, set out in legislative history as:

10 The problem we find happening is, typically, where the court would enter a divorce  
11 decree...would provide that the nonparticipating spouse could receive retirement benefits,  
12 while the participating member is still an active employee. That is totally contrary to the  
13 system. That spouse would present that decree to the system, which they would have to  
14 reject....How can we not honor a court order? The PERS was not a party to that lawsuit, so  
15 that order is not binding on the retirement system. So what happens if the parties can't work  
16 it out...? Then the parties have to bring a new lawsuit against the retirement system to try  
17 and get enforcement of that order. At that time we try to point out to the court they can't do  
18 that, because it's not in compliance with Chapter 286.

19 In other words, while Mr. Pyne's comments were rather ambiguous as to the intended scope  
20 of the statutory change, Mr. Ray indicated that the sole objective of the terminology used was to  
21 shield PERS from any court direction or demand to distribute benefits other than as set out by the  
22 Plan's terms.

#### 23 **D. The Sad History of NRS 125.155**<sup>62</sup>

24 NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS  
25 retirement benefits in divorce. The legislation in its original form was heard by the Assembly  
26 Judiciary Committee on March 31, 1995, backed by Mr. Gary Wolff, purportedly on behalf of the  
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28 <sup>61</sup> *Id.*

<sup>62</sup> “Laws are like sausages. It's better not to see them being made.” Otto von Bismarck (1815 - 1898) (attrib.)

1 Nevada Highway Patrol Association, accompanied by the association’s lawyer, and Mr. Robert  
2 Fowler, representing the Law Enforcement Council, Service Employees International Union.

3 The trial court had issued its decision in Mr. Wolff’s divorce case dividing his retirement  
4 benefits on November 22, 1994.<sup>63</sup> He did not tell the Committee that, nor that he was at that moment  
5 a party to an appeal in the Nevada Supreme Court whose course he hoped to alter by means of a  
6 statutory amendment.

7 In its original form, the proposed legislation would have stated that unvested retirement  
8 benefits were not divisible at all, effectively reversing *Forrest*<sup>64</sup> and *Gemma*.<sup>65</sup> It also would have  
9 required a dollar-for-dollar offset of Social Security benefits, effectively reversing the Nevada  
10 Supreme Court’s holding in *Wolff* and *Boulter*<sup>66</sup> that such benefits are immune from such offsets as  
11 a matter of federal pre-emption. It would have required an automatic reversionary interest in the  
12 spousal share of the property upon death of the former spouse back to the member, in contravention  
13 of the Nevada Supreme Court’s holding in *Wolff*, and the very structure of various retirement plans,  
14 including ERISA’s divided interest scheme and mandatory spousal survivorship coverage,<sup>67</sup> and the  
15 heritable spousal share set out in federal law for CSRS and FERS.

16 None of these effects were clearly disclosed; none of those appearing made clear that only  
17 a tiny and ever-shrinking minority of States even consider vestedness an issue as to the divisibility  
18  
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20 <sup>63</sup> *Wolff v. Wolff*, 112 Nev. 1355, 1357, 929 P.2d 916, 917 (1996)

21 <sup>64</sup> *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

22 <sup>65</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

23 <sup>66</sup> *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997) (under 42 U.S.C. 407(a) (1983), any state action is  
24 preempted by a conflicting federal law, such as the Social Security Act, under the Supremacy Clause (Article IV, Clause  
2) of the United States Constitution). Of course, *Boulter* was not decided until after the 1995 legislative session.

25 <sup>67</sup> See, e.g., Marvin Snyder, VALUE OF PENSIONS IN DIVORCE (3d. ed., Panel Publishers 1999), at 22 (explaining  
26 how, until the interest is divided, with the spousal portion permanently the property of the spouse, the standard death  
27 benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a “qualified joint and  
survivor annuity,” or “QJSA.”

1 of retirement benefits.<sup>68</sup> The Nevada Bar Family Law Section had heard about the proposed  
2 legislation, and its Executive Council was assured that the lawyers appearing at the hearing<sup>69</sup> would  
3 convey just how counterproductive and injurious to community property law the proposal was. And,  
4 indeed, both attorneys appeared at the hearing, and are listed as testifying in opposition to the bill,<sup>70</sup>  
5 although Ms. Cooney further testified that legislative action was required because the retirement  
6 benefits decisions of the Nevada Supreme Court “tend to cloud issues rather than clear them up.”<sup>71</sup>

7 But the bill was not killed as the Section was informed. Instead, it was assigned to a  
8 subcommittee, consisting of four members of the Assembly, who apparently met with Ms. Cooney  
9 and others.<sup>72</sup> Any input by the attorneys purporting to speak for the NTLA or the Section was  
10 apparently unauthorized.<sup>73</sup>

11 Ms. Cooney did reveal that she was the current spouse of Judge Michael Fondi, but  
12 apparently never disclosed that the legislation could be used to undo the Nevada Supreme Court’s  
13 decision in the original *Fondi* case and dispossess the earlier former spouse of her interest in the  
14

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15 <sup>68</sup> See, e.g., discussion in Marshal Willick, *Hitting the Jackpot in Pension Cases: Secrets to Getting the*  
16 *Retirement Share Your Client Deserves* (PESI National Divorce Skills Institute, Las Vegas, Nevada, 2007), posted at  
17 [http://www.willicklawgroup.com/published\\_works](http://www.willicklawgroup.com/published_works). The reason for this near-uniformity is pretty simple; where  
18 vestedness is required for divisibility, an employee spouse can wait until a few months short of vesting of a 20-year  
19 retirement, divorce a spouse to whom the employee had been married that entire time, and summarily divest the spouse  
20 of any interest whatsoever in what is frequently the most valuable asset of a marriage.

21 <sup>69</sup> Valerie Cooney, Esq., and Beverly Salhanick, Esq., for the Nevada Trial lawyers Association (“NTLA”; now  
22 known as the “Nevada Justice Association,” having changed its name in 2008. References here are to the organization  
23 as it was then named).

24 <sup>70</sup> See Minutes of Assembly Judiciary Committee, March 31, 1995, considering AB 292.

25 <sup>71</sup> *Id.*

26 <sup>72</sup> See Minutes of Assembly Judiciary Committee, May 12, 1995, considering AB 292. The on-line record is  
27 not complete, and does not include any of the exhibits, or even a transcription of the hearing of April 20, but only the  
28 notation that the “tape is on file” with the Legislative Counsel Bureau.

<sup>73</sup> In the Family Law Section’s subsequent investigation, all seven of the other NTLA members that should have  
had to vote to back such legislation claimed either that they were in opposition to the bill, or never heard of it. To a  
member, they reported either hearing nothing or being told the bill was dead in committee, and none reported any vote  
on it ever being taken to give it support as “an NTLA bill” or “an NTLA supported bill,” which apparently is not allowed  
without such a vote being taken. The Section was opposed to the proposed legislation, basically for the reasons stated  
by Ms. Salhanick at the first hearing, and had been told the bill was killed.

1 retirement benefits.<sup>74</sup> She also did not reveal that Judge Fondi had already filed a second appeal in  
2 the Nevada Supreme Court relating to those retirement benefits,<sup>75</sup> which could be affected by the  
3 proposed legislation.

4 It is therefore unsurprising that the bill was reported out of subcommittee with the statement  
5 that it “was the result of interested parties working together and are in full agreement with the work  
6 document and amendments.”<sup>76</sup>

7 The Assembly, however, added a provision indicating that the legislation would only affect  
8 cases filed on or after the date of enactment. The “interested parties” turned their efforts to trying  
9 to eliminate that provision of the bill,<sup>77</sup> with Ms. Cooney stating (preposterously) that the time-rule  
10 was adopted from California, but that it “in reality is not well-suited to Nevada.”<sup>78</sup>

11 The effort to make the legislation retroactive failed, and the bill went to the Senate, where  
12 they tried again.<sup>79</sup> This time, Ms. Cooney made the additional incorrect assertion that the time rule  
13 does not allow divorces to be finalized, but “requires the parties to return to court to litigate the  
14 division and the value of the non-participating spouse’s interest.”<sup>80</sup> She further asserted that PERS  
15 was “unique” based on the early regular retirement dates for police/fire PERS participants.<sup>81</sup>

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16  
17 <sup>74</sup> The earlier spouse had about a 16-year time rule interest in the PERS benefits. *Fondi v. Fondi*, 106 Nev. 856,  
802 P.2d 1264 (1990).

