

THE DANGER OF *DAVIDSON* TO PENSION DIVISIONS

The Nevada Supreme Court has again increased the likelihood of unjust enrichment and wrongful deprivation in divorce cases by holding laymen to technical legal requirements. In *Davidson v. Davidson*, 132 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 71, Sep. 29, 2016), the Court denied to a spouse her half of the equity in a home when she did not formally sue her ex soon enough, holding that NRS 11.190(1)(a) bars the enforcement of a divorce decree six years after the “last transaction or the last item charged or last credit given.”

In *Davidson*, the husband was awarded the house in the divorce, and the wife signed and delivered a quitclaim deed, but the parties cohabited for another 5 years. Three years after their final break-up, the ex-wife moved to enforce the Decree term entitling her to half the equity. The trial court denied the wife’s claim on the basis that more than six years had passed since the Decree issued.

The Supreme Court affirmed. Again focusing on property distributions in divorce, the Court held that the “Nevada legislature did not grant the family courts the authority to endlessly enforce divorce decrees.”

Our Court has an unfortunate history of applying legal technicalities harshly to deprive spouses of community property, especially in the area of pensions.¹ *Davidson* is troubling for many reasons, including that it might require parties peacefully cohabiting to sue one another in order to vindicate their property rights, in apparent contradiction of well-established authority² and the cases holding that statutes of limitations are stayed during marriage³ and cohabitation.⁴

Beyond those general problems, the sweeping language of *Davidson* poses a risk that judges might decide not to enter QDROs or other pension-division orders in cases involving divorces entered more than six years earlier.

It is *extremely* common for parties to divorce while still employed, and not think to enter a QDRO until someone retires many years later. For a lot of reasons, doing so is a risky mistake,⁵ but it does not mean that parties should be deprived of their share of marital property.

Similarly, it would be absurd to require a non-employee spouse to “renew” a divorce judgment every six years – perhaps for decades – until an employee

spouse retired and benefits actually became payable, but that would be the logical result of considering a QDRO to be “enforcement” of a decree under the overly-broad language employed in *Davidson*. Still, there is some authority elsewhere that a statute of limitation to get a pension-division order filed starts to run upon entry of a divorce decree.⁶

But the great weight of authority recognizes that the divorce decree constitutes the actual “division” of the asset as between the parties, and entry of a QDRO is merely a ministerial act directing a *third party* to act, in recognition of the spouse’s already-adjudicated right to the benefits.⁷

Davidson specifically acknowledged earlier authority holding that a statute of limitations runs against each installment of a pension as it becomes due.⁸ Courts elsewhere, based on the same holding, have found that a spouse’s right to payments was complete upon entry of the decree, and nothing requires a QDRO to be filed within any specific time after that decree.⁹

The *Davidson* decision is problematic for several reasons, but under no condition should it be extended to deny enforcement of a non-employee spouse’s already-adjudicated separate property interest in a pension, no matter when the employee spouse retires, and no matter when the QDRO is submitted.

If and when this issue presents itself in Nevada, the deciding court should follow the jurisdictions that have ruled in favor of protecting the adjudicated separate property interest of a former spouse, finding that entry of a QDRO is a ministerial act directed at a third party to enforce a final court order.

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¹ See Marshal Willick, *Partition Actions: What Every Nevada Divorce Lawyer Needs to Know* (in *Advanced Family Law CLE*, State Bar of Nevada, Las Vegas, Nevada, Dec., 2015), posted at <http://www.willicklawgroup.com/published-works/>.

² See, e.g., *Hay v. Hay*, 100 Nev. 196, 678 P.2d 672 (1984) (former wife could sue former husband for property acquired during the decades that the parties cohabited starting right after they divorced).

3 *In re Estate of Crawford*, 730 P.2d 675 (Wash. 1986) (issue of validity of marital agreements are tolled during marriage); *Cord v. Neuhoff*, 94 Nev. 21, 573 P.2d 1170 (1978) (1974 action challenging 1953 postnuptial agreement was perfectly permissible).

4 *See Maglica v. Maglica*, 66 Cal. App. 4th 442, 78 Cal. Rptr.2d 101 (1998) (quantum meruit claim tolled during cohabitation; limitations period for the claim runs from the date the relationship ended).

5 *See* Legal Note Vol. 16, *When QDROs Should Be Drafted* (May 11, 2010), posted at <http://www.willicklawgroup.com/newsletters/page/3/>.

6 *See In re Larimore*, 362 P.3d 843 (Kan. App. 2015) (“the division of a party’s retirement account in a divorce decree constitutes a judgment subject to dormancy . . . when, as in this case, the division qualifies as a final determination of the parties’ interests in the marital estate”).

7 *See Duhamel v. Duhamel*, 753 N.Y.S.2d 673 (N.Y. Sup. Ct. 2002) (action to compel the entry of a QDRO is an action “to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties’ own binding agreement” and is not subject to the limitations period on actions to enforce a judgment); *see also Jordan v. Jordan*, 147 S.W.3d 255 (Tenn. Ct. App. 2004); *Johnson v. Johnson (Zoric)*, 270 P.3d 556 (Utah 2012); *Gilmore v. Gilmore*, 227 P.3d 115 (N.M. 2009); *Ochoa v. Ochoa*, 71 S.W.3d 593 (Mo. 2002).

8 *Bongiovi v. Bongiovi*, 94 Nev. 321, 579 P.2d 1246 (1978).

9 *Fischbach v. Fischbach*, 975 A.2d 333 (Md. Ct. App. 2009); *Ryan v. Janovsky*, 999 N.E.2d 895 (Ind. Ct. App. 2013) (20-year delay in having QDRO prepared is not relevant where benefits have not yet entered pay status, so no statute of limitations had even begun to run. The wife’s right to a share of the pension “arises from the settlement agreement; the QDRO only creates her right to be paid directly from the pension plan”).