

Case No. 73977

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KILGORE
Appellant

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Elizabeth A. Brown
Clerk of Supreme Court

v.

ELENI KILGORE
Respondent

AND

ELENI KILGORE
Cross-Appellant

v.

RICHARD KILGORE
Cross-Respondent

Appeal and Cross-Appeal

From the Eighth Judicial District Court, Family Division
The Honorable Cheryl B. Moss, District Judge
District Court Case No. D-12-459171-D

RESPONDENT ANSWERING BRIEF
CROSS-APPELLANT'S OPENING BRIEF

FRED PAGE, ESQ.
NEVADA BAR NO. 6080
5940 SOUTH RAINBOW BLVD.
LAS VEGAS, NEVADA 89118
T: (702) 469-3278
F: (702) 628-9884
Attorney for Respondent/Cross-Appellant

I.
NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made so that the justices of this Court may evaluate possible disqualifications or recusal:

1. There are not corporations or entities subject to this disclosure;
2. Fred Page, Esq. has represented Respondent/Cross-Appellant in this appeal and in the district court case.
3. Roger Guiliani, Esq. represented Respondent/Cross-Appellant in the district court case.
4. Leo Flangas, Esq. represented Respondent/Cross-Appellant in the district court case.
5. Respondent is not using a pseudonym.

PAGE LAW OFFICE



FRED PAGE, ESQ.
Nevada Bar No. 6080
5940 South Rainbow Blvd.
Las Vegas, Nevada 89118
Telephone: (702) 469-3278
Facsimile: (702) 628-9884
Attorney for Respondent/Cross-Appellant

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TREATISES

Nevada Family Law Practice Manual §2F.34.

I.
JURISDICTIONAL STATEMENT

This is an appeal from a final judgment pursuant to NRAP 3A(b)(1). The district court entered final judgment on August 21, 2017.¹ Richard timely filed a Notice of Appeal on September 6, 2017.² Eleni timely filed a Notice of Cross-Appeal on September 15, 2017.

II.
ROUTING STATEMENT

This case is presumptively assigned to the Intermediate Court of Appeals per NRAP 17(b)(5), as the issue concerns community property rights relating to divorce. Because this case, however, raises issues of statewide public importance, the Supreme Court may wish to hear it. NRAP 17(a)(14).

The issues involved contain an important interpretation of whether a spouse may be deprived of his or her share of community property in contravention of the statute by employee spouse continuing to work beyond their first eligibility for first retirement. Many employee and non-employee spouses may be affected by this decision.

¹ 8-JA-001560-1562

² 8-JA-001559

III.
STATEMENT OF ISSUES ON APPEAL AND CROSS-APPEAL

1. Whether the district court erred in requiring Appellant to begin making payments on Respondent's community property share of his developed the account to full maturity, thereby imposing a *de facto* retirement penalty.
2. Whether the district court erred in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets without allowing for an offset of his community property share of Respondent's divided retirement assets;
3. Whether the district court erred in ordering a division of Appellant's vacation/sick time.
4. Whether the district court erred in refusing to order Appellant/Cross-Respondent to commence full payment of Cross-Appellant's community property interest in the PERS retirement account to Respondent/Cross-Appellant in Appellant/Cross-Respondent's name upon his first eligibility for retirement.

IV.
STATEMENT OF THE CASE

This is an appeal and cross-appeal from a Post-Decree of Divorce evidentiary hearing filed August 21, 2017; Hon. Cheryl B. Moss presiding. The parties were

divorced from each other on March 13, 2013. In the Decree, the parties were awarded their respective time-rule share of the other's defined contributions plans with the state of Nevada Public Employees Retirement System. The parties also later executed and filed a Qualified Domestic Relations Order that required Appellant/Cross-Respondent to commence paying Respondent/Cross-Appellant's share of the community property to her upon Appellant/Cross-Respondent's first eligibility for retirement.

Appellant/Cross-Respondent had accrued valuable vacation/sick time with the City of Las Vegas at the time of the Decree was entered that was never discussed and was never divided. The district court ordered that the vacation/sick time accrued balances be determined at the time the Decree was entered and be divided equally.

Appellant/Cross-Respondent was marshal with the City of Las Vegas and was eligible for retirement at the time the Decree of Divorce was entered. Under *Sertic v. Sertic*,³ Appellant/Cross-Respondent was required to commence paying Respondent/Cross-Appellant her community property share of the defined benefit plan. In March 2015, Respondent/Cross-Appellant made a request to

³ 111 Nev. 1194, 901 P.2d 148 (1995).

Appellant/Cross-Respondent to commence paying her community property of the retirement benefits are required by *Henson v. Henson*.⁴

The district court refused to make Appellant/Cross-Respondent pay to Respondent/Cross-Appellant her full share of the community property that was due to her under *Sertic* and *Henson, supra*, concluding that Appellant/Cross-Respondent could not afford to pay and thereby divested Respondent/Cross-Appellant of her share of her community property and effectuated an unequal division of community property in contravention of NRS 125.150(1)(b) and the agreement contained within the Qualified Domestic Relations Order.

V. STATEMENT OF FACTS

Under NRAP 28.1(c)(2), Respondent/Cross-Appellant, Eleni Kilgore (hereinafter “Eleni”), may submit a statement of facts if she is dissatisfied with and Appellant/Cross-Respondent, Richard Kilgore’s (hereinafter “Richard”) statement of facts. Richard’s statement of facts is incomplete.

Eleni and Richard were married to each other on December 15, 1992.⁵ The stipulated Decree of Divorce was entered on March 13, 2013.⁶ At the time of the

⁴ 130 Nev. Adv. Op. 79 (Oct. 2, 2014)

⁵ 1 JA-000001

⁶ 1 JA-000002

entry of the Decree, there were three minor children who are now emancipated and are not subject of this appeal.⁷

The Decree of Divorce provided for division of the respective state of Nevada pensions via Qualified Domestic Relations Order (hereinafter “QDRO”) that the parties had through the Nevada Public Employees Retirement Systems (hereinafter “PERS”).⁸

The Decree of Divorce contained no mention of Richard’s vacation or sick pay that he had accrued through his employment with the City of Las Vegas Marshal’s office.⁹ Richard conceded that the Decree of Divorce contained no mention of the survivor benefit that both parties had through PERS.¹⁰

No Notice of Appeal was ever filed.