18 <sup>75</sup> No. 26570, filed in January, 1995, and briefed from May to July.

19 <sup>76</sup> See Minutes of Assembly Judiciary Committee, May 24, 1995, considering AB 292.

20 <sup>77</sup> See Minutes of Assembly Judiciary Committee, June 17 & June 20, 1995, considering AB 292.

21 <sup>78</sup> See Minutes of Assembly Judiciary Committee, June 17, 1995, considering AB 292. She did not reveal that  
22 the rule is followed in every community property State, and the great majority of equitable division States; the only  
23 significant variation is in Texas, which employs a “rank and grade at divorce” approach that enormously undervalues  
24 the spousal share. See *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). For a full explanation of the mathematical error  
in that approach, see Marshal Willick, *Divorcing the Military: How to Attack; How to Defend* 17-22, posted at  
[http://www.willicklawgroup.com/military\\_retirement\\_benefits](http://www.willicklawgroup.com/military_retirement_benefits).

25 <sup>79</sup> See Minutes of Senate Judiciary Committee, June 26, 1995, considering AB 292.

26 <sup>80</sup> *Id.*

27 <sup>81</sup> *Id.*

1           During the Senate hearings, Ms. Cooney was accompanied by attorney Muriel Skelly, who  
2 joined Ms. Cooney’s call to make the legislation applicable to previously-decided cases as well as  
3 newly-filed ones. Ms. Skelly identified herself as “a member of the Executive Council of the  
4 Section,” but did not disclose that she was Mr. Wolff’s divorce attorney, nor that she represented him  
5 in an appeal already filed in the Nevada Supreme Court that would be directly affected by the  
6 proposed legislation,<sup>82</sup> nor that she appeared to assist her client, and espousing a position at odds  
7 with that of the Section.

8           It was only the next day that the Family Law Section discovered that the bill had not been  
9 killed in the Assembly, as it had been informed.<sup>83</sup> The Section scrambled to put together a written  
10 report to Senator James (chair of Senate Judiciary) as to all the damage the proposed legislation  
11 would inflict, but it did not reach him during the next day’s (June 27) Committee proceedings, which  
12 is why the legislative history for that date says only that “he is awaiting a facsimile from a family law  
13 practitioner about a concern with the bill,” but when it did not arrive in time, had the Committee vote  
14 to pass the legislation.

15           When the Senate Judiciary Committee was informed of the various problems with the bill,  
16 that evening, instructions were given to have it quietly amended, essentially overnight and with no  
17 record other than the bill draft itself, but the Section was informed that it could not be killed entirely,  
18 apparently as a matter of comity from chamber to chamber. The worst portions of the bill were  
19 removed between June 28 and June 30, 1995; it was redirected to apply solely to PERS retirements,  
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21           <sup>82</sup> *Id.* In fact, she went further, declaring “I have no personal axe to grind; I have no personal interest in this.  
22 I have no financial axe to grind; I have no financial interest in this. All I have is a professional interest from the trenches  
23 who does this day after day after day. And I can see great injustice, both to men and to women.”

24           <sup>83</sup> I had been jointly retained by the counsel for the Wolffs at the trial court level, to do to the time rule  
25 calculations used in that case. I was also incoming Chair of the Family Law Section in 1995. When I first heard of the  
26 possible introduction of legislation to alter the outcome of the case, I wrote to both opposing trial counsel on March 23,  
27 1995, observing that the proposal would “do significant violence to concepts of community property and equitable  
28 distribution of marital property” and urging both sides to “work together to ensure that neither the legislature nor the  
29 courts are bamboozled into corrupting the law for the benefit of any particular individual.” The response was apparently  
30 to go forward with trying to do just what was warned against, but ensure that no word of it was reported back to the  
31 Section.

1 and was reprinted, passed, and returned to the Assembly, which concurred in the amendments  
2 without other record.

3 The Governor signed the bill on July 5, 1995, still containing the non-retroactivity provisions,  
4 which is why arguments relating to the legislation do not appear in the record of the Nevada Supreme  
5 Court’s opinion in *Wolff* in 1996.

6 The final version of the bill, enacted as NRS 125.155, applies solely to PERS. Section 1(a)  
7 requires any divorce order to be based on the “time rule” and Section 1(b) prohibits basing a division  
8 “upon any estimated increase” based on post-marital service. Section two states that the divorce  
9 court may require that benefits for a spouse not be paid until the participant actually retires, and may  
10 safeguard the spousal share, if it does so order, by way of a bond, life insurance, or other security,  
11 or (by agreement of the parties only) by increase in the spousal share to compensate for the delay in  
12 payments. Section three provides that a spousal share ordered under that statute terminates upon  
13 death of either party unless a retirement option providing for survivorship benefits is agreed or  
14 ordered, although the phrasing is confusing and appears garbled.

15 Much of the final version of the bill merely restated existing law – such as codification of the  
16 time rule, or the provision permitting a court order “upon agreement of the parties.” Much of the  
17 rest is simply inapplicable to anything. For example, paragraph 1(b) is built around the phrase “In  
18 determining the value of an interest in or entitlement to a pension or retirement benefit . . . .” The  
19 problem is that Nevada divorce courts generally do not “determine a value.” Under *Gemma* and  
20 *Fondi*, our courts simply divide the retirement itself, whatever its value, equally, so that both spouses  
21 share the benefits, and the risks, of whether the benefits will ever appear, and if so in what amount.

22 Paragraph 1(b) also prohibits the court from basing its determination on any “estimated  
23 increase” in value resulting from a promotion or raise as a result of continued employment after the  
24 divorce. Of course, the time rule does not “estimate” anything, but simply accords an ever-smaller  
25 slice of an ever-enlarging pie to the former spouse, in precise math.

1           It is possible (but by no means certain) that the language was intended to prevent application  
2 of the time rule as used in all other cases, by freezing the spousal share at a hypothetical division of  
3 whatever rank and grade had been achieved by the employee at the time of divorce.<sup>84</sup> If so, the  
4 statute would apparently emulate the defective Texas variation of the time rule discussed above, and  
5 would accord to spouses of PERS members a lesser accrual of the community property of a marriage  
6 than everyone else in this State. The language is so unclear, however, that it may not do anything;  
7 no known case has ever applied the time rule as Texas would.

8           The key operative word in NRS 125.155(2) is “may.” The provision is an “opt-out” clause  
9 – for PERS cases only – to the mandate of *Gemma* and *Fondi* that the spouse is eligible for  
10 distribution of his or her share of the retirement at the employee spouse’s first eligibility for  
11 retirement. The legislative history states that it was intended to undercut the change of Nevada’s  
12 community property scheme from “equitable” to “equal” in 2003, but just for PERS participants.

13           There has never been a case, apparently, in which a court has ordered a bond to secure  
14 payment of a spousal share ordered not paid at eligibility, in accordance with NRS 125.155(2)(a).  
15 It is difficult to conceive how such an order might work, as such a bond would require a dollar sum  
16 certain to secure an unknown future performance to begin on an unknown future date.

17           NRS 125.155(2)(b) actually does something – it explicitly permits a court to order private  
18 life insurance to make up for the lack of any “pre-retirement survivor annuity” in the PERS system.<sup>85</sup>

19           Paragraph 2(c) provides that the court may “pursuant to an agreement of the parties” increase  
20 the value of the spousal share as compensation for delay in payment. Of course, that is what the time  
21 rule does *automatically* for everyone else. It is hard to imagine a circumstance in which a PERS  
22  
23

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24           <sup>84</sup> The mechanics of the math of such an approach are detailed below.

25           <sup>85</sup> In other words, the reality that even if ordered, the survivor’s benefits provisions under PERS do not go into  
26 effect until and unless the participant actually retires; if the member dies before retirement, the former spouse gets  
27 nothing under the statutory scheme, since death benefits are not payable to a former spouse, and survivor’s benefits do  
28 not become effective until actual retirement.

1 participant, having gained the ability to deprive his or her spouse of that automatic “smaller slice of  
2 the larger pie” benefit, would ever agree to give it back; there is no known instance of it being used.

3 Paragraph 2(d) allows a court to order the employee to “provide any other form of security”  
4 for actual payment to the former spouse. This, also, has apparently never been done.

