Death by PERS: Tips and Traps of PERS Retirement Division and Survivorship Options

by

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BIOGRAPHY

Marshal S. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American Academy of Matrimonial Lawyers (AAML) and the International Academy of Family Lawyers (IAFL), former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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There are many common PERS missteps that can subject you to liability. These materials will step through some of the misperceptions that we see repeatedly. Not recognizing them can bite counsel (and their clients) in negotiations, mediation, and in the courtroom, and subject counsel to liability from their clients. Knowing at least the basics enables practitioners to make better decisions and protect their clients' interests.

1. Misunderstanding What Is Actually Available For Division

The Nevada Public Employees Retirement System (PERS) is basically a defined benefit plan. In other words, the member works for a number of years, and once vested and at retirement age (which varies, as explained below), receives a benefit payable monthly for the remainder of the member's life.

Some PERS employees have a separate deferred compensation account or other defined contribution accounts[1] which have a cash value. If you are involved in a case where one of the employees has a PERS pension to be divided, make sure you investigate and ascertain if there is also a deferred compensation plan to be addressed.

2. Attempting to Equalize Other Community Property with a PERS Pension

Some States require that during a divorce, all pensions are to be "valued" at the time of divorce with that value being placed on a marital balance sheet. Fortunately, Nevada is not one of those States. However, you will find some attorneys hiring actuaries to value the PERS pension or attempting to apply a value to the pension to accomplish an equalization.

This process is fraught with danger as there is no sure way to precisely value a defined benefit pension. You have no real idea when the parties will die or what the ultimate value of the pension will be until the member is actually retired.

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[1] This may be in the form of a 403(b) or a 457(b) account. They are similar to the more well known 401(k).

In Nevada, the former spouse is entitled to a time rule share of the ultimate benefit received[2] and that amount is unknown until retirement. A "cash out" of the spousal share cannot be compelled, under *Sertic*; choosing to do so requires agreement and various other requirements as set out in that case.

Perhaps the most common error we see in attempts to balance any pension or retirement account with other community property assets is the failure to consider the tax consequences. Most (but not all) IRAs, 401(k) accounts, deferred comp accounts, etc., are ***pre-tax*** assets that cannot be directly offset against regular post-tax assets such as houses, cars, or bank accounts.

Any attempt to balance other assets against a pension must consider the tax consequences, since pre-tax assets may only be "worth" 70-80 cents of their stated face value. Direct offsetting could cost the client many thousands of dollars.[3] Rolling over rather than distributing the spousal portion of the accounts defers, but does not eliminate, the tax.

The same effect is seen whenever such pre-tax pension benefits are used, in indemnification QDROs or otherwise, to satisfy spousal support, child support, or other property arrearages.[4]

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[2] See *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).

[3] As an example, if the deal was that the PERS member would retain a pre-tax deferred compensation account with $20,000 contributed during the marriage, and the spouse would receive a $20,000 stock account, the PERS member would only be receiving about $15,000 in value, to the spouse's $20,000.

[4] If the member owed $5,000 in child support arrearages and the arrearages were ordered to be recovered from the member's share of the deferred compensation account, the former spouse would lose approximately 20% due to the tax on that money when it is paid out to the former spouse. If the money was rolled over to the spouse's tax deferred account and then paid out, it would be even worse – the former spouse would also have to pay a 10% penalty on an early withdrawal, in essence only getting $3,500 of the $5,000 owed.

3. Not Accounting for the Member's Possible Death Before Retirement

PERS does ***not*** provide a pre-retirement survivorship interest for the spouse. In other words even if you have a QDRO in place, if the participant dies before retiring, ***all*** benefits – including survivor benefits for the former spouse – are lost.[5]

A prudent attorney will get an order that the former spouse may obtain an insurance policy securing the spousal interest, to remain in place at least until the member actually retires (this is discussed further below). We have seen several cases where this was not done, the member died before retiring, the former spouse got nothing, and then tried to sue the lawyer alleging that she was not warned of that possibility.