At the time the Decree for Divorce was filed, Richard was employed as a marshal for the City of Las Vegas. Richard had been enrolled in PERS by virtue of being a marshal with the City of Las Vegas since May 8, 1989.¹¹

⁷ 1 JA-000002

⁸ 1 JA-000003-1 JA000004

⁹ 1 JA-000001-1 JA-000010

¹⁰ 5 JA-000894 *Transcript*, 1 JA-000001-1 JA000010

¹¹ 5 JA-000855 *Transcript*

As a marshal with the City of Las Vegas, Richard was part of the police-fire section of PERS.¹² Members who are part of police-fire are eligible to retire with an unreduced benefit after 20 years of service beginning at age 50 in PERS.¹³ Richard achieved the 20 year mark in PERS in June 2009.¹⁴

Richard reached age 50 on April 20, 2011.¹⁵ Richard, pursuant to Chapter 286 of the Nevada Revised Statutes would have been eligible for an unreduced retirement benefit through police-fire on April 20, 2011 and would not suffer any early retirement penalty.¹⁶

Eleni was employed with the Clark County School District as a school teacher. Eleni had been enrolled in PERS since February 16, 1993.¹⁷ As school teacher, Eleni was a regular member of PERS.¹⁸ There are different rules for police-fire and regular

¹² 5 JA-000855 *Transcript*

¹³ 5 JA-000855-56 *Transcript*

¹⁴ 5 JA-000856 *Transcript*

¹⁵ 5 JA-000857 *Transcript*

¹⁶ 5 JA-000857 *Transcript*

¹⁷ 5 JA-000864 *Transcript*

¹⁸ 5 JA-000864 *Transcript*

members.¹⁹ Eleni would not be eligible to retire with an unreduced benefit until approximately 2023.²⁰

On October 14, 2014, Richard filed a Motion to modify his child support obligation as he had been terminated from his position as a marshal with the City of Las Vegas.²¹ Richard was terminated for misconduct.²²

On December 9, 2014, the hearing on Richard's Motion to modify child support obligation came on for hearing. Because the senior judge, Hon. Kathy Hardcastle, did not have any financial disclosure forms in front of her, she declined to enter any financial orders.²³

Richard filed a new motion on an Order Shortening Time, this time to try and enforce the December 9, 2014, orders, change custody and hold Eleni in contempt.²⁴

At the hearing, it was pointed out for the first time that Eleni should have been receiving her community property share of the pension under *Sertic v. Sertic*.²⁵ The

¹⁹ 5 JA-000864 *Transcript*

²⁰ 5 JA-000867 *Transcript*

²¹ 1 JA-000012-1 JA-000027

²² 1 JA-000023-1 JA000026

²³ 1 JA-000236

²⁴ 2 JA-00241

²⁵ 111 Nev. 1194, 901 P.2d 148 (1995); 2 JA-000276 *Transcript*

district court agreed, stating, “. . . when you first become eligible and she has a community interest in the divorce she should be having a distribution. . . he can’t hold out until he’s like 70 years old, and not collect then she’s not getting her portion.”²⁶

It was also pointed out that there was omitted vacation and sick pay that Richard received when he was terminated from the City of Las Vegas.²⁷ Counsel were ordered to research retirements and submit Briefs.²⁸ Richard was further required to fill out and submit a work search journal now that he was unemployed, and that Richard would be under an ongoing obligation to do that and that he would be documenting in the work search journal “today” forward.²⁹

On March 10, 2015, Eleni submitted her Brief regarding retirement benefits and omitted assets to the district court and requested that Richard commence paying benefits immediately.³⁰ At the hearing on March 11, 2015, Richard asked for more

²⁶ 2 JA-000277 *Transcript*

²⁷ 2 JA-000277 *Transcript*

²⁸ 2 JA-000443, 2 JA-000446

²⁹ 2 JA-000271 *Transcript*, 2 JA-000278 *Transcript*, 2 JA-000281 *Transcript*, 2 JA-000443.

³⁰ 2 JA-000317 to 2 JA000322.

time to file his Brief regarding retirement benefits and omitted assets. A new date was set, June 10, 2015, to give Richard the additional time he requested and for Richard to turn in his work search journal.³¹

At the June 10, 2015, hearing, it was pointed out that Richard had not provided a work search journal.³² Because Richard was still unemployed, the Court declined to require that he pay Eleni her share of her community property interest in the pension even though he had not retired.³³ The Court deferred sanctions even though Richard had still failed to provide a work search journal for the prior five months.³⁴ Instead, the matter was sent out for a settlement conference.³⁵

On June 24, 2015, the Qualified Domestic Relations Order (hereinafter (QDRO)) formally dividing the pension in Richard's name and giving Eleni her community property share was finally filed.³⁶ Richard was defined as the Participant and Eleni was defined as the Alternate Payee.³⁷

³¹ 2 JA-000383 *Transcript*

³² 3 JA-000491 *Transcript*

³³ 3 JA-000481 *Transcript*

³⁴ 3 JA-000491 *Transcript*, 3 JA-000528

³⁵ 3 JA-000529

³⁶ 3 JA-000518 to 3 JA-000522

³⁷ 3 JA-000519

In the QDRO it was stated, “[t]he retirement system is specifically directed to pay the benefits as determined herein directly to the Alternate Payee at the first possible date.”³⁸ In the QDRO, it was further stated, that “[t]he Participant shall make payments directly to the Alternate Payee, of the sum required by this Order, no later than the fifth day of each month until payments from the retirement system to the Alternate Payee commence under this Order.”³⁹ The QDRO was executed by both Richard and Eleni with Richard approving as to form and content.⁴⁰

On August 28, 2015, the settlement conference was held. Only minor issues were resolved.⁴¹

On January 4, 2016, Richard was reinstated as a marshal with the City of Las Vegas.

On February 9, 2016, a status check hearing was held. Eleni filed a Supplement and a Schedule of Arrears showing that if one went back to the date the Decree of Divorce was filed to February 9, 2016, Richard would owe approximately

³⁸ 3 JA-000520

³⁹ 3 JA-000520

⁴⁰ 3 JA-000523

⁴¹ 3 JA-000534 to 3 JA-000537

\$85,753.80, before interest, for retirement benefits that should have been paid to Eleni.⁴²

On February 9, 2016, Richard was ordered by the district court to commence paying Eleni \$1,200 per month for her partial share of her interest in the PERS defined benefit plan in Richard's name.⁴³ Richard never made a single payment.

The Order from the February 9, 2016, indicated that an evidentiary hearing was set for July 25, 2016, at 1:30 p.m. on stack #1 regarding the outstanding financial issues of:

- a. The Survivor Beneficiary designation for the Nevada Public Employees retirement account for both pre and post retirement designations.
- b. The omitted vacation and sick pay that Plaintiff received when he was terminated from the City of Las Vegas but was never divided.
- c. The property equalization payments for the defined benefit plan that were to be made to Defendant by Plaintiff upon Plaintiff's first eligibility for retirement but that were never made.

