

RICHARD KILGORE,
Appellant/Cross-Respondent,

vs.

ELENI KILGORE,
Respondent/Cross-Appellant.

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1 **NRAP 16.1 Disclosures**

2 This was previously addressed in the Opening Brief.

3 **Routing Statement**

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5 **Jurisdictional Statement**

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7 **Statement of the Issues**

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9 **Statement of the Case**

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11 **Statement of the Facts**

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13 **Summary of the Argument**

14 This was previously addressed in the Opening Brief.

15 **Argument**

16 ***Standard of Review***

17 “Question[s] of law [are] subject to de novo review.” *Ogawa v Ogawa*, 125
18 Nev. 660, ___, 221 P 3.d, 699, 704 (2009). “The district court’s factual findings,
19 however, are given deference and will be upheld if not clearly erroneous and if
20 supported by substantial evidence.” *Id.*

1 An abuse of discretion is “[a] clear ignoring by the court of [applicable legal
2 principles], without apparent justification.” *Hotel Last Frontier v. Frontier Prop.,*
3 *Inc.*, 79 Nev. 150, 154, 380 P. 2d 293, 294 (1963).

4
5 ***The district court erred in finding that it lacked discretion in requiring Appellant***
6 ***to begin making payments on Respondent's community property share of his***
7 ***divided retirement assets before he has developed the account to full maturity***

8 In 1989, this Court issued *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429
9 (1989) which held that a “nonvested pension interest acquired during marriage is
10 community property and that it is not error to permit the nonemployee spouse to
11 elect to receive those benefits when the employed spouse is first eligible to retire”
12 *Id* at 430. This Court was mindful of a litigant holding the pension “hostage” by
13 refusing to retire and depriving the recipient spouse of his/her share of property
14 they would be entitled to. This Court affirmed the *Gemma* decision in *Sertic v.*
15 *Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

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19 In direct response to the *Gemma* decision, the Nevada State Legislature first
20 considered establishment of guidelines for distribution of PERS retirement benefits
21 in the 1995 session. During that legislative session, the Committee on Judiciary
22 considered Assembly Bill (“AB”) 292. Upon introduction, AB 292 read in
23 relevant part:
24
25

26 ...

27 1. In making a disposition of community property pursuant to NRS
28 125.150, the court:

1 (a) Shall not make a disposition of any interest in or entitlement to a
2 pension or retirement benefit to which only one party to the divorce has
3 contributed unless:

4 ...

5 (2) The contributing party has reached the required age to be
6 eligible for retirement with full benefits; or

7 (3) The contributing party has retired.

8 Legislative History of AB 292, 68th Leg. (Nev., Mar. 7, 1995). The clear intent of
9 the proposed language was to not only reject this Court's mandatory "first eligible
10 to retire" ruling in *Gemma*, but also to prohibit the courts from awarding any PERS
11 benefits until achievement of full retirement benefits or actual retirement.

12 In the initial hearing on AB 292, the Nevada Highway Patrol Association
13 testified in support of the Bill, noting that "great inequity" had arisen when state
14 law enforcement experienced divorce. Hearing on A.B. 292 Before the Senate
15 Judiciary Comm., 68th Leg. (Nev., March 31, 1995). As proposed, AB 292 would
16 have prevented courts from addressing this Court's concerns in *Gemma*.
17 Specifically, by denying courts the authority to make any disposition of benefits
18 prior to eligibility for retirement with full benefits or actual retirement, the
19 potential for abuse by the PERS retiree remained.
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23 Proponents of the bill provided the example of troopers either forced into
24 early retirement or forced to pay ex-spouses out of their fairly modest wages
25 despite the ex-spouse actually continuing to work and earn far in excess of the
26 trooper. *Id. at 1232-35*. Those testifying in opposition to AB 292 noted concern
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28

1 for those who continue to work beyond retirement in order deprive their former
2 spouses of community property benefits. *Id.*

3 Instead, the discretionary language ultimately adopted allowed for a
4 balancing of interests by the court, whereby the abuses addressed in *Gemma* and
5 the great inequities potentially resulting from it could be avoided. If strictly
6 applied, the *Gemma* “first eligible to retire” language could dramatically impact all
7 PERS and Nevada Judicial Retirement System (NJRS) participants. While police
8 and fire would undoubtedly be most often affected, with potential “first eligibility”
9 occurring as young as thirty-seven (37) years old, for those who participate full-
10 time in a cadet program beginning at seventeen (17) years, other PERS and NJRS
11 retirees may also face equally harsh consequences.