4. Not Understanding Nevada Law On First Eligibility

Nevada Law allows for payment of retirement benefits to the former spouse at the participant's first eligibility to retire.[6] The concept is that the rights of the former spouse should not be affected by the unilateral action of the participant, including continued employment after achieving eligibility to retire.

An amazing number of Nevada lawyers do not realize this, and attorneys for spouses are setting themselves up for malpractice liability by permitting orders to be entered that call for payment to the spouse "upon retirement."

PERS will not pay anything to the former spouse until the participant actually retires. This requires the order to clearly provide that the member is to make payments to the former spouse upon eligibility for retirement until the plan (PERS) begins to make the payments after actual retirement.

Some members will vow to continue working until they die to divest their former spouse of their property interest. Nevada law allows for the former spouse to make a request (usually requiring a motion)[7] to begin receiving benefits at the first opportunity for the member's retirement.

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[5] There is a small "death benefit" for surviving current spouses, but that is ***not*** the survivorship benefit under the retirement.

[6] See *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

[7] See *Henson v. Henson*, 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, October 2, 2014).

5. Not Understanding PERS' Multiple Retirement Eligibility Dates

Unlike may retirement systems, PERS does not have a single universal age of eligibility for retirement – it varies from employee to employee based on a couple of different factors: age and length of service.

Most PERS participants are eligible for retirement at age 65 with five years of service, or 60 with ten years of service, or any age with thirty years of service.[8] Certain employees operate under separate rules, however. Police and fire-fighters also can retire at age 65 with five years of service, but they become eligible to retire at age 55 with ten years of service, or age 50 with 20 years of service, or at any age with 25 years of service.[9]

So a regular PERS employee who joined the system at age 18 could retire with full benefits at the age of 48; if police/fire, that age could be 43.

The point is that in ***every*** PERS case where the member is still employed, counsel must project the possible retirement dates for the member, considering the possibility of continuing service, and of leaving service at any time.

6. Not Accounting for the Participant's Full Reversionary Interest in the Pension Benefits

In every system like PERS – in which the payments (but not the retirement itself) can be divided – the structure of the plan determines what happens to the ***former spouse's*** portion of the payment stream if the former spouse dies first: the payments revert to the employee.

Where the ***employee*** dies first, however, various results are possible.

For a former spouse to continue receiving money after death of the employee, there must be specific provision made by way of a separate survivorship interest payable to the former spouse upon the death of the member. Otherwise, payments being made

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[8] NRS 286.510(1).

[9] NRS 286.510(2).

to the former spouse simply stop; this is just one of the ways in which the employee's rights are superior to those of the non-employee, even when benefits are "equally" divided.[10]

The only known way to cope with this imbalance while the member is still in service is through private insurance on the life of the member, payable to the former spouse, and therefore provide the parties with comparable security for their respective insurable interest in the other party's life.[11]

Once the member retires, if an option was selected providing a survivorship benefit for the spouse, ***both*** parties' interests are "secured." If not, the member's interest is secured, but not that of the former spouse.

Only by securing both parties' interests can counsel – and the Court – obey the mandate of NRS 125.150 and *Blanco*[12] to equally divide the benefits and burdens of community property upon divorce. Any Decree and PERS QDRO that does not secure the spousal share both before and after the member's retirement is in violation of that statutory and case law, and subjects counsel to potential malpractice liability.

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[10] For example, PERS provides that the option selection will be "automatically adjusted" to option one (the unmodified allowance) if a spouse or former spouse with a survivorship option predeceases the member. NRS 286.592(1). The system has no corresponding benefit to protect a former spouse – it has no "pre-retirement survivorship 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.

[11] 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).

[12] *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013).

7. Not Knowing the Options

PERS provides multiple "options" under which a retiring member can give up a bit of the lifetime benefit payment stream in exchange for varying death benefits to be paid to an eligible survivor beneficiary. This is ***how*** the spousal share is secured – by choosing an option with a survivorship interest. But there are multiple choices available.

Options 1 is the "Unreduced" benefit, paying the largest possible lifetime sum, but providing no survivorship.[13] If the member dies, all payments to the former spouse stop.