⁴² 3 JA-000556, 1 ROA 000019

⁴³ 3 JA-000567

d. The Hartford Deferred Compensation Account in Plaintiff's name that was never divided.⁴⁴

On July 25, 2016, the first day of trial, Richard submitted a new Financial Disclosure Form claiming that he was now making \$88,344.36 or \$7,362.03 per month.⁴⁵ The expenses Richard listed in his Financial Disclosure Form totaled \$5,460.00.⁴⁶ The expenses included a \$1,200 per month payment for the PERS payment to Eleni that Richard was ordered to pay on February 9, 2016, but never did.⁴⁷

Also on the first day of the evidentiary hearing Marshal Willick, Esq. was stipulated as to being an expert witness as to PERS law, survivor beneficiary law, and child support law.⁴⁸

As to when payments should commence, Mr. Willick testified that the from 1989 going forward, the Nevada Supreme Court issued a series of decisions, "Gemma, Fondi, Sertic, and Wolff which collectively stand for the proposition that

⁴⁴ 3 JA-000567

⁴⁵ 3 JA-000629

⁴⁶ 3 JA-000631

⁴⁷ 3 JA-000631

⁴⁸ 4 JA-00645 *Transcript*

the normal date of payment of a retirement benefit to a spouse is upon eligibility of an employee's retirement regardless of whether or not the employee chooses to retire.⁴⁹ Mr. Willick further testified that the only change has been in *Henson*⁵⁰ when the Court held that in order to actually get a flow of payments that either has to be provided for in the underlying order, or you have to file a motion to document that you are requesting payment at that time.⁵¹

As to whether the survivor beneficiary is an omitted asset, Mr. Willick concluded that a PERS survivor beneficiary is an asset, that there was no reasonable interpretation of the meaning of a survivorship interest other than a property interest.⁵² If Richard predeceased Eleni without the survivor beneficiary being in place, payments to her would cease. Without the survivor beneficiary being in place, Eleni would have to purchase a policy of insurance to protect herself.⁵³

As to vacation and sick pay, it was acknowledged that vacation and sick pay had not been directly addressed by the Nevada Supreme Court.⁵⁴ Mr. Willick

⁴⁹ 4 JA-000648 *Transcript*

⁵⁰ 130 Nev. Adv. Op. 79 (Oct. 2, 2014)

⁵¹ 4 JA-000648, 4 JA-000649 *Transcript*

⁵² 3 JA-000650

⁵³ 4 JA-000650-651 *Transcript*

⁵⁴ 4 JA-000653 *Transcript*

concluded that vacation and sick pay classify as assets accrued during marriage, and the presumption is that they will analyze like all other property interests that accrue during marriage and that if they are omitted that the partition statute applies to like anything else.⁵⁵

Richard testified that accrued vacation and sick pay were never discussed.⁵⁶ Richard agreed that the vacation pay was accrued during the course of the marriage.⁵⁷ Richard further agreed that Eleni never received any monies from the accrued vacation and sick pay.⁵⁸

Richard additionally testified that the survivor benefit was never addressed in the Decree of Divorce and was never addressed by anybody.⁵⁹

As to Eleni's community property share of the retirement benefits, Richard admitted that he had not made any payments to her and claimed he did not know of any order requiring him to make payments.⁶⁰

⁵⁵ 4 JA-000653 *Transcript*

⁵⁶ 4 JA-000755-756, 4 JA-000796 *Transcript*

⁵⁷ 4 JA-000756 *Transcript*

⁵⁸ 4 JA-000757 *Transcript*

⁵⁹ 4 JA-000757-756 *Transcript*

⁶⁰ 4 JA-000764-765 *Transcript*

On August 15, 2016, Sonya Hellwinkle, Director of Employment Production Services from PERS testified.⁶¹ Ms. Hellwinkle testified, that members who are part of police-fire are eligible to retire with an unreduced benefit after 20 years of service beginning at age 50 in PERS.⁶² Ms. Hellwinkle indicated that Richard achieved the 20 year mark in PERS in June 2009.⁶³

Richard reached age 50 on April 20, 2011.⁶⁴ It was further testified to by Ms. Hellwinkle that Richard, pursuant to Chapter 286 of the Nevada Revised Statutes would have been eligible for an unreduced retirement benefit through police-fire on April 20, 2011, and would not suffer any early retirement penalty.⁶⁵ Ms. Hellwinkle confirmed that until Richard retired that PERS would not make a payment directly to Eleni as the PERS system is unable to pay benefits to an ex-spouse prior to the retirement of the participant.⁶⁶

⁶¹ 5 JA-000848 to JA000883 *Transcript*

⁶² 5 JA-000855-56 *Transcript*

⁶³ 5 JA-000856 *Transcript*

⁶⁴ 5 JA-000857 *Transcript*

⁶⁵ JA-000857 *Transcript*

⁶⁶ 5 JA-000860-861 *Transcript*

As to Eleni testimony was provided by Ms. Hellwinkle that Eleni was employed with the Clark County School District as a school teacher. Eleni had been enrolled in PERS since February 16, 1993.⁶⁷ As school teacher, Eleni was a regular member of PERS.⁶⁸ There are different rules for police-fire and regular members.⁶⁹ Eleni would not be eligible to retire with an unreduced benefit until approximately 2023.⁷⁰

After Ms. Hellwinkle finished testifying, Richard continued his testimony. Richard testified that he understood that if he continued working until the day he died that Eleni would not receive any monies directly from PERS.⁷¹ Richard further agreed that the Eleni's interest in the income stream from the pension was community property.⁷² There is no factual dispute that Richard is the one who is in sole control as to if and when Eleni would receive her share of the income stream from the pension in Richard's name.⁷³

⁶⁷ 5 JA-000864 *Transcript*

⁶⁸ 5 JA-000864 *Transcript*

⁶⁹ 5 JA-000864 *Transcript*

⁷⁰ 5 JA-000867 *Transcript*

⁷¹ 5 JA-000908 *Transcript*

⁷² 5 JA-000908 *Transcript*

⁷³ 5 JA-000924 *Transcript*

On December 1, 2016, a status check hearing was held regarding child support issues, PERS issues, and omitted asset issues. The district court clarified and recalculated what child support should be.⁷⁴

The district court also clarified that total of the arrears that Richard would owe for the PERS payments that should have been made to Eleni. The monthly payment due to Eleni for her community property share of defined benefit plan in Richard's name was calculated to be \$2,455 per month retroactive to March 2015.⁷⁵ The total amount of the arrears due to Eleni for Richard's nonpayment of the retirement benefits since Eleni first made her demand for payment was calculated to be \$56,575.76.⁷⁶ The district court spent an extended amount of time going over the Financial Disclosure Forms of the parties and going over their expenses.⁷⁷

After going over the calculations, the district court ordered that Richard only pay \$350 per month toward the judgment and nothing toward any payments of

⁷⁴ 7 JA-001431-1432 *Transcript*

⁷⁵ 7 JA-001432

⁷⁶ 7 JA-001432 *Transcript*, 1 ROA 000027

⁷⁷ 7 JA-001305 to 7JA-001414 *Transcript*

Eleni's community property share of the pension.⁷⁸ The daily interest at the legal rate was \$8.11.⁷⁹ For a 30 day period that would \$243 (8.11 x 30).⁸⁰

Even though Richard stipulated and agreed in the QDRO he signed to make payment upon first eligibility, the district court stayed any collection on the judgment from Richard's paycheck.⁸¹

The district court further calculated that Richard would owe Eleni \$4,317.85 less taxes for the vacation and sick time that was omitted.⁸²

The district court issued the Minute Order incorporating the above, on January 9, 2017.⁸³

On January 19, 2017, Eleni filed a Motion to Alter or Amend.⁸⁴ The Motion was heard on March 28, 2017, and was continued on to June 8, 2017. The district court granted the Motion to Alter or Amend in part. The district court adjusted child

⁷⁸ 7 JA-001403 *Transcript*

⁷⁹ 1 ROA 000027

⁸⁰ 1 ROA 000027

⁸¹ 7 JA-001432

⁸² 7 JA-001432

⁸³ 7 JA-001430-1433

⁸⁴ 7 JA-001434 to 7 JA-001448

support and adjusted the net amount of the vacation and sick pay that should be paid to Eleni.

