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5 29 U.S.C. § 414(p)(1)(B). 2

6 Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992), 5 C.F.R.
7 Parts 831 *et seq.*. 4

8 ERISA, Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974), 29 U.S.C. § 1001 *et seq.*. 2

9 Retirement Equity Act ("REA"), Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984). 2

10 **MISCELLANEOUS**

11 15A Am. Jur. 2d Community Property § 101 (1976). 12, 39

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1 and governed by, the Employee Retirement Income Security Act of 1974, known as “ERISA,”⁵
2 codified at 29 U.S.C. § 1001 *et seq.* ERISA was substantially modified and refined in 1984 by the
3 Retirement Equity Act (“REA”),⁶ which provided that certain domestic relations orders, containing
4 specific terms, must be accepted and honored by ERISA-qualified pension plans.

5 Virtually *any* judgment, decree, or order dealing with alimony or support for a spouse, former
6 spouse, child, or other dependent made according to local domestic relations law is considered a
7 domestic relations order, or “DRO” under ERISA/REA.⁷ It becomes a *Qualified* Domestic Relations
8 Order, or “QDRO,” and must be recognized and enforced by an ERISA plan, when it creates or
9 recognizes one of the listed classes of persons as an “Alternate Payee” with a right to receive all or
10 any portion of the benefits normally payable to a participant in that plan, contains the various
11 required terms for such an order, and omits anything that would *dis*-qualify it from qualifying.

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

19 Completely separate statutory schemes govern administration of retirement benefits of
20 members of the United States Armed Forces. On June 26, 1981, the United States Supreme Court
21

22 local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay
23 benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

24 ⁵ Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

25 ⁶ Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

26 ⁷ See 29 U.S.C. § 414(p)(1)(B). More specifically, it is a decree, judgment, or other order providing for
27 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 issued its opinion in *McCarty v. McCarty*.⁸ The Court determined that state community property
2 laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by
3 federal law. The majority held that the apparent congressional intent was to make military retirement
4 benefits a “personal entitlement” and thus the sole property of individual service members, so the
5 benefits could not be considered as community property in a California divorce. The Court invited
6 Congress to change the statutory scheme if divisibility of retired pay was desired.⁹

7 It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection
8 Act (“USFSPA”) on September 8, 1982.¹⁰ The declared goal of the USFSPA at the time of its
9 passage was to “reverse *McCarty* by returning the retired pay issue to the states.”¹¹ By fits and starts,
10 every State in the Union eventually permitted military retirement benefits to be divided as property.¹²

11 The primary purpose of the USFSPA was to define state court jurisdiction to consider and
12 use military retired pay in fixing the property and support rights of parties to a divorce; the point here
13 is that the federal statute was essentially an enabling act permitting States to address the subject, so
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15 ⁸ *McCarty v. McCarty*, 453 U.S. 210, 101 S. Ct. 2728 (1981).

16 ⁹ 453 U.S. at 235-36, 101 S.Ct. at 2743.

17 ¹⁰ Also commonly known as the “Federal Uniformed Services Former Spouses Protection Act,” or FUSFSPA,
18 or as “the Former Spouses Act,” or in some references simply as “the Act.” 10 U.S.C. § 1408 (amended every year or
19 two since 1983).

20 ¹¹ “The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981,
21 the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision
22 is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and
23 other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or
24 retainer pay should be divisible [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts
25 applying community property, equitable distribution or other principles of marital property determination and
distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least
afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and
the effective date of this legislation the opportunity to return to the courts to take advantage of this provision.” S. Rep.
No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S. Code Cong. & Ad. News 1596, 1611. *See also*
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)
(some partial federal pre-emption may remain after passage of the USFSPA).

26 ¹² Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. As of June 26, 1981, all community property
27 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.

1 treatment of retired pay was again made dependent on State divorce laws. There is no specific title
2 required for a military pension division order.

3 Also outside the scope of ERISA are retirement benefits of federal Civil Service employees.
4 Those benefits are administered by the Office of Personnel Management (“OPM”) under extensive
5 separate federal regulations governing division of the CSRS¹³ and FERS¹⁴ defined benefit plans,¹⁵
6 and the TSP defined contribution plan.¹⁶ An order dividing Civil Service retirement benefits is
7 required by regulation to be titled “COAP,”¹⁷ and an order dividing a TSP account is a “RBCO.”¹⁸

8 There are enormous variations among the technical requirements of the various administering
9 bodies for valid orders dividing retirement plans, but after the cases of the 1980s, a few unifying
10 principles were clarified that may be useful to the Court in this case.

11 First, the question of whether retirement benefits are divisible and, if so, how they should be
12 divided, is a matter of State law. Federal principles such as due process, and equal protection, may
13 bear on the divisibility of retirement benefits, and it may be necessary to comply with the technical
14 requirements of a federal agency administering retirement benefits, but generally “Because domestic
15 relations are preeminently matters of state law, we have consistently recognized that Congress, when
16 it passes general legislation, rarely intends to displace state authority in this area. Thus we have held
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19 ¹³ “Civil Service Retirement System.”

20 ¹⁴ “Federal Employees Retirement System.”

21 ¹⁵ See Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R.
22 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.

23 ¹⁶ Created by the 1986 statute creating FERS, the TSP is a defined contribution type of plan for federal
24 employees. The TSP is expressly *excluded* from the regulations governing the CSRS and FERS retirement benefits.
5 C.F.R. § 838.101(d). Instead, It is administered by a Board entirely separate from the OPM (the Federal Retirement
25 Thrift Investment Board). 5 U.S.C. § 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

26 ¹⁷ “Court Order Acceptable for Processing.” 5 C.F.R. § 838.803.

27 ¹⁸ For “Retirement Benefits Court Order.”

1 that we will not find preemption absent evidence that it is ‘positively required by direct
2 enactment.’”¹⁹

3 It is for this reason that State divorce courts can, for example, order that a spouse of a military
4 member is entitled to 100% of the retirement benefits, although disposable retired pay is defined by
5 federal law as not more than 50% of such benefits.²⁰ It is why a court can order a retiree who has
6 waived military retirement benefits for disability, as allowed under the federal retirement scheme,
7 to nevertheless personally pay to the former spouse the amount that is not directly payable by the
8 federal pay center.²¹

9 Even in ERISA cases – arguably the single most highly pre-empted area of retirement
10 benefits – Congress may require that various benefits of federal employees are or are not in
11 existence, but it is for the States to determine who should get what benefits upon divorce.²²

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

15 For example, in the legislative history of NRS 125.155 discussed below, most of those
16 commenting seemed to understand the difference between defined benefit (pension) plans, and
17 defined contribution (cash) plans. But the history indicates that the Legislature was repeatedly told
18 that the PERS plan was “unique” in refusing to actually make payments to a former spouse until the

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20 ¹⁹ *Mansell v. Mansell*, 490 U.S. 581, 587, 109 S. Ct. 2023, 2028 (1989), quoting *Hisquierdo v. Hisquierdo*, 439
21 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,
176, 49 L. Ed. 390 (1904)).

22 ²⁰ See, e.g., *Ex parte Smallwood*, 811 So. 2d 537 (Ala. 2001), cert. denied, 534 U.S. 1066 (2001); *Grier v.*
23 *Grier*, 731 S.W.2d 931 (Tex. 1987) (USFSPA did not limit the amount of retirement benefits that could be apportioned
24 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).

25 ²¹ *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 ²² “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 retiree actually retires. In fact, that is true of *every* plan that has only a “divided payment stream”
2 form of benefit, rather than a “divided interest” form – including the military and Civil Service
3 retirement plans governing millions of retirees.

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

8 This Court is, properly, deferential to the legislative branch in construing legislative
9 enactments.²³ Circumspection should be heightened, however, where the record indicates that the
10 legislature was mistaken as to matters relevant to its deliberations, or deliberately misinformed by
11 those providing it information about the legal background of the proposal before it.