5 Section three provides that any interest created by the court pursuant to this statute terminates  
6 at the death of either party unless otherwise provided by agreement or court order. Again, as with  
7 section one, that is already the law. And it is hard to make the text following subsection (b) make  
8 any linguistic sense with the first half of the paragraph.

9 The July, 1995, Chair’s Column in the *Nevada Family Law Report* pretty concisely stated  
10 the position of the Section leadership on the process and result of enacting NRS 125.155:

11 Several members of the Executive Council were instrumental in deflecting what  
12 would have been incredibly bad legislation, in the form of A.B. 292. That bill would have  
13 significantly damaged the whole scheme of community property by disallowing division of  
14 unvested retirement benefits, among other things. It was detected the day before its final  
15 vote in the Senate, having passed entirely through the Assembly, and Senate Judiciary,  
16 without any notice to the Council whatsoever.

17 . . . .  
18 The organized family law Bar must become more proactive in the legislative  
19 process. Too much, we have allowed private lobbying groups to speak for the family law  
20 Bar. Experience has shown clearly that those organizations, and their representatives, have  
21 political and personal agendas considerably beyond looking out for equity, impartiality, and  
22 logic in family law.

23 As noted by Edmund Burke, “All that is necessary for the triumph of evil is for good  
24 men to do nothing.” It seems to me essential to have a neutral advisory presence in the  
25 legislature to prevent the kind of selfish stupidity exemplified by A.B. 292 from becoming  
26 the law of this state. We owe it to the system we serve, and to our collective clients, strong  
27 and weak, rich and poor, to prevent the statutory law from being twisted to serve the  
28 purposes of a few political insiders rather than the public generally.

29 Six weeks after the effective date of the statute, the Nevada Supreme Court in *Sertic*  
30 specifically ordered that **all** spousal shares of retirement benefits are to be distributed to spouses  
31 upon members’ first eligibility for retirement.<sup>86</sup> Accordingly, the Section anticipated a quick court  
32 challenge to NRS 125.155. But the statute in its watered-down form lay, virtually ignored by Bench  
33 and Bar for the next 13 years, and the few times it was made an issue at trial it apparently never went

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34 <sup>86</sup> *Sertic* itself involved federal CSRS benefits.



1 up on appeal, until *Hedlund*, where all of the difficult issue were ducked in favor of an unpublished  
2 remand.

3  
4 **III. ISSUES PRESENTED BY PERS AND NRS 125.155**

5 **A. Whether the District Court Can Order Payments to the Former Spouse Before**  
6 **the Member Actually Retires**

7 **1. The Question as Posed**

8 The short answer is “yes.” The only fair reading of NRS 125.155(2) is permissive,<sup>87</sup> and  
9 obviously, if a court “may” do something, it can just as easily not do it. A secondary issue is raised  
10 by the issuance of the *Sertic* and *Wolff* opinions after the effective date of the statute, however.

11 In other contexts, the Nevada Supreme Court has held that a legislative failure to address the  
12 Court’s construction of a legal term constitutes “legislative adoption” of the Court’s rulings.<sup>88</sup> The  
13 *Sertic* and *Wolff* opinions include directions to the district courts, respectively, that “While no  
14 method is perfect, the advantages of the ‘time rule’ clearly outweigh any other method of pension  
15 division,” and that “the ‘equal distribution’ presumption governing Nevada’s community property  
16 laws” require application of the time rule. And the Legislature has not disturbed either holding in  
17 the past five sessions.

18 Of course, the new statute also inserted a caveat in the opening line of NRS 125.150,  
19 purporting to exempt divisions of retirement benefits under NRS 125.155 from the entirety of the  
20 property division law governing all other marital assets. So it is possible to read the Nevada  
21 Supreme Court’s two post-statute holdings harmoniously with the statute, and the analysis changes  
22 to one of equal protection, which is discussed below.

23  
24 <sup>87</sup> See *Westgate v. Westgate*, 110 Nev. 1377, 887 P.2d 737 (1994); *Libro v. Walls*, 103 Nev. 540, 746 P.2d 632  
25 (1987) (use of term “may” in NRS 125.180 created an equitable defense to a support arrearages claim in the discretion  
of the trial court).

26 <sup>88</sup> See, e.g., *Lewis v. Lewis*, 50 Nev. 419, 425-26, 264 P. 981, 982 (1928) (noting that in a prior opinion, the  
27 Court had construed the divorce laws as to residence as requiring actual presence, and that the Nevada Legislature had  
re-enacted the law using the same language after the Court had so held).

1           **2.     Implicated Issues and Their Resolution**

2                   **a.     Validity of Time-Rule Divisions in Nevada Law**

3           The Legislature was mis-informed both that Nevada’s application of the time rule was  
4 somehow not in keeping with the application of law elsewhere, and that applying the law to PERS  
5 participants as it applied to others created “special problems” because of the early retirement possible  
6 under PERS.<sup>89</sup> Both assertions were false; the alleged problem does not exist.

7           As a matter of law, it is possible to value the spousal share in at least two ways. The great  
8 majority of States applying the time rule view the “community” years of effort *qualitatively* rather  
9 than quantitatively, reasoning that the early and later years of total service are equally necessary to  
10 the retirement benefits ultimately received.<sup>90</sup> This provides to the former spouse an ever “smaller  
11 slice of a larger pie” by getting a shrinking percentage of a retirement that is increasing in size based  
12 upon post-divorce increases in the wage-earner’s salary and years in service.

13           As the Nevada Supreme Court’s prior opinions have noted, some critics complain that such  
14 a formula gives the non-employee former spouse an interest in the employee spouse’s post-divorce  
15 earnings, at least where the divorce occurs while the employee is still working. The same point was  
16 raised by Ms. Cooney in the legislative hearings that led to NRS 125.155, as somehow a unique  
17 “problem” in PERS cases.<sup>91</sup>

18           As noted above, a small minority of States, including Texas, have adopted this approach,  
19 sometimes in cases that do not appear to have contemplated the actual mathematical impact of the  
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21                   <sup>89</sup> See Minutes of Assembly Judiciary Committee, March 31, 1995, June 17 & June 20, 1995, considering AB  
22 292.

23                   <sup>90</sup> See, e.g., *Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *Bangs v. Bangs*, 475 A.2d 1214  
24 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995);  
25 *Croley v. Tiede*, \_\_\_ S.W.3d \_\_\_, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COA-R3-VC, Oct. 5, 2000).  
26 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).

27                   <sup>91</sup> See Minutes of Senate Judiciary Committee, June 26, 1995, considering AB 292.

1 decision reached.<sup>92</sup> This minority approach undervalues the spousal interest by giving no  
2 compensation for deferred receipt, and also contains a logic problem, at least in a community  
3 property analysis, of treating similarly situated persons differently.

4 Specifically, the majority time rule approach used here and most other places comes closest  
5 to providing equity to successive spouses. Two consecutive spouses, during the first and last halves  
6 of a member's career, would be treated equally under the qualitative approach, but very differently  
7 under any approach that freezes the spousal share at the level of compensation being received by the  
8 member at the time of divorce.

9 An example helps illustrate. Presume a worker who was in service for exactly 20 years, who  
10 was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce  
11 from wife two. Presume he had started work at \$20,000 per year, and had enjoyed 5% raises every  
12 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

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27 <sup>92</sup> See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

1 In PERS, or any other defined benefit plan,<sup>93</sup> the above wage history would make his average  
2 monthly salary during his last three years' service \$4,014.21, and the retirement formula<sup>94</sup> would  
3 make his retired pay \$2,007.11.

4 Under the *qualitative* approach to the time rule embraced by this and most other time rule  
5 states, the member would receive half of this sum himself – \$1,003.55. Each of his former spouses,  
6 having been married to him for exactly half the time the pension accrued, would receive half of *that*  
7 sum – \$501.78. In other words:

8	Member:	\$1,003.55
9	Wife one (10 years):	\$ 501.78
10	Wife two (10 years):	\$ 501.78
	Total:	\$2,007.11

11 If the calculations were done in accordance with the position of the critics of the time rule  
12 set out above (and *possibly* under the vague language of NRS 125.155(1)(b)), however, the results  
13 would be quite different. Wife one's share of the retirement would be calculated in accordance with  
14 rank and grade at the time of her divorce from the employee; in this case, she would get a pension  
15 share based on the "high three" years at the ten year point, which was \$2,464.38. The formula would  
16 produce a hypothetical retirement of \$616.10. Wife one would receive half of that sum – \$308.05,  
17 but not until after the member's actual retirement, ten years later.