On August 2, the Findings of Fact, Conclusions of Law, and Order from the July 25, 2017, August 15, 2016, and October 31, 2016, evidentiary hearing was filed.⁸⁵ In the Findings of Fact, Conclusions of Law, and Order From Evidentiary Hearing and Status Check Hearing, the district court made the following pertinent findings as it related to Richard making payments in lieu of PERS making payments,

1. After the Decree was entered, Richard never made any payments to Eleni for her share of the PERS defined benefit plan in his name.⁸⁶
2. On March 10, 2015, Eleni made a formal request in a Brief filed with the Court that she begin receiving her share of the PERS defined benefit plan in Richard's name because he has reached first eligibility for retirement.⁸⁷
3. Richard testified that if he continued working that Eleni will not receive any monies from PERS directly.⁸⁸

⁸⁵ 8 JA-001538 to 8 JA-001558

⁸⁶ 8 JA-001540

⁸⁷ 8 JA-001540

⁸⁸ 8 JA-001543

4. Richard further testified that he agreed that pursuant to the terms of the Decree of Divorce that Eleni's interest in the PERS pension in his name was community property.⁸⁹
5. Richard additionally testified that by him continuing to work that he was not allowing Eleni to receive her share of her community property and as long as he kept working, PERS would not pay Eleni.⁹⁰
6. Richard testified that because will not pay Eleni any monies until he retires he was in sole control as to if and when Eleni would get paid.⁹¹
7. The Court found that Sonya Hellwinkle testified to the following:
 - a. Pursuant to Chapter 286, Richard was eligible for an unreduced retirement benefit on April 20, 2011 as he was 50 years of age and had 20 years of service.⁹²
 - b. However, PERS will not pay a retirement benefit to the nonworking directly prior to the working spouse retiring.⁹³

⁸⁹ 8 JA-001543

⁹⁰ 8 JA-001544

⁹¹ 8 JA-001544

⁹² 8 JA-001545

⁹³ 8 JA-001545

- c. If a working spouse decides to work until the day they die then PERS will never make a payment to the nonworking spouse. If that scenario occurs, the non-working spouse never receives a payment from PERS.⁹⁴
- d. If Richard decided to work until died, no payment would be made by PERS to Eleni for her share of the retirement.⁹⁵
- e. The only way for Eleni to get her share the retirement income stream from Richard is for her is to get it from him directly.⁹⁶
- f. As long as Richard continues to work, PERS will not make any payments to Eleni, Richard must make payments to Eleni.⁹⁷
- g. Eleni is a part of the Clark County School District.⁹⁸
- h. As a regular member, Eleni would first be eligible to retire at age 60 or after 30 years of service with an unreduced benefit.⁹⁹

⁹⁴ 8 JA-001545

⁹⁵ 8 JA-001545

⁹⁶ 8 JA-001546

⁹⁷ 8 JA-001546

⁹⁸ 8 JA-001546

⁹⁹ 8 JA-001546

- i. For 30 years of service, Eleni would be first eligible for retirement in 2023 if there were no breaks in service.¹⁰⁰

8. However, execution on Richard's paychecks is stayed and instead, due to the financial conditions of the parties, Richard should pay Eleni \$350.00 per from January 2017, forward into her Chase bank account.¹⁰¹

The district court made the following conclusions of law as it relates to Richard making payments in lieu of PERS making the payments.

1. The defined benefits plan with Nevada PERS in Richard's name is community property.¹⁰²

2. At the time the Decree of Divorce was entered that no compelling reason was put forth for there to be an unequal division of community property.¹⁰³

In *Sertic v. Sertic*, the Supreme Court ordered that the "normal distribution of a spousal share of a retirement is to be upon first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker did retire at that time."¹⁰⁴

¹⁰⁰ 8 JA-001546

¹⁰¹ 8 JA-001547

¹⁰² 8 JA-001549

¹⁰³ 8 JA-001549

¹⁰⁴ 8 JA-001550

The district court concluded that, the omitted deferred compensation account and the omitted vacation/sick time were never discussed or considered. Eleni should be entitled, as a matter of law, to one-half of the time rule portion of the accumulated vacation and sick pay from the date of marriage through March 13, 2013.¹⁰⁵

The Order from the March 28, 2017, and June 5, 2017, hearings were filed on August 2, 2017, as well.

On August 21, 2017, the Notice of Entry of Order from the July 25, 2017, August 15, 2017, and October 31, 2017, evidentiary hearing and the March 28, 2017, and June 5, 2017, hearings were filed.¹⁰⁶

VI.

SUMMARY OF ARGUMENT

A. Full Maturity of the PERS Defined Benefit Plan: Richard claims that he should be allowed to work until the defined benefit plan reaches full maturity before he should be required to pay any monies to Eleni. The position taken by Richard is contradicted by the existing case law and is contradicted by the QDRO he and Eleni executed and had filed with the district court.

¹⁰⁵ 8 JA-001550

¹⁰⁶ 8-JA-001560, 1 ROA 000033

B. Request for an Offset: Richard claims that he should receive an “offset” from Eleni’s PERS defined benefit plan before he has to pay anything to her. The position taken by Richard is also contradicted by existing case law and Richard fails to provide any methodology should be done, even if his proposal was not a violation of existing case law.

C. Division of Vacation/Sick Pay: Richard claims that accrued vacation/sick pay is somehow not an asset. Accrued vacation/sick pay can be valued, thereby making the accrued vacation/sick pay an asset to be divided. NRS 125.150(1)(b) requires that all community property, to the extent practicable shall be divided equally absent a compelling reason to the contrary. There is no compelling reason why accrued vacation/sick pay should not be divided in a divorce.

D. Payment of Eleni’s Community Property Share of the Defined Benefit Plan in Richard’s Name: The district court refused to make Richard pay Eleni’s share of her community property in the retirement benefits to her, except for \$350 per month. The Decree was never appealed, the case law that exists requires Richard to commence payment upon his first eligibility and request by Eleni, and Richard agreed in the QDRO to commence making payments. Despite that, the district court refused to make Richard pay anything more than \$350 per month toward Eleni’s share of her community property. The district court’s actions have

effectuate an unequal division of community property on a *res judicata* Decree that required an equal division.

VII. STANDARD OF REVIEW

Most trial court orders in family law issues are reviewed for an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009); *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922, P.2d 451, 543 (1996).

In *NOLM, LLC v. County of Clark*, 120 Nev. 736, 100 P.3d 658 (2004) the Supreme Court held that it reviews the district Court's findings of fact for an abuse of discretion and will not set aside those findings, "unless they are clearly erroneous or not supported by substantial evidence." 100 P.3d at 366. A court abuses its discretion when it makes a factual finding which is not supported by substantial evidence and is "clearly erroneous." *Real Estate Division v. Jones*, 98 Nev. 260, 645 P.2d 1371 (1982)

A court can err in the exercise of personal judgment and does so to a level meriting appellate intervention when *no* reasonable judge could reach the conclusion reached under the particular circumstances. *Franklin v. Bartsas Realty, Inc.* 95 Nev. 559, 598, P.2d 1147 (1979). In *Goodman v. Goodman*, 68 Nev. 484, 236 P.2d 305 (1951), the Supreme Court held that a court does *not* abuse its discretion when the court reaches a result that could be found by a reasonable judge.