12 13 **B. Division of Pensions in Nevada Community Property Law**

14 Pensions have been recognized as community property by community property States for
15 many decades,²⁴ and that recognition was extended to unvested²⁵ and unmatured²⁶ pension benefits
16 long ago.²⁷ Statutory and case law throughout the country now recognizes pension benefits as
17 marital property with near-uniformity.

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20 ²³ 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 ²⁴ 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 ²⁵ 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 ²⁶ *Id.* A “matured” pension is one in which a particular employee is eligible for present payments from a plan.

²⁷ 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 Rationales for that recognition usually include that the benefits accrued during marriage, that
2 income during marriage was effectively reduced in exchange for the deferred pension benefits, and
3 that the choice was made to forego possible alternative employment which would have paid more
4 in current wages, in order to have the pension.

5 There is little Nevada statutory law specifically directed to retirement benefits. Instead, they
6 fall under the general definition of community property in NRS 123.220: “all property” acquired
7 after marriage, with certain exceptions. All such property is divided under NRS 125.150 – the key
8 statute governing division of property upon divorce – which mandates an equal distribution of
9 community property, in the absence written reasons for finding a “compelling reason” to make an
10 unequal disposition.²⁸

11 Nevada case law has long held that property acquired during marriage is presumed to be
12 community property, and that the presumption can only be overcome by clear and convincing
13 evidence.²⁹ The first Nevada case explicitly noting that retirement benefits earned during a marriage
14 are divisible community property was apparently *Ellett v. Ellett*.³⁰

15 In *Forrest v. Forrest*,³¹ relying on the line of California opinions dividing the gross sum of
16 all retirement benefits,³² this Court held that “retirement benefits are divisible as community property
17 to the extent that they are based on services performed during the marriage, whether or not the
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22 ²⁸ NRS 125.150(1)(b). As discussed below, the statute also contains an exception to the statutory mandate of
23 equal division where “otherwise provided” by either a premarital agreement or NRS 125.155.

24 ²⁹ See, e.g., *Todkill v. Todkill*, 88 Nev. 231, 495 P.2d 629 (1972).

25 ³⁰ *Ellett v. Ellett*, 94 Nev. 34, 573 P.2d 1179 (1978).

26 ³¹ *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

27 ³² See *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981); *In re Marriage of Brown*, 544 P.2d 561 (Cal. 1976).

1 benefits are presently payable.”³³ In other words, the Court held that all forms of retirement benefits,
2 whether or not vested, and whether or not matured, are community property subject to division.³⁴

3 In *Walsh v. Walsh*,³⁵ the divorce decree had stated only that the wife was awarded “half of
4 the retirement benefits,” even though the husband clearly had accrued a portion of the retirement
5 benefits before marriage. The Court construed the decree as meaning half of the retirement benefits
6 earned *during* marriage.

7 *O’Hara v. State ex rel. Pub. Emp. Ret. Bd.*³⁶ was not a divorce case. It involved a married
8 Nevada PERS participant who chose the maximum monthly annuity, providing no survivor’s
9 benefits, upon retirement. She died shortly after retirement, and her widower sued the retirement
10 board, seeking to alter the benefit option selection to include a survivorship benefit for himself. In
11 the context of an ongoing marriage, this Court found that the “community property interests of a
12 nonemployee spouse do not limit the employee’s freedom to agree to terms of retirement benefits,”
13 and ruled that the employee may choose any available options so long as “the community property
14 interest of the nonemployee spouse is not defeated.”

15 The next year, in *Gemma v. Gemma*,³⁷ this Court turned to the issues of PERS retirement
16 benefits in the context of divorce. The Court reiterated that Nevada law permits the division of
17 unvested retirement benefits, and discussed the two possible methods of distributing a spouse’s share
18 of those benefits, by way of determining the present value of the pension and awarding half to each

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20 ³³ *Forrest*, 99 Nev. at 607, 668 P.2d at 279.

21 ³⁴ Throughout the legislative history of NRS 125.155, everyone involved seemed oblivious of the existence or
22 holding of *Forrest*. The various witnesses – and legislators – indicated enormous confusion about the meaning of
23 “vestedness” of retirement benefits, and seemed to have no knowledge that if unvested retirement benefits are divided,
24 no money is paid to a former spouse until and unless the worker becomes eligible to receive benefits. Rather, they
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.

25 ³⁵ *Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1987).

26 ³⁶ *O’Hara v. State ex rel. Pub. Emp. Ret. Bd.*, 104 Nev. 642, 764 P.2d 489 (1988).

27 ³⁷ *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

1 spouse (requiring a cash out of the nonemployee spouse’s share), or by a “time rule” division of the
2 benefits themselves, stating that the latter is preferred.

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

11 Almost exactly a year after *Gemma*, the Court considered the divorce of a Judge from a legal
12 secretary in *Fondi v. Fondi*.⁴⁰ The trial court had calculated the marital percentage of the amount the
13 Judge *would have* received from PERS if he retired on the date of divorce. On appeal, that holding
14 was reversed, and the Court clarified its holding in *Gemma* to specify not only application of the time
15 rule, but also use of the “wait and see” approach, under which the community has an interest in the
16 pension benefits *ultimately received*, not just the pension accrued as of the date of divorce.

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

24 ³⁸ *Gemma v. Gemma*, 105 Nev. 458, 463-64, 778 P.2d 429 (1989), quoting from *In re Marriage of Luciano*,
25 164 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 this Court since 1983 in *Forrest*.

26 ³⁹ 105 Nev. at 462-63, 778 P.2d at 431-32.

27 ⁴⁰ *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

1 In *Carlson v. Carlson*,⁴¹ this Court ordered the set aside of a property distribution under
2 NRCP 60(b), where a private pension had been greatly undervalued in the original divorce
3 proceedings. During marriage, the parties had chosen a form of retirement benefit with a
4 survivorship option, but the divorce decree did not qualify under ERISA to cause survivor's benefits
5 to be paid to the spouse. On remand, the court therefore directed that the trial court amend the
6 decree to constitute a QDRO to provide those survivorship benefits to the former spouse.

7 The same year, in *Carrell v. Carrell*,⁴² this Court reversed a district court decree
8 characterizing a portion of the husband's share of pensions as "spousal support" instead of property.
9 Citing *Walsh, supra*, and NRS 125.150(5)&(7), the Court explained that retirement benefits earned
10 during marriage are community property, and so are not subject to future modifications, whereas
11 spousal support can be modified upon a showing of changed circumstances, remarriage, or death.

12 In *Waltz v. Waltz*,⁴³ the divorce decree had awarded the entire military retirement to the
13 husband, but ordered him to pay to the former spouse, by military allotment, the sum of \$200 plus
14 cost of living adjustments, as "permanent alimony." This had been done because the military pay
15 system did not allow direct payments to a spouse with an overlap of military service and marriage
16 of less than ten years. The decree had been formulated to make sure the spouse actually received her
17 property award, under the rubric of "permanent alimony" as allowed by NRS 125.150(5).

18 In *Sertic v. Sertic*,⁴⁴ the trial court had ordered immediate distribution of the value of the
19 wife's share of the Civil Service Retirement System (CSRS) pension. This Court reversed, stating
20 that providing the spouse with anything other than a time-rule distribution could only be done upon
21 certain special findings not present in that case.

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23
24 ⁴¹ *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992).

25 ⁴² *Carrell v. Carrell*, 108 Nev. 670, 836 P.2d 1243 (1992).

26 ⁴³ *Waltz v. Waltz*, 110 Nev. 605, 877 P.2d 501 (1994).

27 ⁴⁴ *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

1 The Court further clarified that “actual division” under the “wait and see” approach (which
2 may be done at trial) is *not* the same as present *distribution* of the pension asset itself. Further, the
3 Court more clearly stated that the normal distribution of a spousal share of a retirement is to be upon
4 the employee spouse’s first eligibility for retirement, and that if a worker does not retire at first
5 eligibility, the worker must pay the spouse whatever the spouse would have received if the worker
6 *did* retire at that time.⁴⁵

7 *Wolff v. Wolff*⁴⁶ was another PERS case involving a Highway Patrol officer. The employee
8 spouse became eligible to retire three months after divorce, but elected to keep working. The district
9 court had calculated the spousal share of the retirement and ordered the husband to pay that sum to
10 the wife from his salary until he actually retired. The lower court also tried to “reflect” that the
11 husband was paying taxes on his current salary, and so awarded a couple hundred dollars less per
12 month in “Limited Temporary Spousal Support” until the husband retired, as a “reasonable
13 equivalency.”

