

PUBLIC EMPLOYEES RETIREMENT SYSTEM [“PERS”] BENEFITS

by

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I. RETIREMENT BENEFITS UNDER PERS

A. Structure of the Retirement Plan

Nevada, like most states, has its own pension program. PERS (the state “Public Employees Retirement System”) has origins going back to 1947 and is now codified at NRS 286.010, *et seq.* Essentially, the system is a defined benefit retirement program.

The system has been amended several times, creating classes of PERS retirees depending upon when they accrued service credits, and when they began service. Members are credited with 2.5% of their highest average compensation during any three years (usually, their last three years) for each year of service earned before July 1, 2001; that credit increases to 2.67% for all years thereafter.¹ Those that began service before July 1, 1985, can earn a maximum of 90% of their average compensation, and can accrue service credit for up to 36 years; those that began service after that date can earn up to 75% of their average compensation and can accrue service credit for up to 30 years.²

Until 1989, benefits vested after ten years. Thereafter, benefits vested after five years of service; survivor’s benefits vest upon the member’s eligibility for retirement, completion of ten years of service, or the member’s death, whichever occurs first.³

Certain workers have paid in to “member’s contribution” accounts from the days when PERS had employee as well as employer-paid funding. That amount is refundable in certain circumstances, and may be applied to the (divisible) retirement in others, so it is important to know in any PERS case if there have been any employee contributions.⁴

Most PERS participants are eligible for retirement at 65 with five years of service, or 60 with ten years of service, or any age with 30 years of service.⁵ Certain employees operate under separate rules, however. Police and fire-fighters also can retire at age 65 with five years of

¹ NRS 286.551(1).

² NRS 286.551(1)(a)-(b).

³ NRS 286.6793.

⁴ Of course, the importance of such contributions should not be *overstated*, either. One ploy used by some attorneys representing members was to assert the member’s contributions as the value of the plan, and offer to trade it, keeping “the retirement” in exchange for some other item of modest value, when those contributions were almost always a very small fraction of the actual plan value. *See* discussion of benefits, value, and contributions in section III(A) of the Introduction.

⁵ NRS 286.510(1).

service, but they become eligible to retire at age 55 with ten years of service, or age 50 with 20 years of service, or at any age with 25 years of service.⁶

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

There are several options under PERS for the form of monthly benefits, securing various levels of survivorship payments for beneficiaries, which are discussed in the death benefits section of these materials.

B. Laws Affecting Distribution of PERS Benefits in Divorce⁸

In 1993, the Nevada Legislature approved AB 555, which basically patterned the state PERS statutes after the ERISA/REA rules governing private Qualified Domestic Relations Orders. The new provisions required court orders dividing PERS benefits to be signed by a district court judge or supreme court justice, and explicitly provided for enforcement on behalf of an “alternate payee,” who may be a spouse, former spouse, child, or other dependent of a member or retired employee.⁹ The adoption of ERISA terminology, however, carried with it the unfortunate potential of confusing the field rather than clarifying it.¹⁰

Enforceable orders include “a judgment, decree or order relating to child support, alimony or the disposition of community property” and extends to “all or a portion of the allowance

⁶ NRS 286.510(2).

⁷ See NRS 286.575; 286.5756. The CPI alternative test is based on lifetime experience, so it is only recently, during the past few years’ run of record low inflation, that some members have bumped up against the cap and received COLA adjustments of less than the sums set out in the fixed-percentage schedule.

⁸ This is a discussion of only the statutory law. The Nevada cases addressing PERS benefits are reviewed in the Introduction.

⁹ NRS 286.6703(4).

¹⁰ ERISA, the federal law that created “QDROs,” is by its own terms inapplicable to any governmental plans, 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.

or benefit of a member or retired employee.”¹¹ An order will be enforced if it satisfies five requirements:

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

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

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

It must not require the system to provide an allowance or benefit not otherwise provided under the state statutes governing PERS.

It must not require payments to an alternate payee before the retirement of a member or the distribution to or withdrawal of contributions by a member.

NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS retirement benefits in divorce. Officers of the Family Law Section did not discover the proposal until nearly the last day of the legislative session, which in its original form would have significantly altered several spousal protections built into Nevada’s community property laws.¹² It was quickly altered, but even the remaining portion contains provisions that either appear to run afoul of Nevada Supreme Court holdings,¹³ or otherwise appear to raise equal

¹¹ NRS 286.6703(1).

¹² For example, the legislation in its original form stated that unvested PERS benefits were not divisible at all. If it had passed in that form, the statute would have undone the principle that all property accrued during marriage is divisible, whether or not vested or matured at the time of divorce, which has been the law of this state for many years. *See, e.g., Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983). The original provisions would have created much mischief if they had been permitted to become law; an employee spouse could have waited until a few months short of vesting of a 20-year retirement, divorced a spouse to whom the employee had been married that entire time, and summarily divested that spouse of any interest whatsoever in the retirement benefits.

¹³ NRS 125.155(2) states that in dividing PERS retirement, a court “may . . . order that the benefit not be paid before the date on which the participating party retires.” This, of course, is contrary to *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995); and *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. It appears to nearly define an equal protection violation, since it states that spouses of participants in the Nevada PERS system are entitled to lesser protection of their community property rights than spouses of all participants in all other private and public retirement systems on which a divorce court might rule.

protection issues, since they treat participants in PERS differently than participants in all other pension plans.

