

QUALIFIED DOMESTIC RELATIONS ORDERS UNDER ERISA AND NEVADA PERS

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TERMINOLOGY

- “QDRO” - Qualified Domestic Relations Order under ERISA and PERS
- Participant - P or Member
- Alternate Payee - A/P (aka Nonmember)
- DB -Defined Benefit Plan, e.g. PERS
- DC - Defined Contribution Plan/Account Balance Plan

PERS

PERS: “QDRO” in name only

“When I use a word,’ Humpty Dumpty said in a rather scornful tone, ‘it means just what I choose it to mean -- neither more nor less.’”

Lewis Carroll, *Alice Through the Looking-Glass*, ch.6 (1872).

Regular vs. Police/Fire: Retirement [#02]

- Most PERS participants are eligible for retirement at 65 with five years of service, or 60 with ten years of service, or any age with 30 years of service.¹
- Police and fire-fighters, however can retire at age 65 with five years of service, but they become eligible to retire at age 55 with ten years of service, or age 50 with 20 years of service, or at any age with 25 years of service.²
 - 1 NRS 286.510(1).
 - 2 NRS 286.510(2).

Regular vs. Police/Fire: Survivorship

- Police and fire-fighters get both the full monthly retirement ***and a 50% survivorship interest, if the same spouse is married to the member at both retirement and the member's death.¹*** In other words, as long as those conditions are satisfied, there is no reduction in the monthly lifetime retirement benefit, and the survivor gets half the monthly sum for life if the member dies first.
 - 1 NRS 286.667.
- This statutory bonus of a “free” survivorship interest presents a substantial strategic planning opportunity

Death of the Member (pre-retirement) [#03]

- No retirement
- No survivorship
- Limited death benefits for surviving spouse or (if unmarried) named beneficiaries.



Death of PERS Member After Retirement

- Options 1-7 and what they mean.
 - 1. Unreduced. Max, but no survivorship.
 - 2. Reduced. Reduced amount to survivor for life. (Akin to 100% joint and survivor annuity.)
 - 3. Reduced (less). 50% of reduced amount to survivor for life. (Akin to 50% joint and survivor annuity.)
 - 4. Same as 2, but starts at survivor age 60.
 - 5. Same as 3, but starts at survivor age 60.
 - 6. Customized reduced amount.
 - 7. Same as 6, but starts at survivor age 60.
 - Pops.

Which Spouse Survivor? [#11]

- When only one optionee allowed, who?
- Length of each marriage or CP vs. SP?

Hypo: Marriage 1 - 10 years; Marriage 2 – 5 years;
Total service = 25 years.

W1 = 20% time rule. W2 = 10% time rule.

Marriage 1 = 40%; Non-marriage 1 = 60%.

Death of the Spouse

- PERS mandates: upon death of the former spouse, “her share” reverts to the member.

IF PLAN WON'T ENFORCE IT,
IS THERE ANOTHER WAY?

What about *Wolff*?

- Affirmed lower court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, explaining that the community interest was divided upon divorce to two sole and separate interests,¹ so that even if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.
- 1 Citing 15A Am. Jur. 2d Community Property 101 (1976).

Implement *Wolff* by the
trustee pay-over order.

Trustee Pay Over Order – Features & Terms [#5]

- On A/P's early death, P shall pay A/P's pre-tax share to A/P's successor(s).
- Enforceable by contempt. *Fithian*
- P excludes A/P's part on tax return.
- Tax-intent clause.

Alternate Method – Increase W's community %. More about that later!

HOT TOPICS IN RETIREMENT PLANS

Gillmore Issues

Opportunities and Risks

- *Gillmore* Principle: *[#04, 05]*
 - “The employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”
 - Note: this is the same principle that governs protection of community interest in disability retirement.

Nevada Adoption of *Gillmore*

- *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989)
- *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990)
- *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995)

Typical *Gillmore* Application

- Participant, age 60, eligible for full Nevada PERS retirement.
- Alternate Payee wants her benefit now.
- Request order that P pay A/P until retired.
- Alternate - can buy out interest.