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

20	Member:	\$1,100.41
21	Wife one (10 years):	\$ 308.05

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22 <sup>93</sup> Such plans are often funded by employer contributions (although in some plans employees can contribute)  
23 and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined  
24 by a formula taking into account the highest salary received and the total number of years worked for the employer (such  
25 as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary  
26 over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-  
27 year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e., \$2,000  
28 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be  
distributed from such defined benefit plans.

<sup>94</sup> Years of service x 2.5% x high-three average basic pay. For ease of calculation, I've used the 2.5%  
accumulator, even though the rate changed to 2.67% after July 1, 2001.

1           Wife two (10 years):     \$ 598.65  
2           Total:                     \$2,007.11<sup>95</sup>

3           These effects, would be even more dramatic, in terms of life-long collections, if the worker  
4 did not actually retire on his first day of eligibility, but continued working after that point, and if the  
5 law did not provide for payment upon eligibility for retirement. In that event, wife one's already  
6 much-reduced shared might not start to be paid for many years thereafter, making her lifetime  
7 collections a tiny percentage of the retirement benefits actually paid. While the language is unclear,  
8 allowance of this result seems to be what NRS 125.155 is designed to permit.

9           The reasoning behind the two approaches to the time rule are found in cases in which a  
10 reviewing court split as to which interpretation is most correct. The Iowa Supreme Court faced such  
11 a conflict in *In re Benson*.<sup>96</sup> Using slightly different reasoning, that Court reached the same  
12 conclusion reached by the Nevada Supreme Court and most others. Quoting at length from a law  
13 review article analyzing the mathematics of the situation, the court found the Texas approach  
14 produces an unfair result to the earlier spouse. Three judges dissented.<sup>97</sup>

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20           <sup>95</sup> The mathematical effects of the various approaches are straight-forward. Unless payments to spouses are  
21 required at each first eligibility for retirement, regardless of the date of actual retirement, a "rank at divorce" proposal  
22 results in a lifetime reduction in the value of the spousal share by at least 13%. And a second spouse married to a  
23 member for the last couple years of service could actually receive more money after divorce than a first spouse who  
24 assisted the member for most of the career. There does not appear to be any valid public policy that could be served by  
25 causing this result.

26           <sup>96</sup> *In re Benson*, 545 N.W.2d 252 (Iowa 1996).

27           <sup>97</sup> The Iowa court apparently did not even consider the possibility of having the wife's interest begin being paid  
28 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  
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, e.g., *In*  
*re Harris*, 27 P.3d 656 (Wash. Ct. App. 2001).

1           Essentially identical holdings to those of the Nevada Supreme Court have been issued in  
2 every other community property State,<sup>98</sup> with the exception as noted of Texas, which freezes the  
3 spousal share at the rank and grade at divorce.

4           In sum, the time rule as adopted in Nevada is in the mainstream and clear majority of legal  
5 thinking on the issue, and it has been applied without difficulty to public, private, State, and federal  
6 benefits equally throughout the community property system without distinction as to the particular  
7 plan involved.

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9                                   **b.       Validity of Spousal Eligibility for Payments at the Member’s**  
10                                   **Eligibility for Retirement**

11           Most of the States employing a standard qualitative time-rule division of retirement benefits  
12 hold that the interest of a former spouse in retired pay is realized at eligibility for retirement, entitling  
13 the spouse to collect a portion of what the member *could* get at that time irrespective of whether the  
14 member actually retires.<sup>99</sup> Most such holdings have employed some variation of the phrasing used  
15 by the California court in *Luciano*: “The employee spouse cannot by election defeat the nonemployee  
16 spouse’s interest in the community property by relying on a condition within the employee spouse’s  
17 control.”<sup>100</sup>

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20           <sup>98</sup> In addition to the law of California, Nevada, and Texas discussed above, *see, e.g., Van Loan v. Van Loan*,  
21 569 P.2d 214 (Ariz. 1977); *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *In re Marriage of Bulicek*, 800 P.2d 394 (Wash.  
22 App. 1990); *Hokin v. Hokin*, 605 N.W.2d 219 (Wisc. Ct. App. 1999); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993)  
(explicitly relying upon *Gemma*); *Johnson v. Johnson*, 638 P.2d 705 (Ariz. 1981), *citing Bloomer v. Bloomer*, 267  
23 N.W.2d 235 (Wis. 1978); *Ramsey v. Ramsey*, 535 P.2d 53 (Idaho 1975); *DeRevere v. DeRevere*, 491 P.2d 249 (Wash.  
Ct. App. 1971); *LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969).

24           <sup>99</sup> *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of*  
*Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251  
25 (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); *Harris v. Harris*, \_\_\_ P.3d \_\_\_ (Wash. Ct. App., No. 45364-5-I, July 30,  
26 2001).

27           <sup>100</sup> *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

1 The question is whether the phrasing of the “QDRO-like” provisions adopted by the Nevada  
2 Legislature in 1993 for PERS somehow prohibits an order, as in *Wolff*, requiring the member to pay  
3 the spouse’s share to the spouse for the period from eligibility to actual retirement. Based on  
4 comparable provisions from the other major retirement systems, the answer should be “no.”

5 The provision in question, NRS 286.6703(3)(e), states that an order that will be approved for  
6 direct payment by the system, must, among other things, “not require the payment of an allowance  
7 or benefit to an alternate payee before the retirement of a member or the distribution to or withdrawal  
8 of contributions by a member.”

9 As discussed at length above, the provision in question was adapted from a piece of ERISA,  
10 governing private retirements, but without all of the surrounding provisions which collectively  
11 permit the splitting off of a spousal share into a separate interest payable based on the life  
12 expectancy, etc., of the spouse. As explained by Deputy Attorney General Ray in 1993, the purpose  
13 of adopting the language was only to state clearly what PERS would and would not do, not  
14 substantively alter divorce law. That interpretation would be consistent with what courts have done  
15 regarding “payment at eligibility” case law applied to other retirement systems.

16 The OPM regulations, for example, are virtually identical to the PERS language quoted  
17 above. The OPM rule flatly states that an order purporting to provide for payments of a spousal  
18 share upon eligibility for retirement will be rejected as “non-complying.”<sup>101</sup> But many States –  
19 including this one – call for CSRS and FERS benefits to be paid by the member upon eligibility.<sup>102</sup>  
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23 <sup>101</sup> See *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the*  
24 *Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program,*  
25 *and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement  
26 and Insurance Group, rev. ed. July, 1997); <http://www.opm.gov/retire/html/library/other.html> at 5 (citing the existence  
of allowance-of-payment-upon-eligibility orders for private pensions, which can be enforced by ERISA-governed  
retirement plans, as one of the things making civil service benefits distinct, and why OPM refuses to honor orders calling  
themselves QDROs).

27 <sup>102</sup> See, e.g., *Sertic, supra*.

1 There is no known instance of an order requiring payments from the employee until retirement, and  
2 from OPM thereafter, being rejected by the OPM.<sup>103</sup>

3 The military retirement system statutes also contain explicit prohibitions against both  
4 ordering a military member to retire,<sup>104</sup> and ordering payment of a spousal share prior to actual  
5 retirement of a member,<sup>105</sup> which under current law could mean 40 years of military service. But  
6 courts have had no difficulty ordering military members to begin payments upon eligibility.<sup>106</sup>

7 Among the Nevada Supreme Court’s rules for statutory construction are the principles that  
8 if a statute is ambiguous, courts should attempt to follow the legislature’s intent, and “no part of a  
9 statute should be rendered nugatory, nor any language turned to mere surplusage, if such  
10 consequences can properly be avoided.”<sup>107</sup> Here, the legislative history states that the provision was  
11 only intended to guide what PERS should do, not alter substantive divorce law. Further, as discussed  
12 below, reading the provision expansively to prohibit orders directed to members personally, as well  
13 as to PERS, would create an equal protection nullity, to be avoided if possible.

14 It *is* possible to avoid that problem, by reading the language consistently with the reading  
15 given to the statutes governing civil service, military, and other retirement systems – as directed to  
16 the retirement system itself, and not as to what courts can and cannot order the parties to do  
17 personally.

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21 <sup>103</sup> I have personally submitted, and had approved, dozens of such orders.