Section one requires any divorce order to be based on the “time rule” and prohibits basing a division “upon any estimated increase” based on post-marital service. Section two states that the divorce court may require that benefits for a spouse not be paid until the participant actually retires, and may safeguard the spousal share, if it does so order, by way of a bond, life insurance, or other security, or (by agreement of the parties only) by increase in the spousal share to compensate for the delay in payments. Section three provides that a spousal share ordered under that statute terminates upon death of either party unless a retirement option providing for survivorship benefits is agreed or ordered.

II. PERS BENEFITS IN DIVORCE ACTIONS

A. Multiple Possible Retirement Dates

Under either the regular or “police/fire” schedules, the importance of the multiple means of achieving eligibility for retirement, based on age and total service time, is that the lawyers must be aware of each possible retirement date if the case involves any PERS participant still in service. The actual date will be determined by which assumptions prove to be correct.

For example, a teacher beginning work in Nevada at age 26, who divorces at age 34, would have only eight years in service. Accordingly (and assuming continued survival), the earliest *certain* retirement is at age 65 – 31 years in the future. If he continued employment for just another two years, however, the teacher would achieve ten years of service and thus be eligible to retire at age 60 – only 27 years in the future. And if he continued work for another 22 years, the teacher would have 30 years of contributions, and could retire immediately, at age 56 – which is only 22 years in the future from the divorce date.

These differences change the actuarial assumptions going into present value calculations, and alter the negotiation and litigation strategies of the lawyers. For example, lawyers trying to negotiate temporary spousal support might well have different positions if they are assuming that retirement is ten years closer, or further away. The lesson is to calculate each possible retirement age, and build into the resulting outcome whatever flexibility is required to cope with the uncertainty.

B. Spousal Consent to Options; Plan Interpretations by PERS

As noted above, there are several retirement options under PERS, with different survivor beneficiary provisions. Since 1987, PERS has required spousal consent to the form of

retirement chosen.¹⁴ As currently enacted, however, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days.¹⁵ The burden is on the spouse to get a court order mandating a retirement option within the 90 day period, which effectively gives only that amount of time within which to decide to file for divorce and get a court order. PERS is statutorily immune from suit for benefits paid because of a member's falsification of marital status on a retirement option selection form.¹⁶

The language used in NRS 286.6703 (the provision calling for payments to "Alternate Payees") has implications that are significant to the practicalities of litigation, both as to what is stated, and what is not stated. Unlike many other retirement plans, there is no requirement that the order be a *final* order, so apparently an interim order is enforceable. The "other dependent" language in the definition of permissible alternate payees appears to clear the way for "palimony" or other such awards. There does not appear to be *any* payment limitation, so even 100% of the benefit could be transferred from the employee to the other party in an appropriate case.

The statutory provisions do not include model terms. PERS appears to follow a policy of honoring, to the degree possible, all Nevada court orders, or at least those that comply with the statutory restrictions of the plan, and for the most part PERS has been reasonable in its statutory interpretation.

For example, NRS 286.6703(3)(e) is pretty obviously intended to prohibit PERS itself from being forced to make any payment to an alternate payee prior to the actual retirement of the member, but it is not phrased as prohibiting merely payments "from the system," like the subsection above it. Rather, its language was apparently modeled on portions of ERISA, 29 U.S.C. § 1055(c), and the resulting language is phrased in such a way that, on its face, any order requiring "the payment of any allowance or benefit to an alternate payee before the retirement of the member" would make the order invalid.

The problem with reading the statute to mean exactly what it says is that any such interpretation would be in direct conflict with the Nevada Supreme Court's mandates in *Gemma/Fondi/Sertic* that the member must make direct payments to the former spouse upon eligibility for retirement, whether or not the member retires. The law on this point is so clear that, today, it would probably be malpractice to *not* provide for payments to the former spouse upon the employee's eligibility for retirement.

Fortunately, on this point, PERS has not been stating that such orders are invalid, and has interpreted the statutory provision as only addressing what the system can and cannot honor.

¹⁴ See NRS 286.541.

¹⁵ See NRS 286.545.

¹⁶ NRS 286.541.

In prior years, it was commonly believed that PERS was not able to honor orders issued after payments began.¹⁷ However, the statutory scheme itself calls for re-computation of the amount payable in certain circumstances,¹⁸ and the agency, again, has been reasonable in honoring court orders altering option selections, etc., post-retirement.

C. Unanswered Questions and Litigation Strategies

1. Dealing with PERS COLAs in *Gemma/Fondi/Sertic* Cases

The logical ramifications of existing case law creates some situations for which there just is no guidance. For example, in the situation in which there is a divorce, but the member continues working after he is eligible to retire, the former spouse is entitled under the *Gemma/Fondi/Sertic* line of authority to the benefits she **would have received** if the member **had** retired. Presumably, that includes cost of living adjustments.

For most retirement systems, that is not difficult – in the military system, for example, there is an annual COLA that is indexed to inflation. But as detailed above, PERS has a complex, multi-year COLA system that is highly “back-weighted”; i.e., the later adjustments are much greater than the first adjustments.

This creates a terrible drafting (and calculation) headache for the lawyers, when the divorce occurs while the member is still in service. If the member remains in service for, say, ten years past the eligibility date for retirement, the former spouse should receive the hypothetical COLAs at the beginning of years four, five, and six (2%), seven, eight, and nine (3%), and ten (3.5%), and would have others coming each year thereafter in accordance with the schedule. The **member**, however, would not receive his first, smallest COLA until four years after his **actual** retirement. This leads to both practical and mathematical difficulties.

Both sides have an interest in getting a written order on file with PERS to ensure option selection and direct payment are as intended, but the complexity of drafting an order that precisely satisfies both the former spouse’s hypothetical award-upon-eligibility, and the member’s actual schedule, with all COLAs, is enormous. The less certain the language, the less certain that PERS will honor it, but as recent history has shown, we cannot even be certain what rate of COLA increase will be applied in future years, since the future inflation rate cannot be known.