Before You Gillmore, consider

- Effect on modifiable Spousal Support.
- Cross-Gillmore.
- Retroactivity date – (a) Eligibility date?
(b) Demand Letter? (c) Motion filing? *Cornejo*
- Optimum date?
 - Get expert analysis.
 - Set up discovery rights in original Decree.

Gillmore: Weigh the Pros & Cons PERS (& Other Plans)

Con Gillmore: Expensive to litigate and draft.

- COLAs and transition to Plan.
- Make A/P whole after TAX.
- If possible, give P a tax break. *Dunkin* [#05]
- Enforceability: “Alimony”

Pro Gillmore:

- Stop erosion of Nonmember’s benefit.
- A/P income needs.

Bird in Hand Today

| DROPS FOR ACTUARIAL EQUIVALENCE UNDER 65 | | |
|---|-----------|-------------|
| Age | AE Factor | Yr's % Drop |
| 55 | 41% | 3% |
| 56 | 44% | 4% |
| 57 | 48% | 4% |
| 58 | 52% | 5% |
| 59 | 57% | 5% |
| 60 | 62% | 6% |
| 61 | 68% | 7% |
| 62 | 74% | 7% |
| 63 | 82% | 8% |
| 64 | 90% | 10% |
| 65 | 100% | |
| Average Drop in % from Age 65 | | 5.9% |

EROSION OF BENEFIT BY WAITING

| Year #/ Start Age | 1 | 2 | 3 | 4 | If Start Were AE to Age 62 |
|-------------------------|------|------|------|------|----------------------------------|
| 62 | 1000 | 1000 | 1000 | 1000 | 1000 |
| 63 | 0 | 1030 | 1030 | 1030 | 1144 |
| 64 | 0 | 0 | 1061 | 1061 | 1294 |
| 65 | 0 | 0 | 0 | 1093 | 1351 |

Gillmore at Full Retirement Date (Benefit Factor Fixed)
 Assume 3% Pay Increases and No COLA
 Alternate Payee's Time Rule Share = \$1000 per month.
 AE = Actuarially Equivalent

So Anticipate *Gillmore!*

- Think Gillmore before the decree.
- At least, advise client of opportunity and danger.
- Defuse Gillmore:
 - Limited [clear*] waiver for fair consideration.
 - Reallocation of assets/buyout.
 - Leave spousal support open for potential Gillmoree. [#04]

* *Crook*

THE EARLY RETIREMENT SUBSIDY

What you don't
know can hurt you.

PERS Early Retirement Penalty or Subsidy?

- Be aware of 4% per year reduction for early retirement.
- If the actuarial equivalent is a 6% reduction, then there is a 2% subsidy.
- Get a Gillmore checkup from an actuary knowledgeable in PERS benefit before attempting Gillmore.

ERISA: “Employer Subsidy for Early Retirement”

- Subsidy can comprise most of benefit.
- Subsidy will be excluded by typical QDRO until P retires.
- As worker approaches age 65 without retirement, subsidy is eroded to extinction.

How Do I Find the Subsidy?

Read the Summary Plan Description “SPD”

\$ ___/mo @ NRA* x “Favorable reduction factors.”

Cf. \$ ___/mo @ NRA x “Actuarial Reduction Factors”

65-55 average of about 6% reduction per year early.

Often found on “deferred vested” retirement page.

Difference = subsidy

*NRA = normal retirement age (usually 65)

A/P Benefit Under Usual QDRO

P & A/P same age. A/P expecting
half of monthly benefit under QDRO

Age 65 benefit of P = \$2000 per month.

| <u>Age</u> | <u>FRF</u> | <u>ARF</u> | Participant Retires | |
|------------|------------|------------|---------------------|--------------|
| | | | <u>Now</u> | <u>Later</u> |
| 65 | 1.0 | 1.0 | \$1000 | \$1000 |
| 60 | 1.0 | .6 | \$1000 | \$ 600 |
| 55 | .75 | .4 | \$ 750 | \$ 400 |
| 50 | .5 | .27 | \$ 500 | \$ 270 |

Reduction Factors: FRF – Favorable; ARF – Actuarial
“FRF” from Chevron SPD, page 25.