Questions of law are reviewed *de novo*. See *State, Div. of Insurance State Farm*, 116 Nev. 290, 293, 995 P.2d 482 (2000). A district court's interpretation of a divorce decree presents a question of law, and reviews such an interpretation *de novo*. See *Ormachea v. Ormachea*, 67 Nev. 274, 291-92, 217 P.2d 355 (364-65 (1950) (providing that a district court's construction and interpretation of the legal operation and effect of one of its divorce decrees presents a question of law); *Nev. Classified Sch. Emps. Ass'n v. Quaglia*, 124 Nev. 60, 63, 177 P.3d 509, 511 (2008) (“We review questions of law *de novo*.”); see also *In re Georgakilas*, 956 A.2d 320, 321 (N.H. 2008) (“In interpreting the meaning of a divorce decree, we review the decree *de novo*.”).

VIII. LEGAL ARGUMENT

A. THE DISTRICT COURT DID NOT ERR IN REQUIRING APPELLANT TO BEGIN MAKING PAYMENTS ON RESPONDENT’S COMMUNITY PROPERTY SHARE OF HIS DIVIDED RETIREMENT ACCOUNT ASSETS BEFORE HE HAS DEVELOPED THE ACCOUNT TO FULL MATURITY

Richard claims that he is entitled to finish his career when his benefits are fully maximized and not when Eleni thinks he should retire. Opening Brief at page 5, lines 11-13. That is not the issue before the Court. Neither the existing case law nor the statutes say anything about full maturity. In addition, Richard agreed when he executed the QDRO that he would pay Eleni upon his first eligibility for retirement.

Nevada Rule of Appellate Procedure 28(a)(10)(A), requires argument which must contain contentions with citations to the authorities and parts of the record on which the appellant relies. Nevada Rule of Appellate Procedure 28(e)(1) requires that every assertion regarding matters in the record shall be supported by a reference to a page and volume number where the matter relied upon is to be found.

The argument made by Richard, from page 5, line 27, through page 6, line 9, of that law enforcement and fire will be “forced into retirement prior to the maximization of their benefits. . . will cost the State hundreds of thousands of dollars. . .” is unsupported by any reference to the record.

In addition, the citation provided by Richard on page 6, lines 16-22, citing to *Gemma v. Gemma*,¹⁰⁷ from the Supreme Court “we do not believe [Appellant] should have such control over when [Respondent] will begin to receive her community interest in the retirement benefits” actually supports Eleni’s position.

On page 7 of his Opening Brief from lines 1-5, Richard fails to make any citation to the record as to how he would receive \$5,100 per month now and \$5,400 per month if he waited until he retired. In addition from page 7, line 14, through page 8, line 2, Richard provides no references to the record making difficult, if not impossible to respond.

¹⁰⁷ 105 Nev. 458, 778 p.2d 429, 431 (1989)

Similarly from page 8, line 15, through page 9, 11, Richard makes assertions but fails to provide any citations to the record to support those assertions.

In the Decree of Divorce, Eleni was awarded her time rule share of the defined benefit plan with the Nevada Public Employees Retirement System in Richard's name pursuant to *Gemma/Fondi*. ”¹⁰⁸ The Decree, the statutes, and the case law say payment is to be made upon first eligibility, as set forth below, and say nothing about full maturity, and in fact, repeatedly state the opposite.

In conformance with the stipulated Decree of Divorce the parties had drafted and both signed and filed with the clerk of the court a stipulated QDRO that required Richard to commence payments to Eleni upon his first eligibility for retirement.¹⁰⁹

It is undisputed that Richard agreed in the QDRO that he signed and was filed with the clerk of the court stated that (1) “[t]he retirement system is specifically directed to pay the benefits as determined herein directly to the Alternate Payee on the first possible date,” (2) PERS is not required to make payments prior to the retirement of the Participant and (3) [Plaintiff] shall make payments directly to the Alternate Payee of the sum required by this Order, no later than the 5th day of each

¹⁰⁸ 1 JA-000003-04

¹⁰⁹ 3 JA-000520, 3 JA-000523

month until payments from the retirement system to the Alternate Payee commence under this Order.”¹¹⁰

Therefore, Richard agreed to make payments directly to Eleni, upon his first eligibility for retirement, after demand by Eleni until he retired and payments commenced by PERS.¹¹¹

The agreement between the parties encompassed in the Decree of Divorce and the QDRO should be enforced. In *Rivero v. Rivero*,¹¹² the Supreme Court held that parties are free to contract and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy. There is nothing unconscionable, illegal or in violation of public policy by Richard agreed to pay Eleni her share of the community property upon his first eligibility and upon her demand.

Notwithstanding the agreement in the QDRO, per *Sertic v. Sertic*, Eleni was and is entitled to begin receiving her share of her community property upon Richard’s first eligibility for retirement.¹¹³ As stated, in *Sertic*, the Supreme Court

¹¹⁰ 3 JA-000520, 3 JA-000523 (Emphasis added)

¹¹¹ 3 JA-000520, 3 JA-00523

¹¹² 125 Nev. 410, 429, 216 P.3d 213, 227 (2009)

¹¹³ 111 Nev. 1194, 904 P.2d 1480

ordered that the “normal distribution of a spousal share of a retirement is to be upon first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker did retire at that time.”

The Nevada Family Law Practice Manual published by the State Bar of Nevada comes to the same conclusion. The Manual states, “in *Sertic* the Nevada Supreme Court . . . for the first time clearly stated that normal distribution of a spousal share of a retirement is to be upon *first eligibility* for retirement and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker *did* retire that time.” (Emphasis in the original.)¹¹⁴

The Supreme Court confirmed in *Gemma v. Gemma* that Nevada was adopting the law of California commonly referenced as the “*Gilmore*” rule so that the wage earner’s unilateral actions could not deprive the spouse of sums otherwise payable¹¹⁵

In *Gemma*, the Supreme Court adopted and quoted the core holding of the California courts, “the employee spouse cannot by election defeat the nonemployee

¹¹⁴ Nevada Family Law Practice Manual, 2F.34 (emphasis in the original).

¹¹⁵ *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

spouse's interest in the community property by relying on a condition within the employee spouse's control."¹¹⁶

The testimony from the stipulated expert Mr. Willick also provided the same conclusion that "Gemma, Fondi, Sertic, and Wolff which collectively stand for the proposition that the normal date of payment of a retirement benefit to a spouse is upon eligibility of an employee's retirement regardless of whether or not the employee chooses to retire."¹¹⁷

Whether one chooses to honor the agreement contained within the QDRO, or rely upon the existing case law, the Family Law Practice Manual or the expert witness, there is no basis under the Court's findings of fact for Richard's claim to be entertained.