¹⁷ There are limitations in what orders may be honored after retirement in both ERISA-governed plans, and government plans such as FERS.

¹⁸ See, e.g., NRS 286.545(2) (recalculation at the end of a 90-day waiting period); NRS 286.592 (recalculation following the death of a survivor beneficiary).

Especially when the retirement of the member is to be many years in the future, it might be necessary, as a practical matter, to state in the Court order a presumed rate of cost of living increases, and include a reservation of jurisdiction to submit a later order, resetting the spousal percentage as a percentage of whatever the member **actually** receives at that time. Even so, for the next fifteen years, the member will have a different, lower percentage of COLA increase than the spouse will have. And if the member does not retire exactly on an anniversary of his retirement eligibility date, then the former spouse's hypothetical COLA increase date will be on a different date than the member's date, in perpetuity.

Mathematically, this situation also produces results that are not obvious and which have never been discussed in the cases. Since the spousal share will have started first, it will increase at a much greater rate than the member's share, effectively giving the spouse an ever-increasing share of the total monthly retirement benefits until fifteen years after the member actually retires, when both will be receiving 5% per year annual COLAs.

From the member's point of view, it will appear (and actually be) that upon actual retirement, the spousal share is growing faster than the member's share each year, whittling away at what the member is receiving while increasing what the spouse is receiving.

Both the drafting and the mathematical problems can be solved, but at a cost. The order can provide that upon actual retirement, and the resetting of the spousal share as a percentage of what the member actually receives, the spouse simply shares in the COLA increases provided to the member. This makes drafting **much** simpler, and greatly reduces the odds of further conflict between the parties, but at the cost of producing a result at variance from the logical implications of the case law.

2. Accrued Sick and Vacation Pay

Courts in other states are split in this issue. Some have reasoned that vacation and sick time were replacements for wages, not supplemental to them like pension or retirement benefits, since vacation and sick time replaced wages on days when the worker did not work, and would not necessarily be liquidated in exchange for cash, since the benefits are often dissipated when the employee takes holiday or vacation time.¹⁹ These decisions tend to focus

¹⁹ See *Bratcher v. Bratcher*, 26 S.W.3d 797 (Ky. App. 2000) (where wife had accumulated vacation and sick leave, would lose any sick leave if she terminated but would be paid for any accrued vacation, court concluded that neither constituted "property" divisible upon divorce); *Thomasian v. Thomasian*, 556 A.2d 675 (Md. App. 1989) (husband's accrued holiday and vacation leave were not marital property, because they were not entitlements like pension or retirement benefits, only replaced wages on days the employee did not work, and did not need to be, and often were not, liquidated by a payment of cash, but instead frequently dissipated, and therefore too speculative to constitute property); *Smith v. Smith*, 733 S.W.2d 915 (Tex. Ct. App. 1987) (accrued vacation and sick pay are not marital assets, as the husband owned no physical control or power of immediate enjoyment over them);

on whether such benefits are adequately “tangible” and the difficulty in reaching a fair valuation, when ultimately finding them to be nonmarital assets.

Other courts have concluded that accrued, unused vacation or sick pay are “in effect” additional wages, as benefits extended to employees as inducements to accept employment, which are valued and divided at the time of divorce.²⁰

Of course, both groups of decisions are focused on their individual State’s definition of both “property” and “marital property,” and the specific plan terms giving rise to the benefits. In cases where the vacation and sick leave were determined *not* divisible, the courts determined that the vacation and sick leave were forms of “alternative pay” often dissipated by its use, or not actually being under the physical control of the employee. In the cases where the vacation and sick leave was divided, the employees were eligible for retirement, had some kind of present right to cash out the benefits, or were cases in which the existence of the benefits in the employee’s name was considered as a “balancing factor” in trying to ensure overall fairness.

The statutes concerning most PERS employees’ rights regarding vacation and sick time are set out at NRS 284.350 and NRS 284.355, respectively.

Vacation pay is accrued at the rate of 1¼ days per month of continuous service, and is cumulative from year to year, with a maximum of 30 days accrual per year.²¹ All leave beyond 30 days must be used during the next year, or it is forfeited. Upon termination of employment, state employees are entitled to lump sum payment of their accumulated annual leave.²² Further, the value of that vacation pay is computed at the rate of pay that the employee had at termination, not the rate of pay at the time the leave was accrued.²³

²⁰ *MEA/AFSCME Local 519 v. City of Sioux Falls*, 423 N.W.2d 164 (S.D. 1988); *In the Matter of the Marriage of Susan M. Hurd*, 848 P.2d 185 (Wash App. 1993) (while no specific rationale provided for finding that vacation leave was ruled a divisible asset, record included finding that the husband was already eligible for retirement, so an additional payment was likely to be made to him); *Schober v. Schober*, 692 P.2d 267 (Ak. 1984) (unused personal leave constitutes a divisible asset since, under state highway patrol employment contract, members may cash out 60 hours of unused personal time each year, and here such time should be considered “vested” and thus divisible); *Lesko v. Lesko*, 457 N.W. 2d 695 (Mich. App. 1993) (over vigorous dissent, majority concluded in an equitable division state, accrued vacation and sick time could be divided).

²¹ NRS 284.350(1).

²² Attorney General Op. No. 24 (Mar. 17, 1955).

²³ Attorney General Op. No. 65 (Jun. 23, 1959).