14 Citing *Walsh*⁴⁷ and *Carrell*,⁴⁸ this Court held that pension payments cannot be classified as
15 temporary spousal support, because such support is subject to possible future modification. The
16 Court found the lower court’s lowering of payments to reflect “the taxable consequences” of the
17 payments was “arbitrary” and held that it violated the equal distribution presumption of NRS
18 125.150(1)(b).

19 This Court rejected the husband’s attack on *Gemma*, which he had argued was “fatally
20 flawed” for non-recognition of the “passive appreciation of the sole and separate portion” of the
21 retirement during the marriage, and explicitly reaffirmed its holdings in *Gemma*, *Sertic*, and *Fondi*.

22
23 ⁴⁵ Inexplicably, the legislative history of NRS 125.155 is devoid of any mention of this case, or its reasoning,
24 and the parties to the present appeal completely ignore it, but for a passing reference without analysis on page 17 of the
Answering Brief.

25 ⁴⁶ 112 Nev. 1355, 929 P.2d 916 (1996).

26 ⁴⁷ 103 Nev. 287, 738 P.2d 117 (1987).

27 ⁴⁸ 108 Nev. 670, 836 P.2d 1243 (1992).

1 The Court specifically affirmed the lower court’s order that the wife’s share would *not* revert to the
2 husband if she predeceased him, but would instead continue being paid to her estate, explaining that
3 the community interest was divided upon divorce to two sole and separate interests,⁴⁹ so that even
4 if her estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was
5 entitled to the payments that she would have received if alive.⁵⁰

6
7 **C. The PERS Retirement System**

8 Nevada, like most states, has its own pension program for State employees. PERS has
9 origins going back to 1947 and is now codified at NRS 286.010, *et seq.* Essentially, the system is
10 a defined benefit pension program.

11 The system has been amended several times, creating classes of PERS retirees depending
12 upon when they began service, and when service credits accrued. Members are credited with 2.5%
13 of their highest average compensation during any three years (usually, their last three years) for each
14 year of service earned before July 1, 2001; that credit increases to 2.67% for all years thereafter.⁵¹
15 Those that began service before July 1, 1985, can earn a maximum of 90% of their average
16 compensation, and can accrue service credit for up to 36 years; those that began service after that
17 date can earn up to 75% of their average compensation and can accrue service credit for up to 30
18 years.⁵²

19 Until 1989, benefits vested after ten years. Thereafter, benefits vested after five years of
20 service; survivor’s benefits vest upon the member’s eligibility for retirement, completion of ten years
21 of service, or the member’s death, whichever occurs first.⁵³

22
23

⁴⁹ Citing 15A Am. Jur. 2d *Community Property* § 101 (1976).

24 ⁵⁰ As discussed below, PERS refuses to enforce this holding.

25 ⁵¹ NRS 286.551(1).

26 ⁵² NRS 286.551(1)(a)-(b).

27 ⁵³ NRS 286.6793. This use of “survivor” is not construed by PERS as including a former spouse.

1 PERS is mainly a “non-contributory” system. Certain workers have paid in to “member’s
2 contribution” accounts from the days when PERS had employee as well as employer-paid funding.
3 That amount is refundable in certain circumstances, and may be applied to the (divisible) retirement
4 in others.

5 The legislative history of NRS 125.155, and the briefs, exhibit much confusion as to when,
6 precisely, PERS participants are “eligible to retire.” Most PERS participants are eligible for
7 retirement at 65 with five years of service, or 60 with ten years of service, or any age with 30 years
8 of service.⁵⁴ Certain employees operate under separate rules, however. Police and fire-fighters also
9 can retire at age 65 with five years of service, but they become eligible to retire at age 55 with ten
10 years of service, or age 50 with 20 years of service, or at any age with 25 years of service.⁵⁵

11 Like many other retirement systems, PERS includes provisions for cost of living adjustments
12 over time. Unlike most other systems, however, the COLA provisions can be (and usually are) fixed,
13 unrelated to inflation, actual cost of living, or any other economic information. PERS provides for
14 post-retirement cost of living adjustments, based upon the lesser of the CPI average or at 2% per year
15 after three full years, 3% per year after six years, 3.5% per year after nine years, 4% per year after
16 12 years, and 5% per year after 14 years.⁵⁶

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

19 In 1993, the Nevada Legislature approved AB 555, which basically emulated language in the
20 ERISA/REA rules governing Qualified Domestic Relations Orders for private retirement plans. The
21 new provisions required court orders dividing PERS benefits to be signed by a district court judge
22
23
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25 ⁵⁴ NRS 286.510(1).

26 ⁵⁵ NRS 286.510(2).

27 ⁵⁶ See NRS 286.575; 286.5756.

1 or supreme court justice, and explicitly provided for enforcement on behalf of an “alternate payee,”
2 who may be a spouse, former spouse, child, or other dependent of a member or retired employee.⁵⁷

3 As discussed above, the ERISA statutory scheme is very large and complex, and the adoption
4 of individual phrases and pieces of ERISA terminology carried with it a large potential of confusing
5 the field and leading to unintended consequences.⁵⁸ The five requirements in the statutory
6 amendment⁵⁹ for an order to be enforced by PERS were:

7 1. It must clearly specify the names, Social Security numbers, and last known
8 mailing addresses, if any, of the member and the alternate payee.⁶⁰

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

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

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

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

23 ⁵⁷ NRS 286.6703(4).

24 ⁵⁸ ERISA, the federal law that created “QDROs,” is by its own terms inapplicable to any governmental plans,
25 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.

26 ⁵⁹ Enacted as NRS 286.6703(3)(a)-(e).

27 ⁶⁰ By later amendment, the Social Security number requirement was eliminated.

1 There was extremely little debate or examination of the detail of the PERS amendments;
2 what little there is shows that the PERS representatives were quite hostile to “the courts legislating
3 divorce law on the pension plans.”⁶¹

4 At a later hearing, Mr. Pyne was pressed for what he meant, and he responded that “the
5 purpose of the legislation is to reemphasize to the courts that before the retirement system will
6 comply with a court order with respect to dividing a [member’s] benefits with his or her divorced
7 spouse, the court order shall comply with the provisions and terms of the retirement act.”⁶² He
8 further specified that the “purpose of the legislation is to protect the system and members of the
9 system from these types of orders which fall outside the scope of the act.”⁶³

10 He went on to explain, apparently, that the purpose of the legislation was not to change
11 divorce law, but only how PERS could and should act when served with an order, testifying that
12 “section 1 . . . is the heart of the legislation because the court orders could not require the system to
13 provide an allowance, benefit, or option not otherwise provided under that chapter and cannot require
14 the payment of an allowance or benefit to an alternate payee before the retirement of a member, or
15 the distribution to, or withdrawal of, contributions by a member.”⁶⁴

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

19 The problem we find happening is, typically, where the court would enter a divorce
20 decree...would provide that the nonparticipating spouse could receive retirement benefits,
21 while the participating member is still an active employee. That is totally contrary to the
22 system. That spouse would present that decree to the system, which they would have to
reject....How can we not honor a court order? The PERS was not a party to that lawsuit, so

23 ⁶¹ See colloquy between Assemblyman McGaughey and Mr. Pyne from PERS, in Minutes of Assembly
24 Committee on Government Affairs, May 11, 1993, considering AB 555.

25 ⁶² Testimony of George Pyne from PERS, in Minutes of Senate Finance Committee, June 2, 1993, considering
26 AB 555.