22 <sup>104</sup> 10 U.S.C. § 1408(c)(3): “This section does not authorize any court to order a member to apply for retirement  
23 or retire at a particular time in order to effectuate any payment under this section.”

24 <sup>105</sup> 10 U.S.C. § 1408(d)(3): “Payments under this section shall not be made more frequently than once each  
25 month, and the Secretary concerned shall not be required to vary normal pay and disbursement cycles for retired pay in  
order to comply with a court order.”

26 <sup>106</sup> *See, e.g., In re Marriage of Harris*, 27 P.3d 656 (Wash. Ct. App. 2001).

27 <sup>107</sup> *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).



1 **c. Equal Protection Concerns as to NRS 125.155**

2 The Nevada Supreme Court has always given substantial deference to legislative enactments,  
3 and has held that “Legislation is presumed constitutional absent a clear showing to the contrary.”<sup>108</sup>  
4 The Court has apparently considered the question of equal protection in the context of divorce cases  
5 only once, in a challenge to the Nevada durational residency statutes, many years ago.<sup>109</sup>

6 There is an equal protection guarantee in both the United States and Nevada Constitutions.<sup>110</sup>  
7 The first inquiry as to whether that guarantee has been violated by some statute is whether a  
8 fundamental right is implicated.

9 The Nevada Supreme Court has repeatedly held that marriage is an object of “great public  
10 concern.”<sup>111</sup> In approving the residency period change at issue in *Worthington*, the Court quoted at  
11 some length from the holding of the United States Supreme Court in *Maynard v. Hill*,<sup>112</sup> which held  
12 that law of marriage and divorce goes beyond contract, to “alteration of a fundamental status in  
13 society.” But the Nevada Supreme Court ultimately found that

14 divorce is not among the inalienable rights of man or the ones granted by Magna Charta, the  
15 federal or state constitution, or the common law, and, except at the will and subject to any  
16 restrictions imposed by the legislature, has never been recognized as one of the guaranteed  
privileges of the citizen . . . .<sup>113</sup>

17 The apparent legal conclusion of no fundamental right may have been altered by later  
18 developments. More recently, the United States Supreme Court ascribed constitutional importance  
19 to the divorce process, in *Boddie v. Connecticut*.<sup>114</sup> Noting that State action was necessary for any

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20 <sup>108</sup> *Starlets International v. Christensen*, 106 Nev. 732, 735, 801 P.2d 1343, 1344 (1990).

21 <sup>109</sup> See *Worthington v. District Court*, 37 Nev. 212, 142 P. 230 (1914) (approving lengthened residency period  
22 to start a divorce case).

23 <sup>110</sup> See Article 4, section 21 of the Nevada Constitution.

24 <sup>111</sup> See, e.g., *Galloway v. Truesdell*, 83 Nev. 13, 23, 422 P.2d 237 (1967).

25 <sup>112</sup> *Maynard v. Hill*, 125 U.S. 190, 8 S. Ct. 723, 31 L. Ed. 654 (1888).

26 <sup>113</sup> 37 Nev. at 244, 142 P. at 241.

27 <sup>114</sup> *Boddie v. Connecticut*, 401 U.S. 371 (1971).

1 person to dissolve a marriage, the Court struck down Connecticut’s mandatory filing fee for obtaining  
2 a divorce on both due process and equal protection grounds:

3 Our conclusion is that, given the basic position of the marriage relationship in this society’s  
4 hierarchy of values and the concomitant state monopolization of the means for legally  
5 dissolving this relationship, due process does prohibit a State from denying, solely because  
6 of inability to pay, access to its courts to individuals who seek judicial dissolution of their  
7 marriages.

8 Accordingly, precedent appears to indicate that equality of treatment under the divorce  
9 statutes for those similarly situated is a fundamental right of constitutional dimension. If so, the  
10 furnishing to spouses of PERS participants different and lesser protections against devaluation and  
11 divestment of their community property rights would violate both the federal and State equal  
12 protection guarantees.

13 The same conclusion is reached, however, even if the Nevada Supreme Court does not  
14 determine that equality of treatment under the divorce statutes is a fundamental right. The Court  
15 stepped through an equal protection analysis in *Barnes v. Eighth Judicial District Court*,<sup>115</sup> and  
16 determined that after looking for the implication of fundamental rights, the review turns to whether  
17 the classification scheme created by the statute “is rationally related to furthering a legitimate state  
18 interest.”

19 The test for that question was set out in *State Farm v. All Electric, Inc.*,<sup>116</sup> as requiring that:

20 Legislative classifications must apply uniformly to all who are similarly situated, and the  
21 distinctions which separate those who are included within a classification from those who  
22 are not must be reasonable, not arbitrary.<sup>117</sup>

23 And determining what the State’s interest might be requires only looking to the legislative  
24 history to see what problem was supposedly being addressed. Nearly a hundred years ago, the

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25 <sup>115</sup> *Barnes v. Eighth Judicial District Court*, 103 Nev. 679, 748 P.2d 483 (1987) (reviewing statutes governing  
26 waivers of filing fees for indigent prisoners and finding that the requirement for indigent prisoners to obtain an affidavit  
27 of an attorney that their cases were meritorious before those cases would be filed violated equal protection).

28 <sup>116</sup> *State Farm v. All Electric, Inc.*, 99 Nev. 222, 660 P.2d 995 (1983); *see also Vance v. Bradley*, 440 U.S. 93  
(1979).

<sup>117</sup> 99 Nev. at 225, 660 P.2d at 997.

1 Nevada Supreme Court held that “in seeking the intention of the legislature in enacting a certain law  
2 we must ascertain the evils sought to be remedied.”<sup>118</sup>

3 As detailed above, the Legislature was told that the PERS plan was somehow unique due to  
4 the potential early retirement dates of its members, because it is a defined benefit (rather than defined  
5 contribution) sort of retirement plan that does not allow for a divided interest, but only a divided  
6 payment stream, and because the plan does not pay anything directly to a former spouse until the  
7 member actually retires. None of those bases withstand analysis.

8 The military retirement system, for example, is a defined benefit plan that does not permit  
9 a divided interest, but only a divided payment stream. And a military member can enlist at age 18,  
10 reaching eligibility for full longevity retirement 20 years later, at age 38. Neither the military system,  
11 nor the Civil Service system, permit their plans to make any payments to a former spouse until the  
12 member/participant actually retires.

13 But the Legislature was told (inaccurately)<sup>119</sup> that the eligibility for police and fire members  
14 of PERS to retire at age 50 was a unique problem requiring special legislation.<sup>120</sup>

15 In *Barnes*, once the legislative purpose was determined, the Court examined the actual effect  
16 of the statute. In that case, the Court found that meritorious as well as frivolous actions would be  
17 blocked, and struck the statute down because the classification scheme created was therefore  
18 arbitrary and irrational, and thus violated equal protection.<sup>121</sup>

19 Here, NRS 125.155 provides lesser protections to spouses of PERS participants for their  
20 community property interest in members’ retirement benefits than are enjoyed by all spouses of  
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22 <sup>118</sup> *Escalle v. Mark*, 42 Nev. 172, 175, 183 P. 387, 388 (1919).

23 <sup>119</sup> As detailed above, police and fire members become eligible to retire at age 55 with ten years of service, or  
24 age 50 with 20 years of service, or at any age with 25 years of service. See NRS 286.510(2). Theoretically, an 18-year-  
25 old police officer could reach eligibility for full retirement at 43 years of age.

26 <sup>120</sup> See Remarks of Dennis Healy in Minutes of Assembly Judiciary Committee, March 31, 1995, considering  
27 AB 292.

28 <sup>121</sup> 103 Nev. at 685, 748 P.2d at 487.

1 members in other retirement systems, by stating that in dividing PERS retirement, a court “may . . .  
2 order that the benefit not be paid before the date on which the participating party retires.”<sup>122</sup> To the  
3 degree that the legislative purpose is to give an advantage to State employees over their spouses not  
4 enjoyed by any other workers for any other entity or agency, the statute would appear to suffer from  
5 at least two equal protection deficiencies.

6 First, *if* it was legitimate to give the employee spouse a greater interest in community  
7 property assets over the non-employee spouse, the federal courts have found that it is impermissible  
8 to favor State employees over federal employees, at least in the area of taxes.