Sick leave is also accrued at the rate of 1¼ days per month of continuous service, and is cumulative from year to year.²⁴ Once a maximum of 90 days has been accrued, only half of each year's accrual of sick leave can be added to the total of accrued, unused sick leave in most cases.²⁵ Upon termination of employment (not the employee's fault), retirement, or death, state employees are entitled to lump sum payment of their accumulated annual leave pursuant to a complex formula.²⁶

However, there are many different units within PERS, representing various collections of employees within various job descriptions and physical locations, and pursuant to NRS 288.150(2), sick leave and vacation leave are within the scope of mandatory bargaining between local governmental employers and the employee bargaining units.

Since the subject-matter of the various collective bargaining agreements can be fair-ranging, and include matters "significantly related" to those enumerated in the statute, it is reasonable to presume that terms that could relate to the rights of employees to cash out vacation or sick time may vary from one group of employees to another as a matter of contract, and thus change over time, and vary from employment unit to employment unit. Apparently, at least in some employment contracts, there are limitations as to how much of the benefits can be turned into cash rather than used for actual illness or vacation.²⁷

Any restrictions on the ability to readily cash in sick and vacation time, whether as a matter of contract or statute, affect valuation. For example, if an employee will not be eligible for retirement for another ten years, and the benefits in question can only be turned in for cash upon retirement, then an argument could be made that they should be devalued like any other future payment, reduced to present value in accordance with a reasonable interest rate, actuarially. Of course, any such conclusion leaves the usual room for disagreement as to discount rates, etc., that are present whenever an actuarial value must be determined.

²⁴ NRS 284.355(1).

²⁵ The PERS Commission can authorize use of the other half of all such accrued, but uncounted sick leave for sufferers of chronic medical conditions who use up all their sick leave that was counted.

²⁶ Thirty days is apparently compensated directly. Additionally, sick leave accrued and counted is apparently valued per the employee's wages, but only paid up to caps that depend on length of service: between 10 and 15 years, up to \$2,500.00; between 15 and 20 years, up to \$4,000.00; between 20 and 25 years, up to \$6,000.00; and for more than 25 years, up to \$8,000.00. For sick leave that accrued but was *not* counted to be carried forward, the employee *also* receives a sum equal to half of the sum of the uncounted sick leave plus 120 hours.

²⁷ Anecdotally, some units are reported to only permit 50% of accrued unused sick or vacation time to be turned in for cash, and some units value unused sick time not by the hourly rate of the employee, but at only 75% of that rate. How this is allowed when it appears clearly at variance with statute has not been explained.

Further, to the degree that sick and vacation time has become a subject of such individual contracts, their valuation is made even more difficult by the possibility that the contracts could be renegotiated prior to the employee's retirement, further limiting or entirely eliminating any or all of these benefits. Thus, an employee could argue that, upon divorce during continuing employment, the benefits are not assignable, but rather are merely overly speculative potential property.

In the meantime, there does not appear to be any Nevada authority on the question of whether to value and divide accrued, unused sick leave and vacation time upon divorce, leaving the Family Courts with the conflicting cases from elsewhere, and the general guiding principles from the Nevada cases indicating that anything that can legitimately be termed "property" acquired during marriage should be valued and divided upon divorce.²⁸

3. Early Retirement by PERS Members

There is no question that when a PERS member takes early retirement, it causes a permanent reduction in the sum of retirement benefits that will be received, because of the statutory reduction of 4% for each year (plus 0.33% for each additional month) that the retirement precedes the required age for retirement as detailed above.²⁹ If a former spouse is to receive a portion of the retirement benefits ultimately paid, then the payments to the spouse will be likewise affected.

This is just one of the specific ways in which there is a conflict between the holdings of *Gemma* and *Fondi* on the one hand ("the employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition solely within the employee spouse's control") and the 1988 holding in *O'Hara* on the other (the "community property interests of a nonemployee spouse do not limit the employee's freedom to agree to terms of retirement benefits").³⁰

²⁸ See, e.g., *Forrest v. Forrest*, 99 Nev. 602, 668 P.2d 275 (1983).

²⁹ NRS 286.510(6).

³⁰ See extended discussion in the Introduction.

III. PERS MATERIALS AND DRAFTING AIDS

A. PERS' Checklist for Drafting Enforceable Orders

QDRO CHECKLIST

The following checklist is to assist you and your attorney in preparing a document that complies with Chapter 286 of the Nevada Revised Statutes.

PART I

Does the Order, Judgment or Decree follow the guidelines and contain the following required information? The responses in this section must be "yes" for qualification of the QDRO.

YES:

Does it specifically direct PERS to pay an allowance or benefit to the Alternate Payee?

Does it relate to child support, spousal support or marital property rights?

Is it properly issued by a court of law for the State of Nevada and signed by a district judge, or by the justices of the supreme court, and entered and certified by the clerk of the district court or clerk of the supreme court?

Does it create or recognize the existence of the eligible alternate payee's right and assign to the alternate payee the right to receive all or part of the member's benefits under a plan when the member's retirement benefits commence?

Does it contain language which authorizes the system to provide specific information to the alternate payee from the retirement file of the member? (In lieu of this provision, the member may file a waiver which allows the ex-spouse to review the member's file. The waiver must be submitted with the QDRO.)

Does it specify clearly the name, last known address and Social Security number of the alternate payee?

Does it state the retirement plan (the Unmodified plan or one of six alternate plans enumerated in NRS 286.590) to which the order applies?

Note: Lacking this information, PERS will assume that the member has sole discretion in the choice of a retirement plan and/or whether to retire or take a refund. Monies payable to an Alternate Payee will be paid in accordance with the benefit plan elected by the member.

Does it specify clearly the amount, percentage, or manner of determining the amount of the allowance or benefit of the member or retired employee that must be paid by the system to each Alternate Payee?