27 ⁶³ *Id.*

28 ⁶⁴ *Id.*

1 that order is not binding on the retirement system. So what happens if the parties can't work
2 it out...? Then the parties have to bring a new lawsuit against the retirement system to try
and get enforcement of that order. At that time we try to point out to the court they can't do
3 that, because it's not in compliance with Chapter 286.

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

8 **D. The Sad History of NRS 125.155**

9 NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS
10 retirement benefits in divorce. The legislation in its original form was heard by the Assembly
11 Judiciary Committee on March 31, 1995, backed by Mr. Gary Wolff, purportedly on behalf of the
12 Nevada Highway Patrol Association, accompanied by the association's lawyer, and Mr. Robert
13 Fowler, representing the Law Enforcement Council, Service Employees International Union.

14 The trial court had issued its decision in Mr. Wolff's divorce case dividing his retirement
15 benefits on November 22, 1994.⁶⁵ He did not tell the Committee that, nor that he was at that moment
16 a party to an appeal in this Court whose course he hoped to alter by means of a statutory amendment.

17 In its original form, the proposed legislation would have stated that unvested retirement
18 benefits were not divisible at all, effectively reversing *Forrest*⁶⁶ and *Gemma*.⁶⁷ It also would have
19 required a dollar-for-dollar offset of Social Security benefits, effectively reversing this Court's
20 holding in *Wolff* and *Boulter*⁶⁸ that such benefits are immune from such offsets as a matter of federal
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23 ⁶⁵ *Wolff v. Wolff*, 112 Nev. 1355, 1357, 929 P.2d 916, 917 (1996)

24 ⁶⁶ *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

25 ⁶⁷ *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

26 ⁶⁸ *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997) (under 42 U.S.C. 407(a) (1983), any state action is
27 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.

1 pre-emption. It would have required an automatic reversionary interest in the spousal share of the
2 property upon death of the former spouse back to the member, in contravention of this Court's
3 holding in *Wolff*, and the very structure of various retirement plans, including ERISA's divided
4 interest scheme and mandatory spousal survivorship coverage,⁶⁹ and the heritable spousal share set
5 out in federal law for CSRS and FERS.

6 None of these effects were clearly disclosed; none of those appearing made clear that only
7 a tiny and ever-shrinking minority of States even consider vestedness an issue as to the divisibility
8 of retirement benefits.⁷⁰ The Nevada Bar Family Law Section had heard about the proposed
9 legislation, and its Executive Council was assured that the lawyers appearing at the hearing⁷¹ would
10 convey just how counterproductive and injurious to community property law the proposal was. And,
11 indeed, both attorneys appeared at the hearing, and are listed as testifying in opposition to the bill,⁷²
12 although Ms. Cooney further testified that legislative action was required because the retirement
13 benefits decisions of this Court "tend to cloud issues rather than clear them up."⁷³

14 But the bill was not killed as the Section was informed. Instead, it was assigned to a
15 subcommittee, consisting of four members of the Assembly, who apparently met with Ms. Cooney
16
17

18 ⁶⁹ See, e.g., Marvin Snyder, VALUE OF PENSIONS IN DIVORCE (3d. ed., Panel Publishers 1999), at 22 (explaining
19 how, until the interest is divided, with the spousal portion permanently the property of the spouse, the standard death
20 benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a "qualified joint and
21 survivor annuity," or "QJSA."

21 ⁷⁰ See, e.g., discussion in Marshal Willick, *Hitting the Jackpot in Pension Cases: Secrets to Getting the*
22 *Retirement Share Your Client Deserves* (PESI National Divorce Skills Institute, Las Vegas, Nevada, 2007), posted at
23 http://www.willicklawgroup.com/published_works. The reason for this near-uniformity is pretty simple; where
24 vestedness is required for divisibility, an employee spouse can wait until a few months short of vesting of a 20-year
25 retirement, divorce a spouse to whom the employee had been married that entire time, and summarily divest the spouse
26 of any interest whatsoever in what is frequently the most valuable asset of a marriage.

27 ⁷¹ Valerie Cooney, Esq., and Beverly Salhanick, Esq., for the Nevada Trial lawyers Association ("NTLA"; now
28 known as the "Nevada Justice Association," having changed its name in 2008. References here are to the organization
as it was then named).

⁷² See Minutes of Assembly Judiciary Committee, March 31, 1995, considering AB 292.

⁷³ *Id.*

1 and others.⁷⁴ Any input by the attorneys purporting to speak for the NTLA or the Section was
2 apparently unauthorized.⁷⁵

3 Ms. Cooney did reveal that she was the current spouse of Judge Michael Fondi, but
4 apparently never disclosed that the legislation could be used to undo this Court's decision in the
5 original *Fondi* case and dispossess the earlier former spouse of her interest in the retirement
6 benefits.⁷⁶ She also did not reveal that Judge Fondi had already filed a second appeal in this Court
7 relating to those retirement benefits,⁷⁷ which could be affected by the legislation.

8 It is therefore unsurprising that the bill was reported out of subcommittee with the statement
9 that it "was the result of interested parties working together and are in full agreement with the work
10 document and amendments."⁷⁸

11 The Assembly, however, added a provision indicating that the legislation would only affect
12 cases filed on or after the date of enactment. The "interested parties" turned their efforts to trying
13 to eliminate that provision of the bill,⁷⁹ with Ms. Cooney stating that the time-rule was adopted from
14 California, but that it "in reality is not well-suited to Nevada."⁸⁰

16 ⁷⁴ See Minutes of Assembly Judiciary Committee, May 12, 1995, considering AB 292. The on-line record is
17 not complete, and does not include any of the exhibits, or even a transcription of the hearing of April 20, but only the
18 notation that the "tape is on file" with the Legislative Counsel Bureau.

19 ⁷⁵ In the Family Law Section's subsequent investigation, all seven of the other NTLA members that should have
20 had to vote to back such legislation claimed either that they were in opposition to the bill, or never heard of it. To a
21 member, they reported either hearing nothing or being told the bill was dead in committee, and none reported any vote
22 on it ever being taken to give it support as "an NTLA bill" or "an NTLA supported bill," which apparently is not allowed
23 without such a vote being taken. The Section was opposed to the proposed legislation, basically for the reasons stated
24 by Ms. Salhanick at the first hearing, and had been told the bill was killed.

25 ⁷⁶ The earlier spouse had about a 16-year time rule interest in the PERS benefits. *Fondi v. Fondi*, 106 Nev. 856,
26 802 P.2d 1264 (1990).

27 ⁷⁷ No. 26570, filed in January, 1995, and briefed from May to July.

28 ⁷⁸ See Minutes of Assembly Judiciary Committee, May 24, 1995, considering AB 292.

⁷⁹ See Minutes of Assembly Judiciary Committee, June 17 & June 20, 1995, considering AB 292.

⁸⁰ See Minutes of Assembly Judiciary Committee, June 17, 1995, considering AB 292. She did not reveal that
the rule is followed in every community property State, and the great majority of equitable division States; the only
significant variation is in Texas, which employs a "rank and grade at divorce" approach that enormously undervalues

1 The effort to make the legislation retroactive failed, and the bill went to the Senate, where
2 they tried again.⁸¹ This time, Ms. Cooney made the additional incorrect assertion that the time rule
3 does not allow divorces to be finalized, but “requires the parties to return to court to litigate the
4 division and the value of the non-participating spouse’s interest.”⁸² She further asserted that PERS
5 was “unique” based on the early regular retirement dates for police/fire PERS participants.⁸³

6 During the Senate hearings, Ms. Cooney was accompanied by attorney Muriel Skelly, who
7 joined Ms. Cooney’s call to make the legislation applicable to previously-decided cases as well as
8 newly-filed ones. Ms. Skelly identified herself as “a member of the Executive Council of the
9 Section,” but did not disclose that she was Mr. Wolff’s divorce attorney, nor that she represented him
10 in an appeal already filed in this Court that would be directly affected by the proposed legislation,⁸⁴
11 nor that she appearing to assist her client, and espousing a position at odds with that of the Section.