The Sucker Bet Subsidy Clause

Found in most model QDROs:

- “If P should retire subsequent to A/P, A/P shall prospectively receive her time rule portion of the employer subsidy for early retirement.” *[#06]*
- Problem:
 - Only partial restoration occurs going forward.
 - Diminishes to zero at normal retirement age.
 - Losses can be huge.
 - Participant may be unaware of loss by failing to retire.

ERISA QDRO Side Stip Terms [#07]

- A/P may claim full early retirement benefit
- A/P may pursue properly calculated benefit at a later date.
- P shall assist A/P with discovery re benefit payable while working.
- Optional: Issue of full vs. shrunken benefits deferred to later date.
- No need to litigate now; moot if P dies or retires early.

SHE SAID SHE WOULDN'T TAKE IT - -
& THE COURT ORDERED HER TO LEAVE IT ALONE!

**KENNEDY, ROBINS &
CARMONA: PROBLEMS IN
WAIVING AND
TRANSFERRING NON-
PARTICIPANT BENEFITS**

[#08]

ERISA BENEFIT WAIVERS

- *Kennedy USSCT Jan. 2009 [#08]*

1974 – Bill *designates* spouse beneficiary of ERISA account balance (savings) plan

1994 – Divorce Decree divests Liv of interest.

2001 – Bill Dies, child claims, plan pays Liv.

2009 – Liv prevails after long litigation.

Why? Plan must be able to rely on documents.

Kennedy Lessons

MAY ASSIGN, BUT NOT WAIVE, BENEFITS IN A QDRO!

*During M, Non-P spouse must waive
in form required by plan.*

TIP: If effective divorce date off in future, and if spouse is auto beneficiary during M, supply A/P with the plan waiver form to be notarized.

TIP: In the MSA: Tell client that, even after divorce, must comply with 401(k) plan rules--in addition to signing over the golf membership and frequent flyer miles.

*Rare: That ex-spouse wife designated beneficiary is
revoked on divorce by plan terms.*

PRENUP & POST-NUP WAIVERS

- Prenup ineffectual? *Robins*
- Post-nup ineffectual?
- What to do during marriage
 - Get notarized signature on plan forms.
 - Specific performance?
 - Terminate plan & roll-over?

The *Carmona* Conundrum

Carmona-like facts:

- 1st: H retired after long career in ERISA plan, at which time W8 becomes mandatory 50% survivor for the \$_000 per month pension. W8 has zero time-rule interest, i.e., no CP.
- 2nd: W8 stips to Decree waiving her interest. H seeks to transfer survivorship to W9.
- 3rd: H dies.