Example: Alternate Payee's Share = 50% x (Years of service credit earned during marriage divided by total years of credited service earned)

If the order establishes payment to the alternate payee based on the period of marriage, the years of service credit earned during the marriage must be either:

1. calculated in the order, or
2. the marriage date given.

Does it specify the number of payments or the period to which the order applies?

Is this optional provision included in the Order?

Does it contain language which provides that if a member dies before the alternate payee begins receiving benefits and a refund of the contribution account is payable, the alternate payee will be eligible to receive the specified share of the refund?

Note: If the member dies before retirement, a refund would only be applicable if the member has no other eligible survivors under NRS 286.671 through 286.6791, inclusive.

PART II

Does the order contain language which is not compatible with the Nevada Revised Statutes, Chapter 286? The responses in this section must be “no” for qualification of the QDRO.

NO:

Does it contain language which requires payment to an alternate payee either in the form of a lump-sum payment, or as an allowance or benefit before the member terminates employment and is eligible for a refund of employee contributions or a retirement benefit? No lump-sum option is available if the member has chosen to receive benefits in any other form allowed under the plan.

Does it require the payment of any type, form, option or amount of benefit other than that allowed under Chapter 286 of the Nevada Revised Statutes?

Note: Receipt by PERS of an order which for any reason does not comply with NRS Chapter 286 will serve as temporary notice to PERS of a forthcoming order regarding distribution of a member's benefits and any attempts to obtain a refund of contributions or retirement allowance from such Member's account will not be allowed for a period of 90 days.

B. PERS QDRO Suggested Clause Set and Commentary

The following clauses have been developed to provide a model for the ready accomplishment of the various tasks required of counsel in dividing PERS retirement benefits. The clauses include means to resolve matters not detailed above, as to disability and survivorship benefits, that are discussed in other sections of these materials.

PROPOSED DIVORCE DECREE CLAUSES FOR PERS DIVISIONS

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that [FORMER SPOUSE] is awarded an interest in [MEMBER]'s pension and retirement interests with the State of Nevada Public Employees Retirement System (PERS), accrued through employment, as follows:

1. The name of the Member is [NAME], Social Security Number 123-45-6789, last known address [ADDRESS], Las Vegas, NV 89108; the name of the Alternate Payee is [NAME], Social Security Number 987-65-4321, last known address [ADDRESS], Las Vegas, NV 89108. Alternate Payee is [STATE RELATION] to the Member and is recognized by a Domestic Relations court as having a right to receive a portion of the allowance or benefit of a member or retired employee from the system.

Use the following paragraph if ALL credits accrued by the Member accrued during the marriage. Substitute "No withdrawals of employee contributions" for the last sentence, if that is the position agreed, preferred, or ordered.

2. The benefit to be payable to the Alternate Payee shall be calculated by means of a formula as follows: All service credits accrued by Member through and including

[DATE OF DIVORCE OR TERMINATION OF SERVICE], as the numerator, and all service credits accrued as the denominator, multiplied by one-half. Any withdrawals from the retirement system shall be divided between the Member and the Alternate Payee in accordance with the same formula.

Use the following paragraph if there was any pre-marital service in PERS, or if there may be any post-marital service. Substitute “No withdrawals of employee contributions” for the last sentence, if that is the position agreed, preferred, or ordered.

[ALT] 2. The benefit to be payable to the Alternate Payee shall be calculated by means of a formula as follows: All service credits accrued by Member from [STARTING DATE] through and including [ENDING DATE] as the numerator, and all service credits accrued as the denominator, multiplied by one-half. Any withdrawals from the retirement system shall be divided between the Member and the Alternate Payee in accordance with the same formula.

Use the below paragraph if following the view that the spousal share is fixed at the Member’s first eligibility for retirement as in the California cases.

3. “Service credits accrued” as used in above formula shall mean all service credits accrued as of the moment of the Member’s first eligibility for retirement.

Use the paragraph below if trying to comply with a literal reading of the *Fondi* decision requiring both immediate distribution to the former spouse at the Member’s first eligibility for retirement, AND an ultimate distribution to the former spouse based upon the benefits “ultimately received” by the Member.

[ALT] 3. “Service credits accrued” as used in above formula shall mean all service credits accrued as of the moment of first eligibility for retirement, for the calculation to be performed at first eligibility for retirement; and shall

mean the total service credits ever received as of the moment the Member actually retires.

4. The retirement system is specifically directed to pay the benefits as determined herein directly to the Alternate Payee at the first date such payments are allowed by statute following the Member's first eligibility for retirement without any early retirement penalty; the retirement system is not required by this order to provide an allowance or benefit not otherwise provided under the statutes governing PERS.
5. This order does not require the retirement system to make payments to an Alternate Payee prior to the retirement of a Member or the distribution to or withdrawal of contributions by a Member, unless the statutes or rules governing PERS allow such a distribution.

The below paragraph requires direct payments by the Member until actual retirement and the commencement of payments from the retirement system directly to the former spouse.

6. Upon the first day of the first month after the Member's attainment of eligibility for retirement without early retirement penalty, and continuing on the first day of each month until payments from the retirement system to the Alternate Payee commence, the Member shall make direct payments of the sum required by the above formula directly to the Alternate Payee.

The following paragraph attempts to secure COLA (Cost Of Living Adjustments) to the pension share payable to the former spouse, in accordance with the schedule of COLA increases that WOULD have accrued if the Member had retired on the date of first eligibility.