12 It was only the next day that the Family Law Section discovered that the bill had not been
13 killed in the Assembly, as it had been informed.⁸⁵ The Section scrambled to put together a written
14 report to Senator James (chair of Senate Judiciary) as to all the damage the proposed legislation
15 would inflict, but it did not reach him during the next day’s (June 27) Committee proceedings, which

16 _____
17 the spousal share. See *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). For a full explanation of the mathematical error
18 in that approach, see Marshal Willick, *Divorcing the Military: How to Attack; How to Defend* (U.S. Army JAG Corps
19 Presentation, Kansas City, MO 2008) 18-21, posted at http://www.willicklawgroup.com/published_works.

19 ⁸¹ See Minutes of Senate Judiciary Committee, June 26, 1995, considering AB 292.

20 ⁸² *Id.*

21 ⁸³ *Id.*

22 ⁸⁴ *Id.* In fact, she went further, declaring “I have no personal axe to grind; I have no personal interest in this.
23 I have no financial axe to grind; I have no financial interest in this. All I have is a professional interest from the trenches
24 who does this day after day after day. And I can see great injustice, both to men and to women.”

25 ⁸⁵ Undersigned counsel had been jointly retained by the counsel for the Wolffs at the trial court level, to do to
26 the time rule calculations used in that case. I was also incoming Chair of the Family Law Section in 1995. When I first
27 heard of the possible introduction of legislation to alter the outcome of the case, I wrote to both opposing trial counsel
28 on March 23, 1995, observing that the proposal would “do significant violence to concepts of community property and
equitable distribution of marital property” and urging both sides to “work together to ensure that neither the legislature
nor the courts are bamboozled into corrupting the law for the benefit of any particular individual.” The response was
apparently to ensure that no word of the ongoing legislative effort was reported back to the Section.

1 problem is that Nevada divorce courts generally do not “determine a value.” Under *Gemma* and
2 *Fondi*, our courts simply divide the retirement itself, whatever its value, equally, so that both spouses
3 share the benefits, and the risks, of whether the benefits will ever appear, and if so in what amount.

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

8 It is possible (but by no means certain) that the language was intended to prevent application
9 of the time rule as used in all other cases, by freezing the spousal share at a hypothetical division of
10 whatever rank and grade had been achieved by the employee at the time of divorce.⁸⁶ If so, the
11 statute would apparently emulate the defective Texas variation of the time rule discussed above, and
12 would accord to spouses of PERS members a lesser accrual of the community property of a marriage
13 than everyone else in this State. The language is so unclear, however, that it may not do anything;
14 no known case has ever applied the time rule as Texas would.

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

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

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27 ⁸⁶ The mechanics of the math of such an approach are detailed below.

1 NRS 125.155(2)(b) actually does something – it explicitly permits a court to order private
2 life insurance to make up for the lack of any “pre-retirement survivor annuity” in the PERS system.⁸⁷

3 Paragraph 2(c) provides that the court may “pursuant to an agreement of the parties” increase
4 the value of the spousal share as compensation for delay in payment. Of course, that is what the time
5 rule does *automatically* for everyone else. It is hard to imagine a circumstance in which a PERS
6 participant, having gained the ability to deprive his or her spouse of that automatic “smaller slice of
7 the larger pie” benefit, would ever agree to give it back; there is no known instance of it being used.

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

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

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

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

22

23 The organized family law Bar must become more proactive in the legislative
24 process. Too much, we have allowed private lobbying groups to speak for the family law
25 bar. Experience has shown clearly that those organizations, and their representatives, have
26 political and personal agendas considerably beyond looking out for equity, impartiality, and
27 logic in family law.

28 As noted by Edmund Burke, “All that is necessary for the triumph of evil is for good
men to do nothing.” It seems to me essential to have a neutral advisory presence in the
legislature to prevent the kind of selfish stupidity exemplified by A.B. 292 from becoming
the law of this state. We owe it to the system we serve, and to our collective clients, strong

⁸⁷ In other words, the reality that even if ordered, the survivor’s benefits provisions under PERS do not go into effect until and unless the participant actually retires; if the member dies before retirement, the former spouse gets nothing under the statutory scheme, since death benefits are not payable to a former spouse, and survivor’s benefits do not become effective until actual retirement.

1 and weak, rich and poor, to prevent the statutory law from being twisted to serve the
2 purposes of a few political insiders rather than the public generally.

3 Six weeks after the effective date of the statute, this Court in *Sertic* specifically ordered that
4 **all** spousal shares of retirement benefits are to be distributed to spouses upon members' first
5 eligibility for retirement.⁸⁸ Accordingly, the Section anticipated a quick court challenge. But the
6 statute in its watered-down form lay, virtually ignored by Bench and Bar for the next 13 years, and
7 the few times it was made an issue at trial it apparently never went up on appeal, until now.

8 **III. DISCUSSION OF ISSUES REQUESTED**

9 **A. Whether the District Court Can Order Payments to the Former Spouse Before** 10 **the Member Actually Retires**

11 **1. The Question as Posed**

12 The short answer is “yes.” The only fair reading of NRS 125.155(2) is permissive,⁸⁹ and
13 obviously, if a court “may” do something, it can just as easily not do it. A secondary issue is raised
14 by the issuance of the *Sertic* and *Wolff* opinions after the effective date of the statute, however.

15 In other contexts, this Court has held that a legislative failure to address this Court's
16 construction of a legal term constitutes “legislative adoption” of the Court's rulings.⁹⁰ The *Sertic*
17 and *Wolff* opinions include directions to the district courts, respectively, that “While no method is
18 perfect, the advantages of the ‘time rule’ clearly outweigh any other method of pension division,”
19 and that “the ‘equal distribution’ presumption governing Nevada's community property laws”
20 require application of the time rule. And the Legislature has not disturbed either holding in the past
21 five sessions.

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23 ⁸⁸ *Sertic* itself involved federal CSRS benefits.

24 ⁸⁹ 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 ⁹⁰ 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 Of course, the new statute also inserted a caveat in the opening line of NRS 125.150,
2 purporting to exempt divisions of retirement benefits under NRS 125.155 from the entirety of the
3 property division law governing all other marital assets. So it is possible to read this Court's two
4 post-statute holdings harmoniously with the statute, and the analysis changes to one of equal
5 protection, which is discussed below.

6 7 **2. Implicated Issues and Their Resolution**

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

9 The Legislature was mis-informed both that Nevada's application of the time rule was
10 somehow not in keeping with the application of law elsewhere, and that applying the law to PERS
11 participants as it applied to others created "special problems" because of the early retirement possible
12 under PERS.⁹¹ Both assertions were false; the alleged problem does not exist.

13 As a matter of law, it is possible to value the spousal share in at least two ways. The great
14 majority of States applying the time rule view the "community" years of effort *qualitatively* rather
15 than quantitatively, reasoning that the early and later years of total service are equally necessary to
16 the retirement benefits ultimately received.⁹² This provides to the former spouse an ever "smaller
17 slice of a larger pie" by getting a shrinking percentage of a retirement that is increasing in size based
18 upon post-divorce increases in the wage-earner's salary and years in service.

19 As this Court's prior opinions have noted, some critics complain that such a formula gives
20 the non-employee former spouse an interest in the employee spouse's post-divorce earnings, at least

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23 ⁹¹ See Minutes of Assembly Judiciary Committee, March 31, 1995, June 17 & June 20, 1995, considering AB
292.

24 ⁹² See, e.g., *Marriage of Poppe*, 97 Cal. App. 3d 1, 158 Cal. Rptr. 500 (1979); *Bangs v. Bangs*, 475 A.2d 1214
25 (Md. App. Ct. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *In re Hunt*, 909 P.2d 525 (Colo. 1995);
26 *Croley v. Tiede*, ___ S.W.3d ___, 2000 WL 1473854 (Tenn. Ct. App., No. M1999-00649-COA-R3-VC, Oct. 5, 2000).
27 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).