9 In *Barker v. Kansas*,<sup>123</sup> the U.S. Supreme Court struck down the tax imposed by the state of  
10 Kansas on military retirement benefits paid to retirees, because the state did not similarly tax retirees  
11 under the Kansas Public Employees Retirement System. Previously, in *Davis v. Michigan*  
12 *Department of Treasury*, the Court had ruled that a state could not tax federal civil service retirees  
13 if it did not also tax recipients of state retirement benefits.<sup>124</sup> Under the standard set forth in *Davis*,  
14 the question was whether taxation on the federal, but not the state, retirees was “directly related to,  
15 and justified by, ‘significant differences between the two classes.’”<sup>125</sup> The *Barker* Court found no  
16 such differences between the classes of federal and state retirees.

17 The question here would be whether State employees could permissively have an advantage  
18 over their spouses relating to division of community property retirement benefits that federal  
19 employees do not have. Since it has already been found that there are no “significant differences  
20 between the two classes,” NRS 125.155 would appear to violate the equal protection rights of  
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22 <sup>122</sup> NRS 125.155(2). This, of course, is directly contrary to *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429  
23 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995); and  
24 *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996), which mandate that *all* spousal shares of retirement benefits are  
to be distributed to the spouses upon first eligibility for retirement.

25 <sup>123</sup> *Barker v. Kansas*, 503 U.S. 594 (1992).

26 <sup>124</sup> See *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803 (1989).

27 <sup>125</sup> *Id.* at 816 (as quoted in *Barker*, 503 U.S. at 598).

1 similarly-situated federal employees to likewise have an advantage over their spouses in divorce  
2 litigation.

3         The second equal protection deficiency, of course, is giving *any* employee spouse an  
4 advantage over his spouse in divorce litigation. As demonstrated above, altering the time rule  
5 application, or eliminating the payment upon eligibility rule, *necessarily* increases the value of the  
6 retirement benefits to the employee, at the expense of both value and security to the non-employee  
7 spouse.

8         Since the basic community property law of Nevada has stated for over half a century that the  
9 “respective interests of the husband and wife in community property during continuance of the  
10 marriage relation are present, existing and equal interests,”<sup>126</sup> a statute that gives one spouse superior  
11 rights to an item of community property would appear to nearly define an equal protection violation.

12         At the least, NRS 125.155 as a whole directly conflicts with NRS 123.225 and NRS 123.330,  
13 since it provides to spouses of participants in the Nevada PERS system lesser protection of, and less  
14 control over, their community property rights than spouses of all participants in all other private and  
15 public retirement systems on which a divorce court might rule. This would appear to violate the  
16 “general and uniform operation” requirement of Article 4, section 21, of the Nevada Constitution.

17         The same criticism could be leveled at NRS 125.155(2) specifically, which the legislative  
18 history makes clear was intended to undercut the change of Nevada’s community property scheme  
19 from “equitable” to “equal” as to a single item of property.

20         In sum, whether or not the right to be treated equally in divorce court is considered a  
21 fundamental right, NRS 125.155 creates a classification scheme that is arbitrary and irrational and  
22 therefore violates equal protection. The distinctions created are not rationally related to furthering  
23 a legitimate State interest. Rather, the statute was based on the false assertion of non-existent  
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27 <sup>126</sup> NRS 123.225. Notably, this statute was the statutory basis for the Nevada Supreme Court’s ruling in *Gemma*,  
*Fondi*, *Sertic*, and *Wolff*.

1 “unique” problems in PERS cases, and it discriminates unreasonably for some similarly-situated  
2 persons and against others for no legitimate purpose.

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4 **d. The Definition of “Eligible to Retire”**

5 A red herring raised repeatedly in the legislative history of NRS 125.155 was the meaning  
6 of the phrase “first eligibility” – the time when payments to the former spouse are to begin. Under  
7 the Nevada PERS statutes, for example, an employee can choose to take early retirement almost any  
8 time after vesting, paying a 4% penalty for each year before regular retirement age that the benefits  
9 are accepted.<sup>127</sup> It could be (and was) argued that this makes every vested PERS participant  
10 “eligible” for retirement benefits, and thus every former spouse eligible for immediate payments (at  
11 a sum taking into effect the penalty, of course).

12 The actual words of the Nevada Supreme Court’s holdings in *Fondi* and *Wolff* cannot be  
13 reasonably interpreted as referring to any time other than the earliest date of *regular* retirement under  
14 the plan (i.e., the time at which an employee can retire without penalty), which time is often  
15 unknown when the divorce occurs while the employee is still in service.<sup>128</sup> However, given the  
16 assertion of the point as a rationalization for the existence of NRS 125.155, the Court should  
17 probably clarify that “eligibility for retirement” does not include any early retirement period.

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<sup>127</sup> See NRS 286.510.

24 <sup>128</sup> For example, a teacher beginning work in Nevada at age 26, who divorces at age 34, would have only eight  
25 years in service. At that moment, the employee’s earliest *certain* retirement is at age 65 – 31 years in the future, because  
26 he could quit working the next day. If he continued employment for just another two years, however, the teacher would  
27 achieve ten years of service and thus be eligible to retire at age 60 – only 27 years post-divorce. And if he continued  
work for another 22 years, the teacher would have 30 years of contributions, and could retire immediately, at age 56 –  
which is only 22 years from the divorce date.

1 **B. Whether There Are Inconsistencies or Conflicts Between NRS 286.6703 and**  
2 **NRS 125.155**

3 **1. The Question as Posed**

4 The short answer is “yes, on the surface,” because NRS 125.155 permits (but does not  
5 require) payment upon eligibility, and the phrasing of NRS 286.6703(3)(e) appears to prohibit any  
6 payments to a spouse until the employee actually retires.

7 However, as detailed above, the language used was only intended to control what the system  
8 would directly pay, and the language can and should be interpreted consistently with the placement  
9 of the prohibition in the PERS regulatory provisions, not the divorce statutes, as a limitation as to  
10 the system only. Since that reading would be consonant with the Nevada Supreme Court’s prior  
11 holdings and retirement benefit divisions as practiced in other pension schemes with similar  
12 restrictions on pre-retirement payments, it is the preferred reading.<sup>129</sup>

13 **2. Implicated Issues and Their Resolution**

14 **a. The Meaning of “Does Not Require the Payment”**

15 As discussed above, NRS 286.6703(3)(e) was intended to prohibit PERS itself from being  
16 forced to make any payment to an alternate payee prior to the actual retirement of the member, but  
17 it is not phrased as prohibiting merely payments “from the system,” like the subsection above it.  
18 Rather, its language was apparently modeled – and apparently by accident – on certain language from  
19 ERISA, phrased in such a way that, on its face, any order requiring “the payment of any allowance  
20 or benefit to an alternate payee before the retirement of the member” would make the order invalid.

21 The problem with reading the statute to mean exactly what it says is that any such  
22 interpretation would be in direct conflict with the Nevada Supreme Court’s mandates in *Gemma,*  
23 *Fondi,* and *Sertic* that the member must make direct payments to the former spouse upon eligibility  
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27 <sup>129</sup> See *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994) (reciting rules of statutory construction).  
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1 for retirement, whether or not the member retires. It would also create an equal protection problem,  
2 as discussed above.

3 To date, PERS has not been stating that such orders are invalid, and has interpreted the  
4 statutory provision as only addressing what the system can and cannot honor. The Nevada Supreme  
5 Court, however, should specify that NRS 286.6703(3)(e) only addresses limitations on direct  
6 payments from PERS. That has been the reading, and the result, as to military retirement benefits  
7 and the Civil Service, and no compelling reason for any different result as to PERS is apparent.

8  
9 **b. Post-Death Payments to a Former Spouse's Estate**

10 There is an aspect of the Nevada Supreme Court's holding in *Wolff* that PERS has, to date,  
11 refused to follow. In *Wolff*, the Court affirmed the order that the wife's share would *not* revert to  
12 the husband if she predeceased him, but would instead continue being paid to her estate, on the basis  
13 that the community interest was divided upon divorce to two sole and separate interests, so that even  
14 if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was  
15 entitled to the payments that she would have received if alive.<sup>130</sup>

16 To date, in every known instance, PERS not only has refused to directly make payments to  
17 a spouse's estate in accordance with that holding, it has reportedly refused to even accept orders

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20 <sup>130</sup>

In the decree, the district court provided that "[Roberta's] vested Community Interest in [Gerhard's] Retirement does not terminate upon [Roberta's] death and continues to her estate until [Gerhard's] death." Gerhard argues that this provision violates "public policy, and, more specifically, [is] in direct conflict with the Public Employees Retirement System of Nevada."