Option 2 provides an actuarially reduced lifetime sum, with the same amount paid to the survivor for life. This is akin to a "100% joint and survivor annuity" in the world of private pensions.

Option 3 provides an actuarially reduced lifetime sum, with 50% of the lifetime sum paid to the survivor for life. This is akin to a "50% joint and survivor annuity" in the world of private pensions.

Option 4 is the same as Option 2, except no benefits are payable to the survivor until that person reaches age 60. If the divorce occurs when the parties are in their mid-50s, this often makes sense as a choice because it is cheaper than an Option 2 selection, with little added risk.

Option 5 is the same as Option 3, except no benefits are payable to the survivor until that person reaches age 60.

Option 6 allows the creation of a customized survivor interest (to match the sum being paid during life to the former spouse, or otherwise), which actuarially reduces the lifetime benefit.

Option 7 is the same as Option 6, except no benefits are payable to the survivor until that person reaches age 60.

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[13] This is for all PERS participants ***except police/fire***, who can select Option 1, get the maximum lifetime benefit, and ***also*** get a 50% survivor annuity without cost for a spouse; the benefit vests in the spouse married to the member at the moment of retirement, even if the marriage subsequently ends.

It is imperative that the attorney understand each of these options and that a clear award of a survivorship option be selected at the time of divorce. The decree should unambiguously state i.e., "the participant is required to select Option 2 at the time of retirement..." That order should, of course, be served on PERS.

8. Not Understanding the Limit of PERS' "Spousal Consent" Rules

Since 1987, PERS has had a rule appearing to require spousal consent to the form of retirement chosen.[14] Under that provision, however, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days.[15]

Apparently, the burden is on the spouse to get a court order prohibiting the member from choosing a different retirement option within the 90 day period. Essentially, a spouse for whom no survivor designation is made who is unhappy with that fact has 90 days to choose to divorce his or her spouse and get a court order mandating a different option. Further, 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]

9. Not Understanding PERS COLAs

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 are) fixed, unrelated to inflation, actual cost of living, or any other economic information.[17]

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,

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[14] *See* NRS 286.541.

[15] *See* NRS 286.545.

[16] NRS 286.541.

[17] PERS does not use the term "COLA." They call the process "post-retirement increases."

3.5% per year after nine years, 4% per year after 12 years, and 5% per year after 14 years.[18]

The point is that the monthly sum payable will increase. Among the considerations of this fact is that a spousal share paid after eligibility for retirement but before actual retirement should also include the COLAs that would be payable if the member had actually retired, and the ability to re-adjust the spousal percentage to reflect a correct dollar distribution at the time of actual retirement.

10. Not Getting the PERS QDRO Filed With the *Decree*

The potential malpractice clock starts ticking the moment a Decree is entered without a QDRO also being filed. Prudent counsel will make sure that both are filed at the same time, because if someone should die before survivorship interests are protected by formal court order, a lifetime stream of benefits can be lost.

Counsel looking out for their own enlightened self-interest should pay attention to this point. Most malpractice cases involve allegations that counsel did not seen to securing retirement or survivorship benefits for a spouse. The case law indicates that the scope of damages is whatever funds the client did not receive because of the error.

The solution is simple. If a retirement is in issue, obtain expert assistance to draft the orders ***before*** negotiating or litigating the rest of the case. The non-employee loses all leverage to negotiate terms once the MSA or decree is completed, and discovery is only available ***prior*** to the divorce. The risk of completely losing retirement or survivorship interest arises at the moment of divorce, and continues escalating with each day that goes by thereafter.

Make sure the order is served on the plan, or the order won't actually accomplish anything. Get verification of service, and to make sure the client gets a copy of that verification. Filing the proof of service with the court entering the Decree and QDRO is also a good idea.

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[18] *See* NRS 286.575; 286.5756.