1 where the divorce occurs while the employee is still working. The same point was raised by Ms.
2 Cooney in the legislative hearings that led to NRS 125.155, as somehow a unique “problem” in
3 PERS cases,⁹³ which has been picked up by at least one of the parties to this appeal and repeated in
4 the briefings to this Court.⁹⁴

5 As noted above, a small minority of States, including Texas, have adopted this approach,
6 sometimes in cases that do not appear to have contemplated the actual mathematical impact of the
7 decision reached.⁹⁵ This minority approach undervalues the spousal interest by giving no
8 compensation for deferred receipt, and also contains a logic problem, at least in a community
9 property analysis, of treating similarly situated persons differently.

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

15 An example helps illustrate. Presume a worker who was in service for exactly 20 years, who
16 was married to wife one for the first ten, and wife two for the next ten, retiring on the day of divorce
17 from wife two. Presume he had started work at \$20,000 per year, and had enjoyed 5% raises every
18 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

25 ⁹³ See Minutes of Senate Judiciary Committee, June 26, 1995, considering AB 292.

26 ⁹⁴ See Respondent’s Supplemental Brief on Appeal at 7.

27 ⁹⁵ See, e.g., *Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987).

1	\$29,549.11	\$2,462.43
2	\$31,026.56	\$2,585.55
3	\$32,577.89	\$2,714.82
4	\$34,206.79	\$2,850.57
5	\$35,917.13	\$2,993.09
6	\$37,712.98	\$3,142.75
7	\$39,598.63	\$3,299.89
8	\$41,578.56	\$3,464.88
9	\$43,657.49	\$3,638.12
10	\$45,840.37	\$3,820.03
11	\$48,132.38	\$4,011.03
12	\$50,539.00	\$4,211.58

13 In PERS, or any other defined benefit plan,⁹⁶ the above wage history would make his average
14 monthly salary during his last three years' service \$4,014.21, and the retirement formula⁹⁷ would
15 make his retired pay \$2,007.11.

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

20	Member:	\$1,003.55
21	Wife one (10 years):	\$ 501.78
22	Wife two (10 years):	\$ 501.78
23	Total:	\$2,007.11

24 If the calculations were done in accordance with the position of the critics of the time rule
25 set out above (and *possibly* under the vague language of NRS 125.155(1)(b)), however, the results
26 would be quite different. Wife one's share of the retirement would be calculated in accordance with
27 rank and grade at the time of her divorce from the employee; in this case, she would get a pension

28 ⁹⁶ Such plans are often funded by employer contributions (although in some plans employees can contribute) and provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of \$2,000 per month during his last years would get \$1,000 per month (i.e., \$2,000 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.

⁹⁷ 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 share based the “high three” years at the ten year point, which was \$2,464.38. The formula would
2 produce a hypothetical retirement of \$616.10. Wife one would receive half of that sum – \$308.05,
3 but not until after the member’s actual retirement, ten years later.

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

6	Member:	\$1,100.41
7	Wife one (10 years):	\$ 308.05
8	Wife two (10 years):	\$ 598.65
9	Total:	\$2,007.11 ⁹⁸

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

16 The reasoning behind the two approaches to the time rule are found in cases in which a
17 reviewing court split as to which interpretation is most correct. The Iowa Supreme Court faced such
18 a conflict in *In re Benson*.⁹⁹ Using slightly different reasoning, that Court reached the same
19 conclusion reached by this Court and most others. Quoting at length from a law review article
20 analyzing the mathematics of the situation, the court found the Texas approach produces an unfair
21 result to the earlier spouse. Three judges dissented.¹⁰⁰

22 ⁹⁸ The mathematical effects of the various approaches are straight-forward. Unless payments to spouses are
23 required at each first eligibility for retirement, regardless of the date of actual retirement, a “rank at divorce” proposal
24 results in a lifetime reduction in the value of the spousal share by at least 13%. And a second spouse married to a
25 member for the last couple years of service could actually receive more money after divorce than a first spouse who
26 assisted the member for most of the career. There does not appear to be any valid public policy that could be served by
27 causing this result.

28 ⁹⁹ *In re Benson*, 545 N.W.2d 252 (Iowa 1996).

¹⁰⁰ The Iowa court apparently did not even consider the possibility of having the wife’s interest begin being paid
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

1 Essentially identical holdings to those of this Court have been issued in every other
2 community property State,¹⁰¹ with the exception as noted of Texas, which freezes the spousal share
3 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.

8
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.¹⁰² 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
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19 community property states, however, and case law has made it clear that a spouse choosing to accept retirement benefits
20 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).

21 ¹⁰¹ In addition to the law of California, Nevada, and Texas discussed above, *see, e.g., Van Loan v. Van Loan*,
22 569 P.2d 214 (Ariz. 1977); *Sims v. Sims*, 358 So. 2d 919 (La. 1978); *In re Marriage of Bulicek*, 800 P.2d 394 (Wash.
23 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
24 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).

25 ¹⁰² *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage*
26 *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
27 251 (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,
2001).

1 spouse's interest in the community property by relying on a condition within the employee spouse's
2 control."¹⁰³

3 Implicit in this Court's inquiry is whether the phrasing of the "QDRO-like" provisions
4 adopted by the Nevada Legislature in 1993 for PERS somehow prohibits an order, as in *Wolff*,
5 requiring the member to pay the spouse's share to the spouse for the period from eligibility to actual
6 retirement. Based on comparable provisions from the other major retirement systems, the answer
7 should be "no."

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

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

19 The OPM regulations, for example, are virtually identical to the PERS language quoted
20 above. The OPM rule flatly states that an order purporting to provide for payments of a spousal
21 share upon eligibility for retirement will be rejected as "non-complying."¹⁰⁴ But many States –

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23 ¹⁰³ *In re Marriage of Luciano, supra*, 164 Cal. Rptr. at 95.

24 ¹⁰⁴ See *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the*
25 *Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program,*
26 *and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement
27 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).

1 including this one – call for CSRS and FERS benefits to be paid by the member upon eligibility.¹⁰⁵
2 There is no known instance of an order requiring payments from the employee until retirement, and
3 from OPM thereafter, being rejected by the OPM.¹⁰⁶

4 The military retirement system statutes also contain explicit prohibitions against both
5 ordering a military member to retire,¹⁰⁷ and ordering payment of a spousal share prior to actual
6 retirement of a member,¹⁰⁸ which under current law could mean 40 years of military service. But
7 courts have had no difficulty ordering military members to begin payments upon eligibility.¹⁰⁹

8 Among this Court’s rules for statutory construction are the principles that if a statute is
9 ambiguous, courts should attempt to follow the legislature’s intent, and “no part of a statute should
10 be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly
11 be avoided.”¹¹⁰ Here, the legislative history states that the provision was only intended to guide what
12 PERS should do, not alter substantive divorce law. Further, as discussed below, reading the
13 provision expansively to prohibit orders directed to members personally, as well as to PERS, would
14 create an equal protection nullity, to be avoided if possible.

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

19
20 ¹⁰⁵ See, e.g., *Sertic, supra*.

21 ¹⁰⁶ I have personally submitted, and had approved, dozens of such orders.

22 ¹⁰⁷ 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.”

24 ¹⁰⁸ 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.”

26 ¹⁰⁹ See, e.g., *In re Marriage of Harris*, 27 P.3d 656 (Wash. Ct. App. 2001).

27 ¹¹⁰ *Rodgers v. Rodgers*, 110 Nev. 1370, 887 P.2d 269 (1994).

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 this Court does not determine that equality
14 of treatment under the divorce statutes is a fundamental right. This Court stepped through an equal
15 protection analysis in *Barnes v. Eighth Judicial District Court*,¹¹⁸ and determined that after looking
16 for the implication of fundamental rights, the review turns to whether the classification scheme
17 created by the statute “is rationally related to furthering a legitimate state interest.”