The district court's findings included the following,

1. Richard was eligible to retire April 20, 2011 as he was 50 years of age and had 20 years of service.¹¹⁸
2. If a working spouse decides to work until the day they die then PERS will never make a payment to the nonworking spouse. If that scenario

¹¹⁶ *Gemma, supra*, 105 Nev. 463-64, quoting *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980)

¹¹⁷ 4 JA-000648 *Transcript*

¹¹⁸ 8 JA-001545

occurs, the non-working spouse never receives a payment from PERS.¹¹⁹

3. If Richard decided to work until died, no payment would be made by PERS to Eleni for her share of the retirement.¹²⁰
4. The only way for Eleni to get her share the retirement income stream from Richard is for her is to get it from him directly.¹²¹
5. Richard testified that if he continued working that Eleni will not receive any monies from PERS directly.¹²²
6. Richard further testified that he agreed that pursuant to the terms of the Decree of Divorce that Eleni's interest in the PERS pension in his name was community property.¹²³
7. Richard additionally testified that by him continuing to work that he was not allowing Eleni to receive her share of her community property

¹¹⁹ 8 JA-001545

¹²⁰ 8 JA-001545

¹²¹ 8 JA-001546

¹²² 8 JA-001543

¹²³ 8 JA-001543

and as long as he kept working, PERS would not pay Eleni.¹²⁴ Richard testified that because will not pay Eleni any monies until he retires he was in sole control as to if and when Eleni would get paid.¹²⁵

All of the district court's findings were amply supported by the record. The record is absent to any of Richard's claims that anyone should wait until his maximum retirement value has been reached and the claims he makes are unsupported by any references to the record. To the contrary, as indicated, there is voluminous evidence which contradicts Richard's position.

B. WHETHER THE DISTRICT COURT ERRED IN REQUIRING APPELLANT TO BEGIN MAKING PAYMENTS ON RESPONDENT'S COMMUNITY PROPERTY SHARE OF HIS DIVIDED RETIREMENT ASSETS WITHOUT ALLOWING FOR AN OFFSET OF HIS COMMUNITY PROPERTY SHARE OF RESPONDENT'S DIVIDED RETIREMENT ASSETS

There was no abuse of discretion in the district court declining to offset Eleni's pension with Richard's pension. The district court's decision was in conformance with the law which should make the abuse of discretion the incorrect standard referred to by Richard as being the incorrect standard to be applied.

¹²⁴ 8 JA-001544

¹²⁵ 8 JA-001544

The law in *Sertic v. Sertic*¹²⁶ is clear and unambiguous. In *Sertic*, the Supreme Court ordered that the “normal distribution of a spousal share of a retirement is to be upon first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker did retire at that time.”

The district court found that Ms. Hellwinkle testified to the following,

1. Eleni is part of the Clark County School District.¹²⁷
2. As a regular member Eleni would first be eligible to retire at age 60 or after 30 years of service with an unreduced benefit.¹²⁸
3. For 30 years of service Eleni would be first eligible for retirement in 2023 if there were no breaks in service.¹²⁹

The position taken by the district court is completely in keeping with Ms. Hellwinkle’s testimony and longstanding Nevada law. In addition, notwithstanding the fact that his position is completely contradicted by existing law, Richard fails to provide any methodology as to how his proposed offsets would work.

¹²⁶ 111 Nev. 1194, 901 P.2d 148 (1995).

¹²⁷ 8 JA-001546

¹²⁸ 8 JA-001546

¹²⁹ 8 JA-001546

Without providing any citation to the record, on page 10, lines 11-21 of his Opening Brief, Richard claims that there will be an “unequal” distribution of property if there is not an offset. The assertion should be a non-starter. Both parties are able to receive their community property share of the retirement in the other party’s name upon their first eligibility. The fact that one party continues to keep working and one party decides to retire upon first eligibility fails to negate the fact that both parties are able to receive their share of the community property at the same time. Both parties have the ability to receive their community property equally as contemplated by NRS 125.150(1)(b).

On page 11, lines 7-8, claims that the district court’s order would require Richard to pay 90 percent of his existing income. Richard’s argument ignores the fact that he is in sole control as to if and when Eleni would get paid.¹³⁰

The position taken by Richard also ignores the holding in *Gemma* that “the employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”¹³¹ Richard can retire, obtain another position, but Richard should honor the agreement in the QDRO he signed, and he required to follow the law.

¹³⁰ 8 JA-001544

¹³¹ *Gemma, supra*, 105 Nev. 463-64, quoting *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980)

The case of *Fernandez v. Fernandez*¹³² is inapplicable because the issue in that case whether parents can stipulate to a nonmodifiable child support order. The Supreme Court in *Fernandez* noted that by law, "[t]he parents of a child ... have a duty to provide the child necessary maintenance, health care, education and support" citing to NRS 125B.020(1) and that "most courts agree that, absent a contrary statutory directive, public policy prevents a court from enforcing a purportedly nonmodifiable child support order, even if the parties stipulate to it." *Id.* at 1036.

The principle that Eleni to which she would like Richard to be held is sound. There is no compelling reason for there to be an unequal division of community property as set out in NRS 125.150(1)(b). By staying any ability for Eleni to receive her property, the district court is effectuating an unequal division of community property on a Decree for which the time to appeal has long since passed, and is ignoring the agreement that Richard made when he signed the QDRO.

There is no good reason legally or logically to offset on PERS retirement account for the other.

¹³² 126 Nev. 28, 222 P.3d 1031 (2010)

C. WHETHER THE DISTRICT COURT ERRED IN ORDERING A DIVISION OF APPELLANT'S VACATION/SICK TIME

Richard attempts to make two claims. One is that the accrued vacation/sick time are not omitted assets, and two, that accrued vacation/sick pay is not community property.

As to Richard's claim that the accrued vacation/sick pay are not omitted assets, Richard cites to authority, *Tomlinson v. Tomlinson*,¹³³ *Amie v. Amie*,¹³⁴ and *Doan v. Wilkerson*¹³⁵ and claims that those cases support his position regarding omitted assets. See Opening Brief at page 12, line 26, through page 13, line 11. As testified to by the stipulated expert, Mr. Willick, *Tomlinson* and *Doan* were specifically abrogated by the passage of NRS 125.150(3) dealing with omitted assets.¹³⁶ Because *Tomlinson* and *Doan* were abrogated by NRS 125.150(3), it appears that Richard may citing to law that is no longer controlling precedent.

The district court made findings of fact and conclusions of law that the vacation/sick pay were omitted assets. The findings of fact and conclusions of law were supported by substantial evidence. Richard testified that accrued vacation and

¹³³ 102 Nev. 652, 729 P.2d 1363 (1986)

¹³⁴ 106 Nev. 541, 796 P.2d 233 (1990)

¹³⁵ 130 Nev. Adv. Op. 48, 327 P.3d 498 (June 26, 2014)

¹³⁶ 4 JA-000679 *Transcript*

sick pay were never discussed.¹³⁷ Richard agreed that the vacation pay was accrued during the course of the marriage.¹³⁸ Richard further agreed that Eleni never received any monies from the accrued vacation and sick pay.¹³⁹

The district court ordered that Richard's entire \$8,635.70 (in vacation/sick pay) was cashed out early and Richard had to pay taxes on the full amount. Therefore, Richard owes Eleni her one-half of \$8,635.70 minus taxes that would have been attributed to Eleni had she gotten paid out her half share at the time of the divorce. Richard and his attorney shall produce proof of how much he was taxed on the \$8,635.70, and half of the taxes shall be taken of Mom's \$4,317.35.