A BIT MORE PERS INFORMATION

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

In 1993, the Nevada Legislature approved AB 555, which basically emulated language in the ERISA/REA rules governing Qualified Domestic Relations Orders ("QDROs") for private retirement plans. 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.[19]

The system has been amended several times, creating classes of PERS retirees depending upon when they began service, and when service credits accrued. 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.[20] 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.[21]

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.[22]

PERS is mainly a "non-contributory" system. Certain workers have paid in to "member's contribution" accounts from the days when PERS had employee as well

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[19] NRS 286.6703(4).

[20] NRS 286.551(1).

[21] NRS 286.551(1)(a)-(b).

[22] NRS 286.6793. This use of "survivor" is not construed by PERS as including a former spouse.

as employer-paid funding. That amount is refundable in certain circumstances, and may be applied to the (divisible) retirement in others.

The legislative history of NRS 125.155 exhibits much confusion as to when, precisely, PERS participants are "eligible to retire." As discussed above, eligibility for retirement varies per employee depending on age and years of service.

As discussed above, there are several options under PERS for the form of monthly benefits, securing various levels of survivorship payments for beneficiaries.

The adoption of individual phrases and pieces of ERISA terminology in the PERS statutes carried with it a large potential of confusing the field and leading to unintended consequences.[23] The five requirements in the statutory amendment[24] for an order to be enforced by PERS were:

> 1. It must clearly specify the names, Social Security numbers, and last known mailing addresses, if any, of the member and the alternate payee.[25]
>
> 2. 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.
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> 3. It must specifically direct the system to pay an allowance or benefit to the alternate payee.
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> 4. It must not require the system to provide an allowance or benefit or option not otherwise provided under the statutes governing PERS.

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[23] 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.

[24] Enacted as NRS 286.6703(3)(a)-(e).

[25] By later amendment, the Social Security number requirement was eliminated.

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

There was extremely little debate or examination of the detail of the PERS amendments; what little there was shows that the PERS representatives were quite hostile to "the courts legislating divorce law on the pension plans."[26] The legislative history indicates that the sole objective of the terminology used was to shield PERS from any court direction or demand to distribute benefits other than as set out by the Plan's terms, not to render them invalid as a matter of law.

The PERS "options" providing for no survivorship or varying survivorship benefits for a former spouse are detailed above. While it is apparently not published, the life table used by PERS is reported to be gender-blind.

Some of the more troubling aspects of PERS' survivorship provisions are discussed above, including the lack of any meaningful spousal consent sign off before losing survivorship interests, and the complete lack of protection of the former spouse from total divestment if the member dies prior to retirement.

The PERS statutes create a necessarily unequal distribution of benefits, despite the mandate in NRS 125.150 that courts equally divide property upon divorce. Any plan with an automatic reversion of the spousal share to the member, should the spouse die first, creates a problem in States, like Nevada, in which the marriage and divorce laws provide that the parties have present, existing, and equal interests in property acquired during marriage, and that property is to be divided equally upon divorce.

The member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the ***full amount of the spouse's share*** of the lifetime benefit if she should die before him. If the former spouse dies first, the member not only continues to get ***his*** share of the benefits, but he will ***also*** get ***her*** share, for as long as he lives. If the member dies first, however, the spouse gets nothing, unless an option is selected with a survivorship provision.

The ***only*** person for whom a survivorship interest has any cost is the former spouse. If both parties are to share benefits, and burdens, of the assets and liabilities

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[26] *See* colloquy between Assemblyman McGaughey and Mr. Pyne from PERS, in Minutes of Assembly Committee on Government Affairs, May 11, 1993, considering AB 555.

distributed, they must equally (or as equally as possible) bear this cost as well, just as they share the zero cost of the member's survivorship interest in the spouse's life. Otherwise one of them gets a survivorship benefit for free, and the other gets a survivorship benefit at significant cost – which would appear to violate the law requiring the presumptively equal division of property.

Unless one believes that upon divorce one party is entitled to a greater share of the benefits, and a lesser share of the burdens, accrued during marriage, then it is necessary to deal with the structure of any retirement system so that the parties benefit, and are burdened, as nearly equally as may be made true. In a PERS case, that would seem to require dividing the burden of the only survivorship benefit that ***has*** a cost – the one for the benefit of the spouse – between the parties.