18 The test for that question was set out in *State Farm v. All Electric, Inc.*,¹¹⁹ as requiring that:
19 Legislative classifications must apply uniformly to all who are similarly situated, and the
20 distinctions which separate those who are included within a classification from those who
21 are not must be reasonable, not arbitrary.¹²⁰

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

24 ¹¹⁸ *Barnes v. Eighth Judicial District Court*, 103 Nev. 679, 748 P.2d 483 (1987) (reviewing statutes governing
25 waivers of filing fees for indigent prisoners and finding that the requirement for indigent prisoners to obtain an affidavit
26 of an attorney that their cases were meritorious before those cases would be filed violated equal protection).

27 ¹¹⁹ *State Farm v. All Electric, Inc.*, 99 Nev. 222, 660 P.2d 995 (1983); *see also Vance v. Bradley*, 440 U.S. 93
28 (1979).

¹²⁰ 99 Nev. at 225, 660 P.2d at 997.

1 held that “in seeking the intention of the legislature in enacting a certain law we must ascertain the
2 evils sought to be remedied.”¹²¹

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)¹²² that the eligibility for police and fire members
14 of PERS to retire at age 50 was a unique problem requiring special legislation.¹²³

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.¹²⁴

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
21

22 ¹²¹ *Escalle v. Mark*, 42 Nev. 172, 175, 183 P. 387, 388 (1919).

23 ¹²² 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.

26 ¹²³ See Remarks of Dennis Healy in Minutes of Assembly Judiciary Committee, March 31, 1995, considering
27 AB 292.

28 ¹²⁴ 103 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.”¹²⁵ 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*,¹²⁶ 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.¹²⁷ 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.’”¹²⁸ 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
21

22 ¹²⁵ 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.

25 ¹²⁶ *Barker v. Kansas*, 503 U.S. 594 (1992).

26 ¹²⁷ See *Davis v. Michigan Dep’t of Treasury*, 489 U.S. 803 (1989).

27 ¹²⁸ *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,”¹²⁹ 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 the case now before the Court, the trial court apparently identified the equal protection
21 problem,¹³⁰ but could only think of increasing the alimony award to deal with it.

22 In sum, whether or not the right to be treated equally in divorce court is considered a
23 fundamental right, NRS 125.155 creates a classification scheme that is arbitrary and irrational and
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25 ¹²⁹ NRS 123.225. Notably, this statute was the statutory basis for this Court’s ruling in *Gemma, Fondi, Sertic,*
26 *and Wolff.*

27 ¹³⁰ See AA 100, where the judge comments on “one set of laws for people who are in the PERS program, and
28 one set of laws for people who are not.”

1 therefore violates equal protection. The distinctions created are not rationally related to furthering
2 a legitimate State interest. Rather, the statute was based on the false assertion of non-existent
3 “unique” problems in PERS cases, and it discriminates unreasonably for some similarly-situated
4 persons and against others for no legitimate purpose.

5
6 **d. The Definition of “Eligible to Retire”**

7 A red herring raised repeatedly in the legislative history of NRS 125.155 was the meaning
8 of the phrase “first eligibility” – the time when payments to the former spouse are to begin. Under
9 the Nevada PERS statutes, for example, an employee can choose to take early retirement almost any
10 time after vesting, paying a 4% penalty for each year before regular retirement age that the benefits
11 are accepted.¹³¹ It could be (and was) argued that this makes every vested PERS participant
12 “eligible” for retirement benefits, and thus every former spouse eligible for immediate payments (at
13 a sum taking into effect the penalty, of course).

14 The actual words of this Court’s holdings in *Fondi* and *Wolff* cannot be reasonably
15 interpreted as referring to any time other than the earliest date of *regular* retirement under the plan
16 (i.e., the time at which an employee can retire without penalty), which time is often unknown when
17 the divorce occurs while the employee is still in service.¹³² However, given the assertion of the point
18 as a rationalization for the existence of NRS 125.155, this Court’s opinion should probably include
19 the clarification that “eligibility for retirement” does not include any early retirement period.

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¹³¹ See NRS 286.510.

24 ¹³² 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
28 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 whether or not the member retires. It would also create an equal protection problem, as discussed
2 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. This Court's
5 resolution of this appeal, however, should specify that NRS 286.6703(3)(e) only addresses
6 limitations on direct payments from PERS. That has been the reading, and the result, as to military
7 retirement benefits and the Civil Service, and no compelling reason for any different result as to
8 PERS is apparent.

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

11 Since this Court's holding in *Wolff* is being explicitly re-examined in this appeal, the time
12 seems ripe to bring to the Court's attention an aspect of its holding that PERS has, to date, refused
13 to follow.

14 In *Wolff*, the Court affirmed the order that the wife's share would *not* revert to the husband
15 if she predeceased him, but would instead continue being paid to her estate, on the basis that the
16 community interest was divided upon divorce to two sole and separate interests, so that even if her
17 estate was not listed as an alternate payee as defined in NRS 286.6703(4), the estate was entitled to
18 the payments that she would have received if alive.¹³⁴

19
20 ¹³⁴ In the decree, the district court provided that "[Roberta's] vested
21 Community Interest in [Gerhard's] Retirement does not terminate upon [Roberta's]
22 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."

23 Although a former spouse's estate is not encompassed by the definition of
24 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,
25 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
26 Community Property § 101 (1976). Consequently, Roberta's estate is *entitled*
to her portion of Gerhard's retirement in the event that Roberta predeceases Gerhard.
27 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.

1 To date, in every known instance, PERS not only has refused to directly make payments to
2 a spouse's estate in accordance with that holding, it has reportedly refused to even accept orders
3 submitted stating that an individual *member* is required to make those payments if the spouse dies
4 first. It is apparently PERS policy to reject any proposed order reciting this Court's holding in *Wolff*
5 on that point.¹³⁵

6 That policy creates a terrible dilemma for counsel, since this Court has required counsel to
7 do what PERS says cannot be done. The danger for drafting counsel is obvious – if counsel
8 complies with the directive of PERS to remove the language that the Court has held should be in
9 such a QDRO, the attorney runs the risk of being sued by the alternate payee's survivors, or estate,
10 should the alternate payee predecease the member and the flow of benefits not go to those survivors.

11 Since this Court, by virtue of the *Order* of November 18, 2008, has invited PERS'
12 participation in the resolution of this appeal, the Court should take advantage of this opportunity to
13 resolve PERS' refusal to obey the Court's mandate in *Wolff*, as the problem is recurrent, and
14 apparently has evaded review for 12 years.

15 When it proposed the scheme of QDRO-like regulations in 1993, PERS submitted and the
16 Nevada Legislature approved a mechanism for the payment to alternate payees of sums found to be
17 due to those persons by order of "a district court or the supreme court of the State of Nevada relating
18 to child support, alimony or the disposition of community property."¹³⁶

19 It is inappropriate for PERS to refuse to honor the opinion of this Court, except where a
20 statute *specifically* makes it impossible for the system to comply with such an order. Since no statute
21 prohibits payments to the estate of a former spouse, or prohibits court orders directing a member to
22

23
24 112 Nev. 1362 (emphasis added).

25 ¹³⁵ One such rejection received by this office flatly stated: "In the event the Alternate Payee predeceases the
26 Participant Retired Employee, the entire benefit is then paid to the retired employee. The Alternate Payee cannot
designate a beneficiary or the estate to receive his portion of the benefit."

27 ¹³⁶ NRS 286.6703.

1 make such payments, PERS should be ordered to alter its policy.¹³⁷ And, since PERS has made an
2 issue of the phrasing in *Wolff* as to choice of pronouns, this Court’s clarification should specify
3 whether its reference to “Gerhard’s obligations,” which referenced payments coming from PERS
4 earlier in the opinion, were intended to make the payment obligation one for the system, or the
5 individual member.

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

9 The distribution of the benefits and burdens of survivorship interests in this presumptive-
10 equal-distribution State, as to retirement systems that are structured to provide their employees
11 superior rights, haven proven problematic to both bench and Bar in divorce cases attempting to treat
12 the parties equally. That problem appears in this case, because the orders below apparently include
13 no form of survivorship or other security for the non-employee spouse’s insurable interest,¹³⁸ while
14 the employee’s interest is 100% secured by the structure of the system itself.