7. Alternate Payee shall be entitled to cost of living adjustments to the benefits payable to

Alternate Payee as set out above in accordance with the statutory schedule of such adjustments (NRS 286.5756) that would have applied if Member had retired at the date of first eligibility for retirement without early retirement penalty. When Member actually retires, PERS shall calculate and pay said benefits to Alternate Payee to the extent permissible by law. Until PERS makes such payments, and to whatever extent PERS does not do so, Member shall make such payments directly to Alternate Payee. Alternate Payee shall also share, in accordance with the division of benefits set out above, in any other post-retirement increases added over time to the benefits payable.

The following paragraph secures to the former spouse a portion of the maximum possible monthly benefit, but provides NO protection at all in the event the Member dies prior to the former spouse. If that happens, the former spouse's payments end. Note that for police and fire fighters ONLY, this permits the Member to have a second spouse be a beneficiary of a 50% survivorship interest, without loss to the monthly payments to the former spouse, so long as the Member is married to second spouse on BOTH the date of retirement and the date of death.

8. The Member is required to elect a form of benefit paying the maximum possible monthly annuity.

The following paragraph provides no survivorship interest whatsoever to the former spouse, and permits the Member to name a second spouse as the Member's beneficiary, but it requires the monthly benefit to the former spouse to be the maximum possible sum that might be payable. Use this paragraph if the former spouse does not care about a survivorship interest, but wants to make sure that the monthly payments are in the maximum possible sum.

- [ALT] 8. The Member is permitted to elect any form of benefit available under the plan, but the sum payable monthly to the Alternate Payee shall be calculated as if Member elected the form of benefit paying the maximum possible monthly annuity, against which the formula set out above shall be applied.

The below paragraph secures to the former spouse a survivorship interest equal to what the former spouse WOULD receive if there was NO survivorship interest and the former spouse was receiving a share of the maximum monthly retirement payable to the Member.

[ALT] 8. The Member is required to elect a form of benefit that would pay to the Alternate Payee (in the event of the Member's death prior to that of the Alternate Payee), a sum equal to the amount that would be paid to Alternate Payee under Option One (the unreduced benefit) under the formula set out above. This Order shall be considered by the retirement system to be a deemed election of whatever form of benefit shall accomplish that result.

The following paragraph is an attempt to secure to the former spouse a survivorship interest equal only to the former spouse's interest in the monthly retirement as reduced for purchase of the survivorship interest.

[ALT] 8. The Member is required to elect a form of benefit that would pay to the Alternate Payee (in the event of the Member's death prior to that of the Alternate Payee), a sum equal to the amount that would be paid to Alternate Payee under Option 6 (actuarially reduced benefit paid for the lifetime of the retired employee), with the "specific sum" payable to the Alternate Payee to be calculated as follows: the system shall determine the Alternate Payee's percentage under the formula set forth above once the Member actually retires; the system will then figure the monthly sum payable if the Alternate Payee obtains a survivorship interest sufficient to secure to Alternate Payee the sum payable under that formula; finally, the monthly annuity, reduced for the survivorship benefit, shall be divided in accordance with the formula set out above.

The following paragraph is an attempt to require the retirement system to calculate the actual cost of securing just the interest of the former spouse in the REDUCED (for the

survivorship) benefits, AND require the system to allocate the entire cost of that interest to the former spouse.

[ALT] 8. The Member is required to elect a form of benefit that would pay to the Alternate Payee (in the event of the Member's death prior to that of the Alternate Payee), a sum equal to the amount that would be paid to Alternate Payee under Option 6 (actuarially reduced benefit paid for the lifetime of the retired employee), with the "specific sum" payable to the Alternate Payee to be calculated as follows: the system shall determine the Alternate Payee's percentage under the formula set forth above once the Member actually retires; the system will then figure the monthly sum payable if the Alternate Payee obtains a survivorship interest sufficient to secure to him the sum payable under that formula; the difference between the sum payable to the Member if option One (unmodified) had been selected, and the sum to be paid with the Alternate Payee's interest secured shall then be deducted entirely from the Alternate Payee's portion of the benefits payable. In other words, the Alternate Payee's interest should be secured in such a way that the Member's death will not have the effect of raising or lowering the benefit payable to the Alternate Payee, and the entire premium for that protection should come from the sums payable to the Alternate Payee. This Order shall be considered by the retirement system to be a deemed election of whatever form of benefit shall accomplish that result.

The following paragraph permits PERS to release such information as is required for the system to comply with the court order; it satisfies the non-disclosure/privacy requirements that the system otherwise follows.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Member has waived any privacy or other rights as may be required for Alternate Payee to obtain

information relating to Member's date of retirement, final grade and step, and pay, present or past retired pay, or other such information as may be required to enforce the award made herein, or required to revise this order so as to make it enforceable. PERS is hereby authorized to provide specific information to Alternate Payee from the retirement file of Member for purposes of issues related to this Decree/Order.

The following paragraph provides that if a member dies before the Alternate Payee begins receiving benefits and a refund of the contribution account is payable, the Alternate Payee will be eligible to receive the specified share of the refund (NOTE: this only applies if the Member dies before retirement without a spouse or eligible survivors under NRS 286.671-286.6791).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that if Member dies prior to retirement, and a refund of the contribution account is payable, Alternate Payee shall be paid a portion thereof, in accordance with the above formula, to the degree allowed by law.

The following paragraph is intended to permanently transfer an Alternate Payee's benefit under *Wolff v. Wolff*. However, you can bargain with opposing counsel for reversion of the benefit back to the member.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that if Alternate Payee should predecease Member, Alternate Payee's portion of the retirement benefits will continue to be paid to Alternate Payee's estate.

The following paragraphs are not REQUIRED to divide PERS pensions, but they might be useful to practitioners dealing with common problems in these cases.