The *Carmona* Conundrum

. . . When the Die Has Been Cast

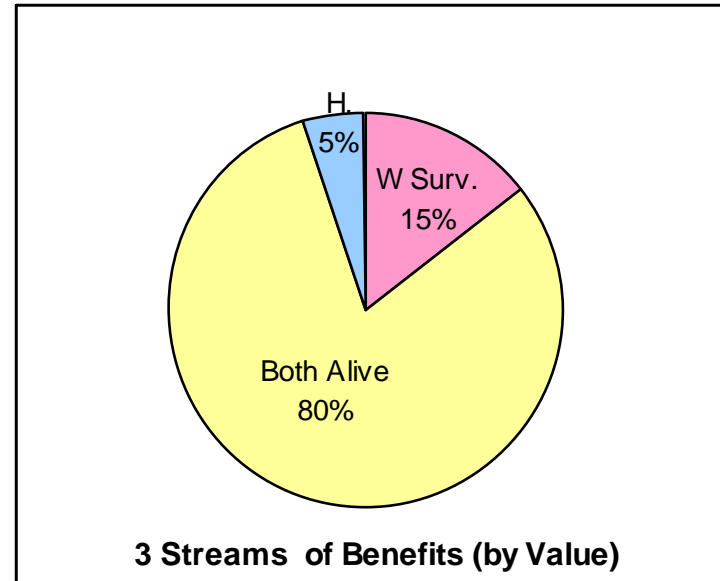
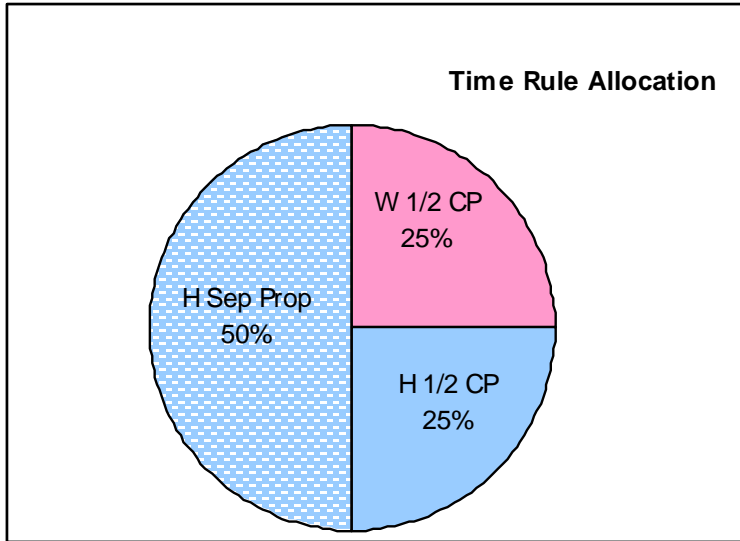
In DB Plan, when W1 has been named survivor upon retirement, can Court order transfer of survivorship from W1 to W2 over plan objection?

- PERS/ERISA Highly unlikely.
- Military Only if W1 loses it. (remarries, dies)
- Civil Service Same As Mil. + W2 can take unused part

IS THERE A BETTER WAY?

THE THREE STREAMS

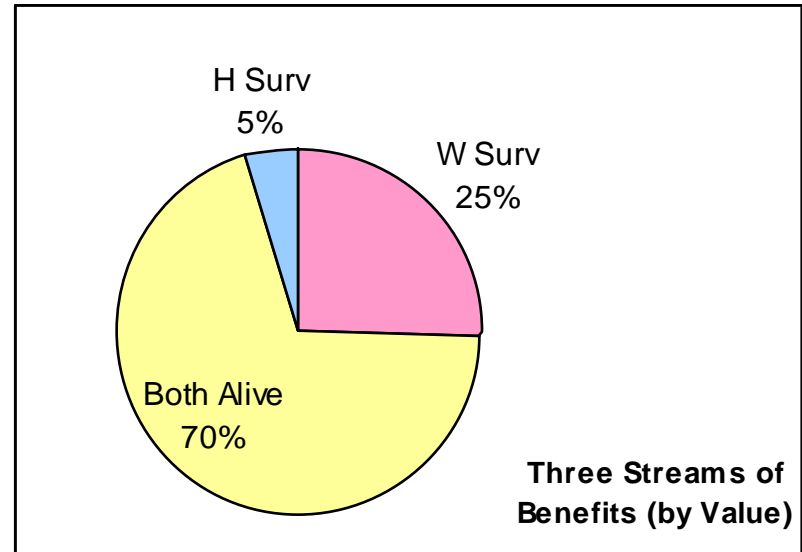
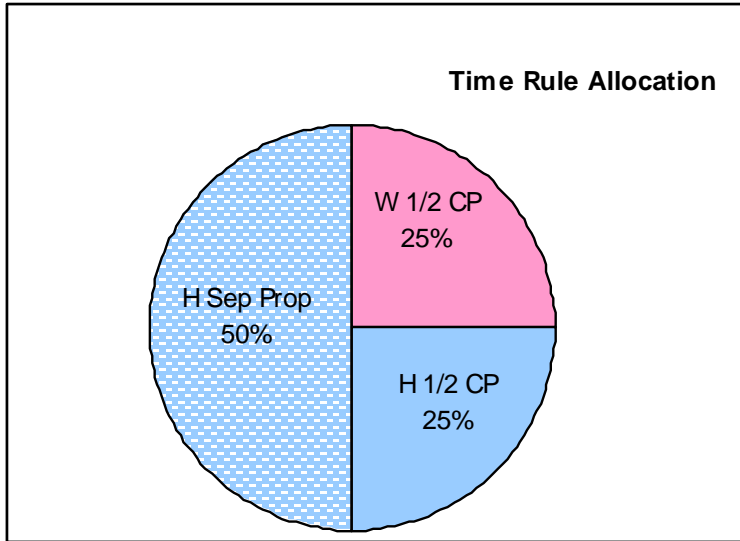
The Kennedy and Carmona Solution Lay
in the Original Division *[#09]*