15 This appeal presents the opportunity to address that common difficulty. This issue should
16 be considered at the same time as the issue discussed above about whether and by whom payments
17 of the spousal lifetime share should be made in the event the non-employee spouse pre-deceases the
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20 ¹³⁷ In a prior case, the office of undersigned counsel was curtly informed that the “Official Policies” of PERS
21 prohibit honoring this Court’s holding in *Wolff*. Apparently, that is what all attorneys are informed. No such “Official
22 Policies” have apparently ever been published, by way of any legislatively-mandated regulation or public process. While
23 PERS is permitted to adopt internal rules pursuant to NRS 286.200, such “official policies” do not have the force of law
24 or are binding on any Court. If the “policies” conflict with *Wolff*, it is the “policies,” and not the decisional law, that must
25 give way. *See Clark Co. Social Service Dep’t v. Newkirk*, 106 Nev. 177, 789 P.2d 227 (1990) (administrative regulation
26 in conflict with state law invalidated, and district court is empowered to grant permanent injunction ordering agency to
27 follow law rather than its internal regulations).

28 ¹³⁸ Any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but
will not get such money if he dies, **definitionally** has an “insurable interest” in the life of the member (this is true for
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 employee, because the structure of the system presents part of the reason for PERS’ refusal to honor
2 this Court’s holding in *Wolff*.

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

9 Where the *employee* dies first, various results are possible. For a former spouse to continue
10 receiving money after death of the employee, there must be specific provision made by way of a
11 separate, survivorship interest payable to the former spouse upon the death of the member.
12 Otherwise, payments being made to the former spouse simply stop; this is just one of the ways in
13 which the employee’s rights are superior to those of the non-employee, even when benefits are
14 “equally” divided.¹³⁹

15 Such “reversionary interest” provisions are not unique to PERS – the military retirement
16 system has a virtually identical scheme, with the addition of a specific statute that PERS does *not*
17 have, providing that both the spousal share of current military retired pay and any Survivors Benefits
18 Plan (“SBP”) benefits in the spouse’s name revert to the member – they may not be left to anyone
19 by will or intestate succession.¹⁴⁰ Case law addressing that retirement system therefore provides an
20 illustration and example of how to deal with survivorship issues under PERS.

23 ¹³⁹ 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.

27 ¹⁴⁰ 10 U.S.C. § 1408(c)(2).

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

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

12 One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in
13 *In re Marriage of Payne*.¹⁴¹ The court held that ordering the member to pay for the wife's SBP gave
14 the wife a right already enjoyed by husband, that is "the right to receive her share of the marital
15 property awarded to her." The court adopted the "default" position for distribution of the premiums
16 (off the top, and therefore divided between the parties), observing that:

17 The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension
18 income of \$2200 per month before the net remainder is divided between the parties pursuant
to the permanent orders. Thus, the expense is shared equally by both parties.¹⁴²

19 The military member had appealed in *Payne*, claiming that the SBP should be funded solely
20 by the former spouse because it is "a court-created asset for her benefit alone." The appellate court
21 rejected that argument, holding instead that the SBP is "an equitable mechanism selected by the trial
22 court to preserve an existing asset – the wife's interest in the military pension."¹⁴³ Many other courts

25 ¹⁴¹ *In re Marriage of Payne*, 897 P.2d 888, 889 (Colo. App. 1995).

26 ¹⁴² *Id.*

27 ¹⁴³ *Id.*

1 have reached the same conclusion.¹⁴⁴ Some courts have viewed the survivorship benefit as a means
2 of insurance, to ensure that the former spouse continues to receive retirement benefits, making the
3 division of the retirement more equitable.¹⁴⁵

4 The courts holding that the SBP should be maintained seem to impliedly realize that the
5 members' survivorship interest in the former spouse's benefits is automatic and free, while the
6 spousal survivorship in the member's benefits requires payment of a premium. None of the
7 decisions goes into detail, comparing what the member or the spouse would actually receive in the
8 event of the death of the other, or whether the results fit into the theory of equitable or equal
9 community property and debt division.

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

17 As a matter of logic and math, where the member has a *free* survivorship interest in the
18 spouse's life, in addition to his own benefits, it seems most appropriate to either have the parties
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21 ¹⁴⁴ *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).

27 ¹⁴⁵ *In re Marriage of Smith*, 148 Cal. App. 4th 1115 (2007).

1 equally divide the premium, or adopt the default position for proportional payments toward that
2 premium.

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

10 This Court’s resolution of this appeal should include the direction that when dividing
11 retirement benefits, absent findings of a compelling reason under NRS 125.150(1)(b) to do
12 otherwise, if only one survivorship interest requires the payment of a premium, that premium cost
13 should presumptively be divided between the spouses as part of the equal division of their property.

14
15 **d. Benefits and Burdens of *Pre-Retirement Survivorship Benefits in*
16 **a Presumptive Equal-Division State****

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

21 In *Wolff*, this Court reviewed NRS 286.6703 and surmised that if the employee died before
22 retirement, a former spouse alternate payee would nevertheless receive “a refund of the contribution
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1 account.”¹⁴⁶ On that basis, the Court reversed the order for the member to obtain a private life
2 insurance policy, finding that it would require an “unequal distribution of debt.”¹⁴⁷

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

9 Given the employee’s automatic and free benefit of restoring option one (full) retirement
10 benefits if the former spouse dies prior to retirement, the cost of the one pre-retirement survivorship
11 interest requiring any payment (private insurance in favor of the former spouse) should
12 presumptively be split equally between the parties, as part of dividing their property rights and
13 obligations equally.

14 15 **IV. CONCLUSION**

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

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24 ¹⁴⁶ *Wolff v. Wolff*, 112 Nev. 1355, 1361, 929 P.2d 916, 920 (1996).

25 ¹⁴⁷ As an aside, this Court has separately approved an unequal division of debt – even all debt to one party –
26 where that party has a higher future income. *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990). The point
27 is not necessary in this analysis, but the Court has asked to be informed when its prior holdings are arguably
28 contradictory.

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

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

15 Nevada is in the clear mainstream of all States, and the overwhelming majority of community
16 property States, in its application of the time rule. Distributions of the spousal share at eligibility for
17 retirement is the norm. The exemption of PERS participants from the law otherwise applicable
18 raises a host of equal protection concerns, as between PERS participants and employees in other,
19 similar retirement systems, and as between PERS participants and their spouses in divorce litigation.
20 Whether or not equality of treatment by the divorce courts is considered a fundamental right, there
21 is little doubt that NRS 125.155 is constitutionally infirm.

22 There are a variety of subtle nuances in this subject area meriting clarification by this Court
23 at the same time that it resolves this appeal, dealing with application of the equal division
24 presumption as it applies to survivorship benefits and their costs, and as to whether and by whom
25 payments may be made to the estate of a former spouse if that person dies prior in time to the
26 employee spouse.

1 In sum, NRS 125.155 should be invalidated as violative of equal protection. PERS should
2 be directed to comply with this Court's prior directions as to how payments should be made, and to
3 whom. And the case immediately before the Court should be reversed and remanded for entry of
4 a decree, and a PERS QDRO, in keeping with constitutional limits.

5 Respectfully submitted this ___ day of December, 2008.

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1 **CERTIFICATE OF MAILING**

2

3 I hereby certify that I am an employee of THE WILLICK LAW GROUP, and on the _____ day

4 of December, 2008, I deposited in the United States Mails, postage prepaid, at Las Vegas, Nevada,

5 a true and correct copy of the Motion to File Answering Brief in Excess of 30 Pages, addressed to:

6 Jeffrey Friedman, Esq.
7 150 N. Center Street, Ste. 323
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14 There is regular communication between the place of mailing and the places so addressed.

15 _____
16 Employee of the WILLICK LAW GROUP

17 P:\wp13\PROBONO\MSW5503.WPD