The below paragraph is a proposed means of coping with the lack under current law of a pre-retirement survivor annuity.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that [MEMBER] shall obtain a policy of life insurance on [MEMBER]'s life with [FORMER SPOUSE] as beneficiary and owner (or transfer an existing policy to such status) in a minimum amount of [APPROXIMATE PRESENT VALUE OF SPOUSAL INTEREST] and maintain such policy until the date on which [FORMER SPOUSE]'s interest in the retirement benefits set out above are fully secured by the putting into place of survivorship benefits fully protecting [FORMER SPOUSE]'s right to collect the sum specified above irrespective of [MEMBER]'s continued survival.

Alternate clause intended to allow court to award a pre-retirement survivor annuity to replace insurance benefit, if such ever becomes available. This includes the

insurance language, which can be included or excluded depending upon the negotiation or order in individual cases.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the court intends to award to [FORMER SPOUSE] such a pre-retirement survivor annuity as may in the future be available in relation to [MEMBER]'s retirement benefits through the state retirement system (PERS), the court acknowledging that at the moment there is no such benefit available. The court expressly reserves jurisdiction to enter such future orders as may be necessary to carry this intention into effect. Until such time as [FORMER SPOUSE]'s interest as set out above is secured by the establishment of such a pre-retirement survivor annuity, [MEMBER] shall obtain and maintain a policy of life insurance on [MEMBER]'s life with [FORMER SPOUSE] as beneficiary and owner (or transfer an existing policy to such status) in a minimum amount of [APPROXIMATE PRESENT VALUE OF SPOUSAL INTEREST] and maintain such policy until the date on which [FORMER SPOUSE]'s interest in the retirement benefits set out above are fully secured by the putting into place of survivorship benefits fully protecting [FORMER SPOUSE]'s right to collect the sum specified above irrespective of [MEMBER]'s continued survival.

The following paragraph attempts to reserve to the court jurisdiction to allow the Member to provide a survivorship interest to a later spouse of all EXCEPT the survivorship interest granted in this decree to the spouse of the current marriage. Note that it presumes that the spouse is receiving a survivorship interest under Option 6, or under some option other than Option 1, since it presumes that there will be SOME survivorship interest to divide, and that less than 100% of the survivorship interest is being awarded to the spouse in the present case.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that this decree does not provide any capacity for the Member to designate a subsequent spouse as beneficiary of a portion of the survivorship interest in the Plan up to all survivorship interests less those awarded to the Alternate Payee. The court intends to permit the Member to make such an allocation of remaining survivorship, but is unable to exercise that intent due to the limitations of the current law. The court expressly reserves jurisdiction to enter such future orders as may be necessary to carry this intention into effect, by modification of this Decree as required to do so, should the law allow.

The following paragraph is an anti-fraud clause designed to allow the court to treat the spousal share AS the spousal share, even if the entire retirement is merged into another form of benefit.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that if [MEMBER] takes any steps to merge the retirement divided herein with another retirement program of any kind, or takes any action that prevents, decreases, or limits the collection by the [FORMER SPOUSE] of the sums to be paid hereunder, [MEMBER] shall make payments

to [FORMER SPOUSE] directly in an amount sufficient to neutralize, as to [FORMER SPOUSE], the effects of the action taken by [MEMBER]. Any sums paid to [MEMBER] that this court order provides are to be paid to [FORMER SPOUSE] shall be held by [MEMBER] in constructive trust until actual payment to [FORMER SPOUSE].

The below paragraph reserves jurisdiction to the court to correct anything that goes wrong with the attempted division of the retirement benefits.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Court shall retain jurisdiction to enter such further orders as are necessary to enforce the award to [FORMER SPOUSE] of the PERS retirement benefits awarded herein, in accordance with the provisions of Nevada case and statutory law, including the recharacterization thereof as a division of Civil Service or other retirement benefits, or to make an award of alimony in the event that [MEMBER] fails to comply with the provisions contained above requiring said payments to [FORMER SPOUSE] by any means, including the filing of bankruptcy, or if government or other regulations or other restrictions interfere with payments to [FORMER SPOUSE] as set forth herein, or if [MEMBER] fails to comply with the provisions contained above requiring said payments to [FORMER SPOUSE].

C. PERS' Own Model QDRO Form

Plaintiff

vs.

Defendant

_____ /

QUALIFIED DOMESTIC RELATIONS ORDER

This Order is intended to be a Qualified Domestic Relations Order (“QDRO”) as it pertains to “Participant” and “Alternate Payee” under the provisions of the Public Employees’ Retirement Act codified at Chapter 286 of the Nevada Revised Statutes (the “Act”) and the policies enacted pursuant thereto, effective on or after October 1, 1993.

This Order creates or recognizes the existence of an Alternate Payee’s right to, or assigns to an Alternate Payee the right to receive a portion of the benefits payable to a plan Participant. It also serves as authorization for the Public Employees’ Retirement System (the “System”) to provide specific information concerning the account to the Alternate Payee at any time.

This Order does not require the System to provide any type of or form of benefit, or any option, not otherwise provided under the Act and policies or require the System to provide increased benefits.

It is the intent of this Order to qualify as a Qualified Domestic Relations Order under the Act and policies and the provisions herein shall be administered and interpreted in conformity with the provisions of the Act and policies.

The following definitions apply to this order:

PARTICIPANT. Participant is defined as the member of the Public Employees' Retirement System.

_____ is a Participant hereunder and his/her last known mailing address is _____ and his/her date of birth is _____ and his/her social security number is _____.

ALTERNATE PAYEE. Alternate Payee is defined as a spouse, former spouse, child or other dependent of a Participant who is recognized by this Order as having a right to receive a portion of the benefits payable under the Act with respect to such Participant.