12 In the case of a thirty (30) year PERS employee, who began his/her public
13 service after high school, for example, first eligibility would occur at the age of
14 forty-seven or forty-eight. For a modest wage earner, with an average highest
15 annual salary of \$45,000.00/year, maximum PERS benefits would total
16 \$33,750.00. Of this amount, up to fifty percent (50%) could be owed to a former
17 spouse. The employee would be forced into retirement and unable to continue
18 working in any PERS eligible capacity despite having no option but to continue
19 working far into the future.

20 For those eligible to contribute to the NJRS, the results could be similarly
21 unjust. For example, if a judge were to begin his/her first six-year term at the age

1 of sixty (60), he/she could be forced to begin making payments to a former spouse
2 before even completing a first term in office.

3 As is often the case, the language of AB 292 underwent multiple
4 modifications, and ultimately resulted in what is now NRS 125.155(2) which
5 states:
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8 The court **may**, in making a disposition of a pension or
9 retirement benefit provided by [PERS] of the Judicial
10 Retirement Plan, **order that the benefit not be paid**
11 **before the date on which the participating party**
retires. (emphasis added)

12 In the Summary of Legislation for AB 292, the Legislative Counsel
13 expressly noted “In making a disposition of the PERS benefits, **the court may**
14 **order that the benefits not be paid before the date of actual retirement.**”
15 Legislative History of AB 292, 68th Leg. (Nev., 1995). The legislation did not
16 apply to cases filed prior to its enactment. However, this Court’s decision in *Sertic*
17 *v. Sertic*, 901 P.2d 148, 111 Nev. 1192 (1995), wherein this Court noted the district
18 court **may order** distribution to the husband upon the wife’s first eligibility to
19 retire, seemed to embrace the discretion created by the newly passed NRS 125.155.
20 *Sertic* at 149.
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23

24 Similarly, in *Henson v. Henson*, 334 P.3d 933, 130 Nev. Ad. Op. 79 (Nev.
25 2014), wherein this Court again referred to the *Gemma* holding regarding
26 eligibility to receive benefits, but noting that NRS 125.155 did not apply, as the
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1 decree was entered in the matter **prior** to the passage of the statute. *Henson* at
2 939.

3 The rationale behind NRS 125.155, to prevent an inequity with different
4 participating members of PERS, is exactly what Appellant is arguing before the
5 Court in the case at bar. This inequity is especially meaningful in this case, as both
6 parties are PERS employees currently eligible to draw benefits. While Appellee
7 would pay an early retirement penalty if she were to retire at this time, Appellant is
8 effectively penalized by reducing his retirement benefits by more than ten (10%)
9 percent if forced to retire prior to achieving thirty years of service. JA- 001293:
10 12-15
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15 By allowing the court discretion in determining when payments should
16 begin, NRS 125.155 allows for consideration of the retiree's age, both party's
17 relative financial condition and retiree's motive in declining to retire. Only with
18 due consideration of these factors can a just result occur.
19

20 Subsequent to the passage of NRS 125.155(2), this Court decided *Hedlund*
21 *v. Hedlund*, 281 P.3d 1180 (2009). The holding of this case, at first look, seems to
22 skewer Appellant's argument. However, a closer look at *Hedlund* reveals a
23 thorough and just analysis of NRS 125.155.
24
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26 The *Hedlund* court stated "the statute's unambiguous language expressly
27 states that the statute is permissive in nature. Accordingly, we determine that NRS
28 125.155 gives the court full discretion to consider directing the employee spouse to