22 Although a former spouse's estate is not encompassed by the definition of alternate payee in NRS 286.6703(4), we conclude that Roberta's estate should be *entitled* to her share of Gerhard's retirement benefits upon his death. Upon divorce, the community interest that Gerhard and Roberta had in Gerhard's retirement became the separate property of each former spouse. See 15A Am. Jur.2d Community Property § 101 (1976). Consequently, Roberta's estate is *entitled* to her portion of Gerhard's retirement in the event that Roberta predeceases Gerhard. Accordingly, the district court did not abuse its discretion by requiring Gerhard to pay Roberta's estate her share of the retirement benefits if Roberta predeceases Gerhard.

27 112 Nev. 1362 (emphasis added).



1 submitted stating that an individual *member* is required to make those payments if the spouse dies  
2 first. It is apparently PERS policy to reject any proposed order reciting the Nevada Supreme Court’s  
3 holding in *Wolff* on that point.<sup>131</sup>

4 That policy creates a terrible dilemma for counsel, since the Nevada Supreme Court has  
5 required counsel to do what PERS says cannot be done. The danger for drafting counsel is obvious  
6 – if counsel complies with the directive of PERS to remove the language that the Court has held  
7 should be in such a QDRO, the attorney runs the risk of being sued by the alternate payee’s  
8 survivors, or estate, should the alternate payee predecease the member and the flow of benefits not  
9 go to those survivors. PERS’ refusal to obey the Court’s mandate in *Wolff* is a recurrent problem  
10 that has evaded review since 1996.

11 When it proposed the scheme of QDRO-like regulations in 1993, PERS submitted and the  
12 Nevada Legislature approved a mechanism for the payment to alternate payees of sums found to be  
13 due to those persons by order of “a district court or the supreme court of the State of Nevada relating  
14 to child support, alimony or the disposition of community property.”<sup>132</sup>

15 It is inappropriate for PERS to refuse to honor the opinion of the Nevada Supreme Court,  
16 except where a statute *specifically* makes it impossible for the system to comply with such an order.  
17 Since no statute prohibits payments to the estate of a former spouse, or prohibits court orders  
18 directing a member to make such payments, PERS should be ordered to alter its policy.<sup>133</sup> And, since  
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21 <sup>131</sup> One such rejection received by this office flatly stated: “In the event the Alternate Payee predeceases the  
22 Participant Retired Employee, the entire benefit is then paid to the retired employee. The Alternate Payee cannot  
23 designate a beneficiary or the estate to receive his portion of the benefit.”

24 <sup>132</sup> NRS 286.6703.

25 <sup>133</sup> In a prior case, my office was curtly informed that the “Official Policies” of PERS prohibit honoring the  
26 Nevada Supreme Court’s holding in *Wolff*. Apparently, that is what all attorneys are informed. No such “Official  
27 Policies” have apparently ever been published, by way of any legislatively-mandated regulation or public process. While  
28 PERS is permitted to adopt internal rules pursuant to NRS 286.200, such “official policies” do not have the force of law  
or are binding on any Court. If the “policies” conflict with *Wolff*, it is the “policies,” and not the decisional law, that must  
give way. *See Clark Co. Social Service Dep’t v. Newkirk*, 106 Nev. 177, 789 P.2d 227 (1990) (administrative regulation  
in conflict with state law invalidated, and district court is empowered to grant permanent injunction ordering agency to  
follow law rather than its internal regulations).

1 PERS has made an issue of the phrasing in *Wolff* as to choice of pronouns, the Nevada Supreme  
2 Court’s clarification should specify whether its reference to “Gerhard’s obligations,” which  
3 referenced payments coming from PERS earlier in the opinion, were intended to make the payment  
4 obligation one for the system, or the individual member.

5  
6 **c. Benefits and Burdens of Post-Retirement Survivorship Benefits  
7 in a Presumptive Equal-Division State**

8 The distribution of the benefits and burdens of survivorship interests in this presumptive-  
9 equal-distribution State, as to retirement systems that are structured to provide their employees  
10 superior rights, haven proven problematic to both bench and Bar in divorce cases attempting to treat  
11 the parties equally. That problem appears particularly clearly whenever the orders include no form  
12 of survivorship or other security for the non-employee spouse’s insurable interest,<sup>134</sup> while the  
13 employee’s interest is 100% secured by the structure of the system itself.

14 In every system like PERS – in which the payments (but not the retirement itself) can be  
15 divided – the structure of the plan determines what happens to the *former spouse’s* portion of the  
16 payment stream if the spouse dies first. As detailed above, the payments revert to the employee, and  
17 as set out above, the question is whether PERS should either directly pay the sums ordered as  
18 belonging to the spouse to the spouse’s estate, or at least stop rejecting orders requiring the member  
19 to make those payments to the spouse’s estate once the spousal share reverts to him through the  
20 system.

21 Where the *employee* dies first, however, various results are possible. For a former spouse  
22 to continue receiving money after death of the employee, there must be specific provision made by  
23 way of a separate, survivorship interest payable to the former spouse upon the death of the member.

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25 <sup>134</sup> Any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but  
26 will not get such money if he dies, *definitionally* has an “insurable interest” in the life of the member (this is true for  
27 PERS or non-PERS cases). The matter is one of fact, not a matter of discretion, award, or debate. “Insurable interest”  
survivorship provisions are found throughout various federal regulations, and refer to any person who has a valid  
financial interest in the continued life of the member. *See, e.g.*, 10 U.S.C. §§ 1448(b) & 1450(a)(1); 10 U.S.C. §  
1450(a)(4).

1 Otherwise, payments being made to the former spouse simply stop; this is just one of the ways in  
2 which the employee’s rights are superior to those of the non-employee, even when benefits are  
3 “equally” divided.<sup>135</sup>

4 Such “reversionary interest” provisions are not unique to PERS – the military retirement  
5 system has a virtually identical scheme, with the addition of a specific statute that PERS does *not*  
6 have, providing that both the spousal share of current military retired pay and any Survivors Benefits  
7 Plan (“SBP”) benefits in the spouse’s name revert to the member – they may not be left to anyone  
8 by will or intestate succession.<sup>136</sup> Case law addressing that retirement system therefore provides an  
9 illustration and example of how to deal with survivorship issues under PERS.

10 Any plan with an automatic reversion of the spousal share to the member, should the spouse  
11 die first, creates a problem in States, like Nevada, in which the marriage and divorce laws provide  
12 that the parties have present, existing, and equal interests in property acquired during marriage, and  
13 that property is to be divided equally upon divorce. The member essentially has an automatic, cost-  
14 free, survivorship benefit built into the law that automatically restores to him the *full amount of the*  
15 *spouse’s share* of the lifetime benefit if she should die before him. If the former spouse dies first,  
16 the member not only continues to get *his* share of the benefits, but he will *also* get *her* share, for as  
17 long as he lives.

18 There is little case law guidance as to what would be an appropriate weighing of risks and  
19 burdens, or why. Several courts have ruled that the SBP be kept in effect for protection of the former  
20 spouse’s interest, using one theory or another, but their reasoning has often been sketchy, or faulty.

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23 <sup>135</sup> For example, PERS provides that the option selection will be “automatically adjusted” to option one (the  
24 unmodified allowance) if a spouse or former spouse with a survivorship option predeceases the member. NRS  
25 286.592(1). The system has no corresponding benefit to protect a former spouse – it has no “pre-retirement survivorship  
26 provision.” In other words, if a former spouse is awarded a portion of the retirement benefits, but the member dies prior  
to retirement, the spouse will receive nothing. Prior to the member’s retirement, PERS leaves the former spouse  
absolutely unprotected from being divested in the event of the member’s death. The only apparent means of securing  
this risk is through private insurance; this is discussed below.

27 <sup>136</sup> 10 U.S.C. § 1408(c)(2).