There is no legal or factual question that the vacation/sick pay was an asset that could be valued and divided upon the date of divorce. NRS 125.150(1)(b), *infra*, requires that all community property, to the extent practicable, shall be equally divided unless there is a compelling reason to the contrary.

There was no abuse of discretion by the district court and the district court properly applied the law in valuing and dividing an asset that accrued during the course of the marriage.

¹³⁷ 4 JA-000755-756 *Transcript*, 4 JA-000796 *Transcript*

¹³⁸ 4 JA-000756 *Transcript*

¹³⁹ 4 JA-000757 *Transcript*

As to Richard's claim that vacation/sick pay are not community property, Richard fails to cite to any precedential or persuasive authority. The record is undisputed. The district court found that the omitted vacation/sick pay from the date of marriage through the date of divorce was community property. The district court's finding was amply support by the record because Richard received \$8,635.70 when he was terminated by the City of Las Vegas for accrued vacation and sick pay.

There is authority nationally regarding the subject of whether vacation/sick pay is property to be divided at the time of divorce. A majority of community property states that have ruled on the issue have concluded that accrued vacation/sick is community property to be divided upon divorce. *See Arnold v. Arnold*,¹⁴⁰ (husband's accumulated vacation leave and sick leave hours were community property because they were fruits of labor during marriage, had value, and were not separate property as that is defined; "the essence of leave is that it is a benefit of employment and, whether considered a benefit in addition to salary, or somehow an aspect of salary, it has independent value"); *Saustez v. Plastic Dress-Up Co.*,¹⁴¹ *see also In re Marriage of Fithian*,¹⁴² (vacation pay is similar to pension or retirement

¹⁴⁰ 77 P.3d 285 (N.M. Ct. App. 2003)

¹⁴¹ 647 P.2d 122 (Cal. 1982)

¹⁴² 517 P.2d 449 (Cal. 1974)

benefits, another form of deferred compensation. Those benefits, too, ‘do not derive from the beneficence of the employer, but are properly part of the consideration earned by the employee’); *In re Marriage of Moore*,¹⁴³ (accrued vacation pay is a community asset regardless of whether the parties can place a value on the time).

In the Matter of the Marriage of Susan M. Hurd,¹⁴⁴ (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).

The only community property state that has not concluded that vacation/sick pay is an asset to be divided upon divorce is Texas. *See Smith v. Smith*,¹⁴⁵ (accrued vacation and sick pay are not marital assets, as the husband owned no physical control or power of immediate enjoyment over them).

Some non-community property states have come to the conclusion accrued vacation/sick pay are divisible assets. *See Grund v. Grund*,¹⁴⁶ (vacation pay is divisible); *Schober v. Schober*,¹⁴⁷ (unused cashable leave valued and distributed at

¹⁴³ 226 Cal. Ct. App. 4th 92 (Cal. 2014)

¹⁴⁴ 848 P.2d 185 (Wash App. 1993)

¹⁴⁵ 733 S.W.2d 915 (Tex. Ct. App. 1987)

¹⁴⁶ 151 Misc. 2d 852, 573 N.Y.S. 2d 840 (N.Y. Sup. Ct. 1991)

¹⁴⁷ 692 P.2d 267 (Alaska 1984)

the number of hours multiplied by the employee's hourly rate at the time of divorce); *MEA/AFSCME Local 519 v. City of Sioux Falls*,¹⁴⁸ (vacation pay is divisible); *Lesko v. Lesko*,¹⁴⁹ (majority concluded in an equitable division state, accrued vacation and sick time could be divided); *In re Cardona and Castro*,¹⁵⁰ (where a spouse had an enforceable right to be paid for accrued vacation or sick leave, as established by an employment agreement or policy, such leave earned during the marriage is marital property and subject to division under UDMA if its value is reasonably ascertainable at the time of divorce); *Ryan v. Ryan*¹⁵¹ (vacation pay is a result of the marital enterprise).

The district court properly concluded that the vacation/sick pay was community property and that the vacation/sick was an omitted asset from the Decree of Divorce. The district court also did not abuse its discretion in ordering that the accrued vacation/sick pay be divided.

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¹⁴⁸ 423 N.W.2d 164 (S.D. 1988)

¹⁴⁹ 457 N.W. 2d 695 (Mich. App. 1993)

¹⁵⁰ 316 P.3d 626 (Colo. 2014)

¹⁵¹ 261 N.J. Super. 689, 619 A.2d 692 (1992)

D. WHETHER THE DISCTRICT COURT ERRED IN REFUSING TO COMPEL RICHARD TO COMMENCE PAYMENT OF ELENİ'S COMMUNITY PROPERTY SHARE OF THE DEFINED CONTRIBUTION PLAN IN RICHARD'S NAME EVEN THOUGH RICHARD REACHED HIS FIRST ELIGIBILITY FOR RETIREMENT

The factual history should be undisputed. In the Decree of Divorce, Eleni was awarded her community property share of defined contribution plan in Richard's name. The Decree of Divorce was never appealed. Richard achieved the 20 year mark in PERS in June 2009.¹⁵² Richard reached age 50 on April 20, 2011.¹⁵³

As a marshal, Richard was part of the police-fire section of PERS.¹⁵⁴ Members who are part of police-fire are eligible to retire with an unreduced benefit after 20 years of service beginning at age 50 in PERS.¹⁵⁵ Richard achieved the 20 year mark in PERS in June 2009.¹⁵⁶

At the December 30, 2014, hearing, it was pointed out for the first time that Eleni should have been receiving her community property share of the pension under

¹⁵² 5 JA-000856 *Transcript*

¹⁵³ 5 JA-000857 *Transcript*

¹⁵⁴ 5 JA-000855 *Transcript*

¹⁵⁵ 5 JA-000855-56 *Transcript*

¹⁵⁶ 5 JA-000856 *Transcript*

Sertic v. Sertic.¹⁵⁷ The district court agreed, stating, “. . . when you first become eligible and she has a community interest in the divorce she should be having a distribution. . . he can’t hold out until he’s like 70 years old, and not collect then she’s not getting her portion.”¹⁵⁸

On March 10, 2015, Eleni submitted her Brief regarding retirement benefits and omitted assets to the district court and requested that Richard commence paying her community property share of the benefits immediately.¹⁵⁹

On February 9, 2016, Richard was ordered by the district court to commence paying Eleni \$1,200 per month for her partial share of her interest in the PERS defined benefit plan in Richard’s name.¹⁶⁰ Richard has never made a single payment despite being directly ordered by the district court to make payment.