1 pay the nonemployee spouse his share of PERS benefits at the first eligible date or
2 to order that the nonemployee spouse wait until the employee spouse actually
3 retires.” *Id* at 1180. Specifically, in footnote 1, the Court states “[t]he legislative
4 history of NRS 125.155 indicates that the statute was enacted to correct any
5 assumptions that *Gemma* requires Nevada courts to order pension payments at first
6 eligibility” *Id* at _____.
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9 This Court has repeatedly noted the discretionary authority vested in the
10 district court with the adoption of NRS 125.155. *See, e.g. Holyoak v. Holyoak*, No.
11 67490 (Nev. Sup. Ct. 2116). Despite this authority, the district court in this matter,
12 while acknowledging the disparate impact of such an award, ordered Appellant to
13 pay Appellee her community property interest in his PERS despite Appellant not
14 being fully vested and without also ordering an offset for Appellant’s PERS
15 benefits. In so ruling, the district court failed to acknowledge its discretion under
16 NRS 125.155. Instead, the district court indicated Appellee was entitled to her
17 community property share because Appellant had passed the date of first eligibility
18 to retire, thereby failing to determine whether, regardless of eligibility, the
19 particular circumstances of this case warrant payment thereof.
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25 The district court’s confusion regarding this issue is understandable. As
26 recently as 2016, this Court has referred to its holding in *Gemma* in support of the
27 position that an ex-spouse is seemingly automatically entitled to his or her share of
28 PERS retirement benefits “starting from the date of eligibility for retirement.”

1 *Holyoak* at 5. However, this analysis fails to recognize the plain language of NRS
2 125.155, which makes the determination of first eligibility discretionary.

3
4 Having incorrectly found Appellee was automatically entitled to her share of
5 Appellant's PERS retirement benefits immediately, the district court sought to
6 reduce what it recognized as an unjust situation by ordering Appellant to pay
7 Appellee an amount less than her community property share each month. Though
8 well intentioned, the practical application of this decision only delays the
9 inevitable, as Appellee accrues a judgment¹ against Appellant at a rate of 3.62%
10 per month until such time as he retires. Assuming Appellant continues to work
11 until fully vested, Appellee will have a judgment exceeding One Hundred and
12 Thirty Thousand Dollars (\$130,00.00) against Appellant at the time of his "fully
13 vested" retirement. This results in the same unjust result the legislature sought to
14 eliminate with the passage of NRS 125.155, albeit the consequences are in the
15 form of a judgment rather than out-of-pocket monthly payments.

16
17 It defies basic logic to assume this was the intent of the legislature: to
18 essentially force an individual to retire OR face insurmountable debt despite thirty
19 years of public service as a first responder.

20
21 Under the plain language of NRS 125.155, the district court has absolute
22 discretion to decline the forced payment of PERS benefits prior to a participant's
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28 ¹ \$2,400 is amount owed to Appellee from retirement, minus the \$300 ordered by
the District Court, leaving a monthly amount owed of \$2,100.00. This amount is
subject to monthly interest of 3.62%.

1 actual retirement. Conversely, the district court has the same authority to order
2 payment upon first eligibility to collect retirement benefits. However, the district
3 court must apply the law fairly and equitably to both Appellant and Appellee. The
4 district court failed to exercise its discretion in declining to award benefits to
5 Appellee until Appellant is fully vested in PERS. Alternatively, the district court
6 erred in declining to award Appellant an offset, as both Appellant and Appellee are
7 eligible to collect PERS benefits, though both will ultimately be penalized if forced
8 to retire prior to fully vesting in the PERS system after thirty years of service.
9

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12 The Court must also recognize the public policy argument present in this
13 case. The State, County and City all have a substantial interest in the PERS
14 employees affected by this incorrect reading of the statutes and case law. Forcing a
15 PERS employee (law enforcement, fire, judge) to retire before an appropriate
16 retirement date, deprives the community of experienced first responders, for whom
17 the government entity has invested substantial resources.
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20 **Conclusion**

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22 THEREFORE, Appellant hereby requests that:

- 23
24 1. This Court reverse the decision of the district court, with instructions to
25 allow Appellant to continue working without making payments on his
26 retirement assets until he has achieved maximum maturity on the
27 retirement assets; or in the alternative, with instructions to allow
28

1 Appellant to offset payments on his retirement assets with his community
2 property interest in Respondent's retirement assets; and,

3
4 2. For such further relief as this Court deems necessary and just.

5 DATED THIS _10th day of May, 2019.

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7 Betsy Allen
8 Betsy Allen, Esq.
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CERTIFICATE OF COMPLIANCE

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 2016 in size 14 font of Times 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 is proportionately spaced, has a typeface of 14 points or more, and contains 4147 words and does not exceed 30 pages.

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 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 on 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 10th day of May, 2019.

/s/ Betsy Allen
Betsy Allen, Esq.
Nevada State Bar No. 6878