1 One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in  
2 *In re Marriage of Payne*.<sup>137</sup> The court held that ordering the member to pay for the wife’s SBP gave  
3 the wife a right already enjoyed by husband, that is “the right to receive her share of the marital  
4 property awarded to her.” The court adopted the “default” position for distribution of the premiums  
5 (off the top, and therefore divided between the parties), observing that:

6 The cost of the Survivor Benefit Plan is deducted from the husband-retiree’s gross pension  
7 income of \$2200 per month before the net remainder is divided between the parties pursuant  
8 to the permanent orders. Thus, the expense is shared equally by both parties.<sup>138</sup>

9 The military member had appealed in *Payne*, claiming that the SBP should be funded solely  
10 by the former spouse because it is “a court-created asset for her benefit alone.” The appellate court  
11 rejected that argument, holding instead that the SBP is “an equitable mechanism selected by the trial  
12 court to preserve an existing asset – the wife’s interest in the military pension.”<sup>139</sup> Many other courts  
13 have reached the same conclusion.<sup>140</sup> Some courts have viewed the survivorship benefit as a means  
14 of insurance, to ensure that the former spouse continues to receive retirement benefits, making the  
15 division of the retirement more equitable.<sup>141</sup>

16 The courts holding that the SBP should be maintained seem to impliedly realize that the  
17 members’ survivorship interest in the former spouse’s benefits is automatic and free, while the

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18 <sup>137</sup> *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

19 <sup>138</sup> *Id.*

20 <sup>139</sup> *Id.*

21 <sup>140</sup> *Potts v. Potts*, 790 A.2d 703 (Md. Ct. Spec. App. 2002) (survivorship interest falls within the definition of  
22 marital property); *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct.  
23 App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP “gives the division of a . . . military  
24 pension more of the attributes of a true property division”); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering  
25 husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife’s receiving nothing if  
26 husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse  
to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court  
recognized that “to terminate [wife’s] survivor’s benefits jeopardizes her 29 year investment in the marital estate”);  
*Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan  
beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Ill. App. Ct. 1991)  
(survivor’s benefit is a separate and distinct property interest).

27 <sup>141</sup> *In re Marriage of Smith*, 148 Cal. App. 4<sup>th</sup> 1115 (2007).

1 spousal survivorship in the member's benefits requires payment of a premium. None of the  
2 decisions goes into detail, comparing what the member or the spouse would actually receive in the  
3 event of the death of the other, or whether the results fit into the theory of equitable or equal  
4 community property and debt division.

5 Division of the only premium that has to be paid is a superior choice to any other in a  
6 community property analysis. Having the member bear the entire premium would only appear to be  
7 a correct result if the court determined that such a result was mandated as a matter of disparity of  
8 income. Similarly, it would be improper to have the former spouse bear the entirety of the SBP  
9 premiums in States (like Nevada) where the courts are required to equally distribute marital property  
10 and debts, because the benefit going to the member in the event of the spouse's death is *greater*, and  
11 there is no cost to that survivorship interest.

12 As a matter of logic and math, where the member has a *free* survivorship interest in the  
13 spouse's life, in addition to his own benefits, it seems most appropriate to either have the parties  
14 equally divide the premium, or adopt the default position for proportional payments toward that  
15 premium.

16 Fortunately, PERS contains multiple survivorship options making it relatively easy for  
17 counsel to construct an order that divides the premium cost between the employee and the non-  
18 employee, so that both pay a share of the only survivorship option carrying a premium, and both  
19 leave the marriage with a secured interest from the date of divorce forward. That comes as close as  
20 is possible, given the structure of such retirement systems, for a court to actually treat both parties  
21 "equally" when one party works for PERS, or the military, or any other employer with a retirement  
22 program structured that way.

23 The Nevada Supreme Court should direct that when dividing retirement benefits, absent  
24 findings of a compelling reason under NRS 125.150(1)(b) to do otherwise, if only one survivorship  
25 interest requires the payment of a premium, that premium cost should presumptively be divided  
26 between the spouses as part of the equal division of their property.

1                                **d.      Benefits and Burdens of *Pre-Retirement Survivorship Benefits in***  
2    **a Presumptive Equal-Division State**

3                                As noted above, one of the ways PERS provides benefits for its members is to provide them  
4 with a free survivorship interest in their spouse's life, before or after retirement, and before or after  
5 divorce. No corresponding benefit is provided for the spouse – if the member dies before retirement,  
6 a former spouse receives nothing.

7                                In *Wolff*, the Nevada Supreme Court reviewed NRS 286.6703 and surmised that if the  
8 employee died before retirement, a former spouse alternate payee would nevertheless receive “a  
9 refund of the contribution account.”<sup>142</sup> On that basis, the Court reversed the order for the member  
10 to obtain a private life insurance policy, finding that it would require an “unequal distribution of  
11 debt.”<sup>143</sup>

12                                Respectfully, the Court's surmise was incorrect. Under the PERS system, there is no pre-  
13 retirement survivorship benefit for a former spouse whatsoever; what *death* benefits there are can  
14 flow to a surviving spouse or child, but not to a former spouse, and the survivorship benefits only  
15 activate upon retirement. When a divorce occurs while the member is still working, the *only* way  
16 to secure the former spouse's insurable interest in the retirement benefits is through a policy of  
17 private life insurance.

18                                Given the employee's automatic and free benefit of restoring option one (full) retirement  
19 benefits if the former spouse dies prior to retirement, the cost of the one pre-retirement survivorship  
20 interest requiring any payment (private insurance in favor of the former spouse) should  
21 presumptively be split equally between the parties, as part of dividing their property rights and  
22 obligations equally.  
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24                                <sup>142</sup> *Wolff v. Wolff*, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996).

25                                <sup>143</sup> As an aside, the Nevada Supreme Court has separately approved an unequal division of debt – even all debt  
26 to one party – where that party has a higher future income. *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990).  
27 The point is not necessary in this analysis, but the Court has asked to be informed when its prior holdings are arguably  
28 contradictory.

1 **IV. CONCLUSIONS**

2 In 1993, representatives of the PERS bureaucracy, openly hostile to what they considered  
3 “interference” by divorce courts in the “orderly” disposition of their retirement system, pushed  
4 through a shadow of the far more complex and comprehensive statutory scheme governing private  
5 retirement benefits in America, but applicable only to PERS, utilizing terminology not ideally suited  
6 for a plan that did not permit the creation of separate interests, but only for a divided payment  
7 stream.

8 In 1995, it seems clear that the Assembly Judiciary Committee was fed misinformation by  
9 people purporting to represent organizations, but actually appearing in their own personal (but  
10 undisclosed) self-interest, who attempted to manipulate the legislative process for their personal  
11 enrichment at the expense of their ex-spouse, their spouse’s ex-spouse, and their client’s ex-spouse,  
12 respectively. By the time word was leaked to the Family Law Section just before the session ended,  
13 it was impossible to kill the pending bill, although the great majority of the harm it would have done  
14 in its original form was deflected.

15 In its watered-down form as passed, it did not affect those who drafted the proposal at all,  
16 but what remained either did nothing, is unworkable, is so vague as to be uncertain what it purports  
17 to do, or directly conflicts with the community property acquisition and distribution rules that have  
18 applied to everyone and everything else for at least the past half century. For PERS participants  
19 only, the equal-division presumption as to community property is elective, the time rule may apply  
20 differently, and the security of spouses of actual collection of their share of the property under the  
21 payment-at-eligibility rule is optional and lessened.

22 Nevada is in the clear mainstream of all States, and the overwhelming majority of community  
23 property States, in its application of the time rule. Distributions of the spousal share at eligibility for  
24 retirement is the norm. The exemption of PERS participants from the law otherwise applicable  
25 raises a host of equal protection concerns, as between PERS participants and employees in other,  
26 similar retirement systems, and as between PERS participants and their spouses in divorce litigation.

1 Whether or not equality of treatment by the divorce courts is considered a fundamental right, there  
2 is little doubt that NRS 125.155 is constitutionally infirm.

3         There are a variety of subtle nuances in this subject area meriting clarification by the Nevada  
4 Supreme Court, dealing with application of the equal division presumption as it applies to  
5 survivorship benefits and their costs, and as to whether and by whom payments may be made to the  
6 estate of a former spouse if that person dies prior in time to the employee spouse. It is a pity tha the  
7 opportunity to do so, in *Hedlund*, was squandered in favor of an unpublished order that left all those  
8 problems extant.

9         NRS 125.155 should be invalidated as violative of equal protection. PERS should be  
10 directed to comply with the Nevada Supreme Court’s prior directions as to how payments should be  
11 made, and to whom.

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