_____ is the Alternate Payee of the Participant and his/her last known mailing address is _____ and his/her date of birth is _____ and his/her social security number is _____. The Alternate Payee is the [specify whether a spouse, former spouse, child, etc.] of the participant.

DOMESTIC RELATIONS ORDER. Domestic Relations Order means any judgment, decree or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent, and is made pursuant to a State of Nevada domestic relations order (including community property law).

This Order is entered pursuant to the laws of the State of Nevada.

OTHER DEFINITIONS. Any other definitions necessary to effectuate this Order shall be adopted from the Act and the policies adopted pursuant thereto, as may from time to time be amended. These definitions shall include any and all definitions, terms or conditions required by statute to qualify this Order as a QDRO.

PLAN. The name of the plan to which this Order applies is the Public Employees' Retirement System/Legislators Retirement System/Judicial Retirement System. The Plan is specifically directed to pay benefits pursuant to this Order.

PLAN ADMINISTRATOR. The Plan Administrator is the Executive Officer, George Pyne, whose address is 693 West Nye Lane, Carson City, NV 89703.

AMOUNT OF BENEFITS. The division of the Participant's and the Alternate Payee's portion of the benefit under the plan is as follows:

The Alternate Payee is entitled to a portion of the Participant's retirement benefit based upon a mandatory selection of **[please specify one option if applicable: the unmodified plan (option 1), or one of the options 2 through 6, as set forth in NRS 286.590]** upon retirement in accordance with a set percentage of _____ **[or the following distribution formula]:**

[The Public Employees' Retirement System will comply with any distribution formula arrived at by the parties provided the distribution formula or method does not result in a violation of the Act or policies nor does it contemplate a benefit in excess of what has been accumulated by the Participant according to the plan. The formula must be stated in clear terms, not subject to more than one interpretation. If the System cannot arrive at a clear determination of the benefit amount to be paid to the Alternate Payee, the order will be rejected for purposes of clarification. Additionally, the System will not pay a benefit to an Alternate Payee prior to the actual retirement of the Participant.]

[If the order establishes payment to the Alternate Payee based on the period of marriage, the years of service credit earned during the marriage must be (1) calculated in the order or (2) the marriage date given].

50% x $\frac{\text{Years of Service Credit Earned During Marriage}}{\text{Total Years of Service Credit Earned}}$

TIME PERIOD. The Alternate Payee shall be entitled to the benefit as calculated above for [period of years beginning with date of Participant's retirement, or as long as Participant is receiving benefits or for some other period chosen by the parties so long as clearly stated and in compliance with the Act]. The Alternate Payee is entitled to payment under the above described formula (or flat dollar amount less than the full benefit) as applied to option _____ (unmodified benefit or one of the six enumerated options set forth at NRS 286.590) [Note: Lacking this information, the System will assume that the Participant has sole discretion in the choice of a retirement plan and/or whether to retire or take a refund of contributions made if available. Monies payable to an Alternate Payee will be paid in accordance with the benefit plan elected by the Participant].

RETENTION OF JURISDICTION. The Court shall retain jurisdiction to amend this Order for the purpose of establishing or maintaining its qualifications as a QDRO, or for purposes of subsequent amendment as required. Neither this Order nor any amendment shall require the System to provide any type or form of benefit, or, any option not otherwise provided for under the Act. It is further provided that any amendment of this Order or the right of the Court to so amend will not invalidate this Order as "qualified" under the Act.

ADMINISTRATOR. A certified copy of the Order shall be served upon the Plan Administrator.

Said Order is subject to review by the Administrator and if approved by the Administrator is effective on the date set forth herein. If this Order is determined by the Administrator to be a QDRO then the Plan Administrator shall, within a reasonable period of time after delivery of this Order, notify the Participant and the Alternate Payee of such determination. If the Administrator determines that the Order does not qualify as a QDRO the Administrator shall, within a reasonable period of time, notify the Participant and the Alternate Payee of the reasons for such determination and shall, if the Participant is to retire within 90 days of the Order maintain the benefit under Option 2 as set forth in NRS 286.545, for a period of 90 days from the date of the Participant's retirement to allow modification of this Order for qualification.

This Order is intended to be merged to the decree of divorce in this matter, and is subject to all provisions of that Decree except in cases where this QDRO and the Decree contradict, in which case the QDRO shall control.

OPTIONAL PROVISIONS. If the participant dies before the alternate payee begins receiving benefits in accordance with the plan selected and a distribution of contributions is available from the account of the participant, the alternate payee shall receive _____% of the distributed refund.

(Note: this provision does not entitle the alternate payee to receive a portion of payable survivor benefits, as those benefits are only payable to a current spouse or dependent children of the participant, or the designated beneficiary listed on the PERS Unmarried Members of the System Form).

DATED: _____

Member

DATED: _____

Former Spouse

APPROVED AS TO FORM AND CONTENT

DATED: _____

Attorney for Plaintiff

DATED: _____

Attorney for Defendant

ORDER

Pursuant to Stipulation by the Parties, **IT IS SO ORDERED.**

DATED this _____ day of _____, 200__ .

DISTRICT COURT JUDGE

IV. CONCLUSION

The Nevada State PERS retirement system is, for the most part, a reasonably straightforward defined benefit plan. It does, however, have peculiarities and limitations, and it is incumbent on all divorce practitioners who represent PERS members (or their spouses) to learn the details of the system, and to deal with division of the retirement benefits themselves, and the related survivorship, sick and vacation leave issues that are necessarily implicated whenever any member of the system is divorced.

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