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

Another problematic artifact of the PERS system is that survivorship interests are non-divisible between successive former spouses, or between a former spouse and a current spouse. Some creative counsel have accomplished this result anyway, by having the relevant court order call for such a division, and having PERS pay the survivorship interest (in one of the beneficiary's names) to a trustee who then divides the benefit.

As of this time, PERS simply refuses to abide by a specific holding of the Nevada Supreme Court as to whether the spouse's lifetime benefit stream may be left to spouse's heirs. In *Wolff*,[27] the Court affirmed the order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate, on the basis that the community interest was divided upon divorce to two sole and separate interests, so that even if her estate was not listed as an

[27] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

alternate payee as defined in NRS 286.6703(4), the estate was entitled to the payments that she would have received if alive.[28]

To date, in every known instance, PERS not only has refused to directly make payments to a spouse's estate in accordance with that holding, it has reportedly refused to even accept orders submitted stating that an individual ***member*** is required to make those payments if the spouse dies first. It is apparently PERS policy to reject any proposed order reciting the Nevada Supreme Court's holding in *Wolff* on that point.[29]

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

When it proposed the scheme of QDRO-like regulations in 1993, PERS submitted and the Nevada Legislature approved a mechanism for the payment to alternate payees of sums found to be due to those persons by order of "a district court or the

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[28] The decree provided that "[Roberta's] vested Community Interest in [Gerhard's] Retirement does not terminate upon [Roberta's] death and continues to her estate until [Gerhard's] death." Gerhard argues that this provision violates "public policy, and, more specifically, [is] in direct conflict with the Public Employees Retirement System of Nevada." The Nevada Supreme Court held that "Although a former spouse's estate is not encompassed by the definition of alternate payee in NRS 286.6703(4), we conclude that Roberta's estate should be ***entitled*** to her share of Gerhard's retirement benefits upon his death. Upon divorce, the community interest that Gerhard and Roberta had in Gerhard's retirement became the separate property of each former spouse. See 15A Am. Jur.2d Community Property § 101 (1976). Consequently, Roberta's estate is ***entitled*** to her portion of Gerhard's retirement in the event that Roberta predeceases Gerhard. Accordingly, the district court did not abuse its discretion by requiring Gerhard to pay Roberta's estate her share of the retirement benefits if Roberta predeceases Gerhard." 112 Nev. 1362 (emphasis added).

[29] One such rejection received by this office flatly stated: "In the event the Alternate Payee predeceases the 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."

supreme court of the State of Nevada relating to child support, alimony or the disposition of community property."[30]

It is inappropriate for PERS to refuse to honor the opinion of the Nevada Supreme Court, except where a statute ***specifically*** makes it impossible for the system to comply with such an order. Since no statute prohibits payments to the estate of a former spouse, or prohibits court orders directing a member to make such payments, PERS should be ordered to alter its policy.[31]

CONCLUSIONS

It is Russian Roulette for divorce lawyers to ***not*** deal with retirement benefits during the course of a divorce. Sooner or later, something will go wrong (for example, if survivorship interests are not secured, it tends to be discovered when people happen to die in an inconvenient order), and the lawyer will look like a target of opportunity.

It is ***possible***, of course, that with adequate CYA letters, etc., lawyers could make it their clients' problems to figure out what to do after the divorce and try to get it done. But it is far better lawyering – in the client's interest and that of the attorney seeking to avoid potential liability – to deal with the retirement benefits during the divorce. Doing so means making sure the proper orders are in place at the time of entry of the Decree – and making sure the relevant retirement plans acknowledge getting them.

PERS cases involve some technical rules, and multiple opportunities to look out for the legitimate interests of both parties, or to fail to do so. To competently serve their clients – and to avoid liability – every lawyer in every PERS case must know how to

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[30] NRS 286.6703.

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

deal with both retirement and survivorship interests, or obtain adequate assistance to do so.

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