| | Adj'd Val. | Benefit | \$1/mo Val. |
|--------------|------------------|---------|-------------|
| W Survivor | \$24,370 | \$475 | 51.3057 |
| Both Alive | \$132,616 | \$950 | 139.5955 |
| H Survivor | \$8,479 | \$950 | 8.9256 |
| Total | \$165,465 | | |

Ask the Actuary for the Value of \$1 per month to insert in last column.

50 % Joint and Survivor Annuity
P already Retired



| | Adj'd Val. | Benefit | \$1/mo Val. |
|--------------|------------------|---------|-------------|
| W Survivor | \$43,610 | \$850 | 51.3057 |
| Both Alive | \$118,656 | \$850 | 139.5955 |
| H Survivor | \$7,587 | \$850 | 8.9256 |
| Total | \$169,853 | | |

100 % Joint and Survivor Annuity
P already Retired

Ask the Actuary
for the Value of \$1
per month to insert
in last column.

Both Alive – Joint Lives

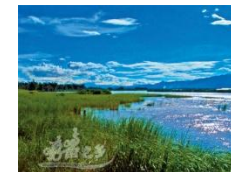


REVIEW: J & S Annuity Three Streams

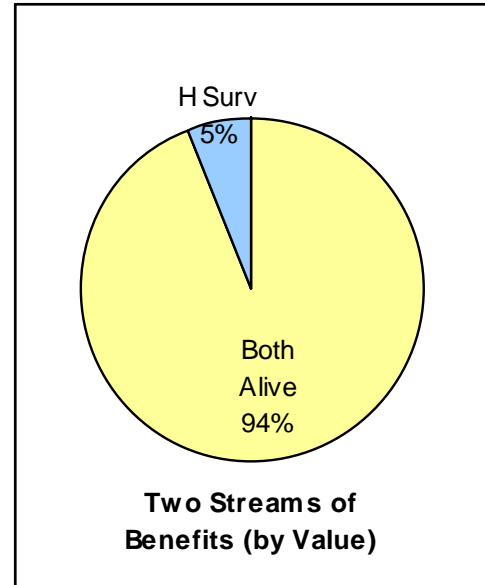
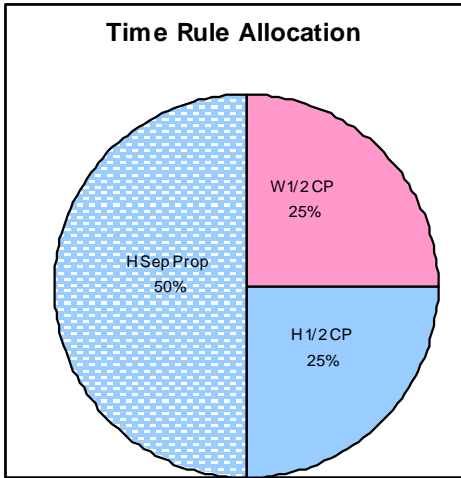
Wife Only Alive



Husband Only Alive



How About Two Streams – Remember Wolff?



| | Adj'd Val. | Benefit | \$1/mo Val. |
|------------|------------|---------|-------------|
| W Survivor | \$0 | \$0 | 51.3057 |
| Both Alive | \$118,656 | \$850 | 139.5955 |
| H Survivor | \$7,587 | \$850 | 8.9256 |
| Total | \$126,243 | | |

Ask the Actuary for the Value of \$1 per month to insert in last column.