On June 24, 2015, the QDRO dividing the pension in Richard’s name and giving Eleni her community property share was filed.¹⁶¹ Richard was defined as the

¹⁵⁷ 111 Nev. 1194, 901 P.2d 148 (1995), 2 JA-000276

¹⁵⁸ 2 JA-000277 *Transcript*

¹⁵⁹ 2 JA-000317 to 2 JA-00032

¹⁶⁰ 3 JA-000567

¹⁶¹ 3 JA-000518 to 3 JA-000522

Participant and Eleni was defined as the Alternate Payee.¹⁶² The QDRO was executed by both Richard and Eleni.¹⁶³

In the QDRO it was stated, “[t]he retirement system is specifically directed to pay the benefits as determined herein directly to the Alternate Payee at the first possible date.”¹⁶⁴ It was further stated, that “[t]he Participant shall make payments directly to the Alternate Payee, of the sum required by this Order, no later than the fifth day of each month until payments from the retirement system to the Alternate Payee commence under this Order.”¹⁶⁵

Because Richard agreed to make payments upon the first possible date directly to Eleni, until he retired, the date the demand was formally made was the date payments to Eleni should have commenced.

The stipulated expert, Mr. Willick, testified that the existing case law stands for the proposition that the normal date of payment of a retirement benefit to a spouse is upon eligibility of an employee’s retirement regardless of whether or not the employee chooses to retire.¹⁶⁶

¹⁶² 3 JA-000519

¹⁶³ 3 JA-000523

¹⁶⁴ 3 JA-000520

¹⁶⁵ 3 JA-000520

¹⁶⁶ 4 JA-000648 *Transcript*

Mr. Willick further testified that the only change in that existing case law has been in *Henson* when the Court held that in order to actually get a flow of payments that either has to be provided for in the underlying order, or one has to file a motion to document that one is requesting payment at that time.¹⁶⁷

Richard testified that he understood that if he continued working until the day he died that Eleni would not receive any monies directly from PERS.¹⁶⁸ Richard further agreed that the Eleni's interest in the income stream from the pension was community property.¹⁶⁹ There is no factual dispute that Richard is the one who is in sole control as to if and when Eleni would receive her share of the income stream from the pension in Richard's name.¹⁷⁰

Ms. Hellwinkle confirmed that until Richard retired that PERS would not make a payment directly to Eleni as the PERS system is unable to pay benefits to an ex-spouse prior to the retirement of the participant.¹⁷¹

¹⁶⁷ 4 JA-000648, 4 JA-000649

¹⁶⁸ 5 JA-000908 *Transcript*

¹⁶⁹ 5 JA-000908 *Transcript*

¹⁷⁰ 5 JA-000924 *Transcript*

¹⁷¹ 5 JA-000860-867 *Transcript*

As stated, in *Sertic, supra* the Supreme Court ordered that the “normal distribution of a spousal share of a retirement is to be upon first eligibility for retirement, and that if a worker does not retire at first eligibility, the worker must pay the spouse whatever the spouse would have received if the worker did retire at that time.”

The Supreme Court confirmed in *Gemma v. Gemma* that Nevada was adopting the law of California commonly referenced as the “*Gilmore*” rule so that the wage earner’s unilateral actions could not deprive the spouse of sums otherwise payable¹⁷² Specifically in *Gemma*, the Court stated, “the employee spouse cannot by election defeat the nonemployee spouse’s interest in the community property by relying on a condition within the employee spouse’s control.”¹⁷³

NRS 125.150(1)(b) states,

1. In granting a divorce, the court:

...

(b) Shall, to the extent practicable, make an equal disposition of the community property of the parties, including, without limitation, any community property transferred into an irrevocable trust pursuant to NRS 123.125 over which the court acquires jurisdiction pursuant to NRS 164.010, except that the court may make an unequal disposition

¹⁷² *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

¹⁷³ *Gemma, supra*, 105 Nev. 463-64, quoting *In re Marriage of Luciano*, 164 Cal. Rptr. 93, 95 (Ct. App. 1980)

of the community property in such proportions as it deems just if the court finds a compelling reason to do so and sets forth in writing the reasons for making the unequal disposition.

As indicated, the Decree given Eleni her time rule share of the pension was never appealed. The QDRO was executed by both parties, not their attorneys, in which they agreed that Richard would pay to Eleni, upon his first eligibility for retirement was the agreement the parties came to. *Rivero v. Rivero*¹⁷⁴ provides that the parties are free to contract and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy.

The payment that the district court required Richard to make toward the arrears covered the interest accruing at the legal rate by approximately \$7.00 per month (\$350 payment – (\$8.11¹⁷⁵ x 30 days = \$243.30)). The two youngest children emancipated June 2018. There was no provision in the district court's orders for after when the children emancipated and child support ended for any payments to be made toward Eleni for her property settlement arrears, or even that Richard would have to pay Eleni her share of the pension going forward.

Despite the Decree being *res judicata*, and despite the parties agreeing that Richard would pay Eleni upon her first eligibility for retirement, the district court gutted a *res judicata* Decree and abrogated agreement that the Richard and Eleni had

¹⁷⁴ 125 Nev. 410, 429, 216 P.3d 213, 227 (2009)

¹⁷⁵ 1 ROA 000027

between themselves and effectuated an unequal distribution of community property in violation of NRS 125.150(1)(b) by refusing to allow Eleni to execute on Richard's paycheck for the \$56, in arrears that were owed.

In conclusion, the district court erred by (1) refusing to enforce the stipulated Decree of Divorce that required a time rule share division, (2) refusing to enforce the terms of the stipulated Qualified Domestic Relations Order voluntarily entered into by the parties requiring payment upon first eligibility, (3) refusing to enforce the existing case law under *Sertic, supra*, *Gemma, supra*, and *Fondi, supra*, that requires payment upon to the non-employee spouse upon first eligibility for retirement, and (4) creating an unequal division of community property in an unappealed Decree of Divorce by refusing to enforce those the terms to which the parties voluntarily agreed.

DATED this 30th day of September 2018

Respectfully submitted
PAGE LAW OFFICE



FRED PAGE, ESQ.
Nevada Bar No. 6080
5940 South Rainbow Blvd.
Las Vegas, Nevada 89118
Attorney for Respondent/Cross-Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point font and Time New Roman.
2. I further certify that this brief complies with the page or type volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(c), it does not exceed 30 pages and/or contains no more than 14,000. The brief contains 9,053 words.
3. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure in particular NRAP 28(e)(1) which requires that every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied upon is to be found. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30 day of September 2018

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A handwritten signature in black ink, appearing to read 'Fred Page', is written over a horizontal line.

FRED PAGE, ESQ.

Nevada Bar No. 6080

5940 South Rainbow Blvd.

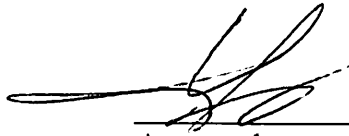
Las Vegas, Nevada 89118

Attorney for Respondent/Cross-Appellant

CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the PAGE LAW OFFICE and that on the 1st day of October 2018, I did serve by way of electronic filing a true and correct copy of the above and foregoing RESPONDENT'S ANSWERING BRIEF AND OPENING BRIEF ON CROSS-APPEAL on the following

Betsy Allen, Esq.
Law Office of Betsy Allen
P.O. Box 46991
Las Vegas, Nevada 89114
Counsel for Appellant/Cross-Respondent



An employee of Page Law Office