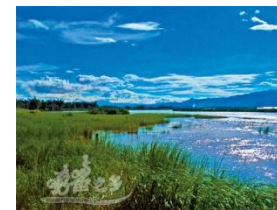
How much of the both-alive benefits must be awarded to wife?
 25/94ths or 26.6% of the joint life benefits.
 Increase W's time rule share by 26.6/25 or by 1.064
 Cheaper and easier than the pay-over order.

Both Alive – Joint Lives

REVIEW:
Shared Interest
No Survivor Benefit
Two Streams



Husband Only Alive



PRACTICAL LITIGATION STRATEGIES

Red Flags

- Health/age of parties – terminal condition means must act quickly.
- Small plan in small business.
 - Not run properly.
 - Over/under funded DB plan.
 - Refer to ERISA (not QDRO) expert.
 - Seek hold harmless for Non-P?

Benefit Holds: the Untrustworthy Participant

- Without hold, H can
 - After divorce, make elections excluding ex-spouse.
 - Take Loan or distribution account balance plan (e.g., 401(k))
 - Retire on single life annuity (cutting off survivor benefits for Nonmember on divorce)
- Seek plan voluntary hold. *[#10]*
- Small Plan - P is owner–get P's statement and underlying investment statement(s).

Reminder:

Secure Survivor Benefits for (vs.) Nonemployee Spouse

- Death before divorce.
- Retirement – can cut off ability to elect survivorship
- Death after divorce but before QDRO.
 - Pre-retirement effect under ERISA
 - Signature-designated beneficiary (DC)

Other Uses for QDRO

- “Support” QDROs
- QDRO for Attorney’s Fees (DC)
- QDRO loan/disbursement for fees
- QDRO as security

Life Insurance

“I detest life insurance agents; they always argue that I shall some day die, which is not so.” -- Stephen Leacock, *Literary Lapses* (1910)

- Insure support & pension until A/P is “vested” (esp. PERS)
- QDRO the life insurance itself (ERISA Welfare Plans)
- But remember: *Waiver of Nonmember ERISA* benefits in order null. (*Kennedy*)

MSA LANGUAGE

A stitch in time . . .

- Timing: QDROs before or at MSA
 - Leverage re survivor benefit scope (ERISA pre-retirement and PERS post-retirement)
 - P most likely to cooperate with discovery.
 - Remarriage: Enter Wife Two . . . [#11]
 - Death: Survivor Benefit loss
- Provisional QDROs. A donut wheel for the A/P's pension interest. [#12]

MSA LANGUAGE (cont'd)

- Who Does the QDRO?
 - Foxes and Chickens
 - Neutral?
- Who Pays? [#17]
 - Share?
 - Reserve jurisdiction to re-apportion?
 - Preparer has access to whom?
 - Quality, Price & Liability – QDRO Mills [#13]

DB Plan MSA Issues

- Effective Dates & Interim Payments
 - P Retired: What about interim payments to A/P before QDRO effective date? *[#05]*
 - Pre- or post-tax payments?
 - What if Non-P tax bracket much lower?
 - CSRS can take up to a year to process a DRO.

DC Plan MSA Issues

- Effective Dates & Interim Payments
 - “As of” date clearly stated.
 - Freeze A/P interest or adjust for gains & losses.
 - Participant Loans
- 8 plans: 8 QDROs or 1 QDRO?
 - Which is better?

DC Plan Issues (cont'd)

- Tracing vs. Time-Rule
 - Tracing is proper rule (+ or – gains & losses)
 - DIY tracing – how and who? *[#15]*
 - Plan may not accept irregular valuation dates.
 - Post-valuation date employer contribution for community effort – allocate part to community.
 - Premarital balance & growth. If no records, should the time rule be used?

IRA Division Tips & Models

- During marriage - no federal survivorship rules.
- Call it "QDRO" to make them happy.
- Simple order language and explanation in materials. *[#16]*
- Key: Order entered on or after divorce.

Share with Associates/Staff

- Get plan information – early & all. [#17, 18, 19]
- Don't assume P knows what plans exist.
 - Beware of non-qualified plans.
- Get expert help early.
- Complete QDROs no later than Decree.
- Make sure your premiums are paid.