Case No. 73977

IN THE SUPREME COURT OF THE STATE OF NEVADA

RICHARD KILGORE
Appellant

v.

ELENI KILGORE
Respondent

AND

ELENI KILGORE
Cross-Appellant

v.

RICHARD KILGORE
Cross-Respondent

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

RESPONDENT/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF

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I.
NRAP 26.1 DISCLOSURE

Pursuant to NRAP 26.1, the undersigned counsel of record certifies that the following are persons and entitles 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.

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IV.
INTRODUCTION

On April 29, 2019, this Court ordered supplemental briefing on addressing NRS 125155(2) and its application to the appeal. The Court ordered that each party should discuss (1) whether a district court can reduce or halt payment of PERS benefits before actual retirement pursuant to NRS 125. 155, and (2) if doing so is inconsistent with the policy underlying *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), and its progeny.

It appears that a similar issue has been addressed by the Nevada Supreme Court in an unpublished disposition in *Hedlund v. Hedlund*, 281 P.2d 1180 (Nev. 2009). The difference was in that case the question posed was whether a district court can ***order payment before actual retirement*** whereas in this case the question posed is whether the district court can ***reduce or halt payment before actual retirement.***

In *Hedlund*, on November 18, 2008, this Court entered an Order Directing Supplemental Briefing and directed that the Nevada Public Employees Retirement System (PERS) and the Family Law Section of the State Bar of Nevada participate in the appeal by filing amicus curiae briefs addressing the issues of:

1. The continued applicability of *Gemma v. Gemma*,[1] and *Wolff v. Wolff*,[2] in light of the enactment of NRS 125.155. Specifically, whether the district court can order payment of a share of a pension to a non-participating PERS member before the participating spouse actually retires when NRS 125.155, provides that "[t]he court may, in making a disposition of a pension or retirement benefit provided by PERS or the Judicial Retirement Plan, order that the benefit not be paid before the date on which the participating party retires."

. . .

The Family Law Section of the Nevada State Bar participated in the case by filing an approximately 58 page brief regarding the issues outlined. That brief was filed on January 2, 2009. In that brief, the Family Law Section provided a detailed history of the passage of NRS 125.155, and then provided a detailed analysis of the interaction between NRS 125.155 and *Gemma*, *supra* as to whether a district court can order payments to be made.

Rather than "re-inventing the wheel," much of the discussion regarding the legislative history of NRS 125.155 and its analysis is taken from the Family Law Section amicus brief from the *Hedlund* case, without reliance upon the opinion as persuasive authority or precedent, to avoid violation of Nevada Rule of Appellate Procedure, Rule 36(c)(2), and is set out below.

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[1] 105 Nev. 458, 778 p.2d 429 (1989).

[2] 112 Nev. 1355, 929 P.2d 916 (1996).

V.
STATEMENT OF ISSUES FOR WHICH SUPPLEMENTAL BRIEFING HAS BEEN ORDERED

A. WHETHER A DISTRICT COURT CAN REDUCE OR HALT PAYMENT OF PERS BENEFITS BEFORE ACTUAL RETIREMENT PURSUANT TO NRS 125.155

1. The History of NRS 125.155[3]

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 AB555, which basically emulated language in the ERISA/REA rules governing Qualified Domestic Relations Orders 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.[4]

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[3] The History of NRS 125.155 is also a part of Continuing Legal Education Materials from Continuing Legal Education Seminar "A PRIMER ON NEVADA PENSION LAW IN DIVORCE, PERS AND NRS 125.155" in 2010, by Marshal Willick, Esq. to the extent there is any objection to the history being taken from the Amicus Curiae Brief from the Family Law Section of the State Bar from the documents filed in the *Hedlund* disposition.

[4] NRS 286.6703(4).

NRS 125.155, enacted in 1995, establishes a set of special rules applicable only to PERS retirement benefits in divorce. The legislation in its original form was heard by the Assembly Judiciary Committee on March 31, 1995, backed by Mr. Gary Wolff, purportedly on behalf of the Nevada Highway Patrol Association, accompanied by the association's lawyer, and Mr. Robert Fowler, representing the Law Enforcement Council, Service Employees International Union.

The trial court had issued its decision in Mr. Wolff's divorce case dividing his retirement benefits on November 22, 1994.[5] He did not tell the Committee that he was at that moment, a party to an appeal in the Nevada Supreme Court whose course he hoped to alter by means of a statutory amendment.

In its original form, the proposed legislation would have stated that unvested retirement benefits were not divisible at all, effectively reversing *Forrest*[6] and *Gemma*.[7] It also would have required a dollar-for-dollar offset of Social Security benefits, effectively reversing the Nevada Supreme Court's holding in *Wolff* and *Boulter*[8] that such benefits are immune from such offsets as a matter of federal pre-

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[5] *Wolff v. Wolff*, 112 Nev. 1355, 1357, 929 P.2d 916, 917 (1996).

[6] *Forrest v. Forrest*, 99 Nev. 602, 669 P.2d 275 (1983).

[7] *Gemma v. Gemma*, 105 Nev. 458, 778 p.2d 429 (1989).

[8] *Boulter v. Boulter*, 113 Nev. 74, 930 P.2d 112 (1997) (under 42 U.S.C. 407(a) (1983), any state action is preempted by a conflicting federal law, such as the Social

emption. It would have required an automatic reversionary interest in the spousal share of the property upon death of the former spouse back to the member, in contravention of the Nevada Supreme Court's holding in *Wolff*, and the very structure of various retirement plans, including ERISA's divided interest scheme and mandatory spousal survivorship coverage,[9] and the heritable spousal share set out in federal law for CSRS and FERS.

None of these effects were clearly disclosed; none of those appearing made clear that only a tiny and ever-shrinking minority of States even consider vestedness an issue as to the divisibility of retirement benefits.[10] The Nevada Bar Family Law Section had heard about the proposed legislation, and its Executive Council was

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Security Act, under the Supremacy Clause (article IV, Clause 2) of the United States constitution). *Boulter* was not decided until after the 1995 legislative session.

[9] *See, e.g,* Marvin Snyder, VALUE OF PENSIONS IN DIVORCE (3d. ed., Panel Publishers 1999), at 22 (explaining how, until the interest is divided, with the spousal portion permanently the property of the spouse, the standard death benefit payable after retirement and after the death of the employee in an ERISA-governed plan is a "qualified joint and survivor annuity," or "QJSA."

[10] *See, e.g.*, discussion in Marshal Willick, *Hitting the Jackpot in Pension Cases: Secrets to Getting the Retirement Share Your Client Deserves* (PESI National Divorce Skills Institute, Las Vegas, Nevada 2007). The reason for this near-uniformity is pretty simple; where vested ness is required for divisibility, an employee spouse can wait until a few months short of vesntng of a 20-yer retirement, divorce a spouse t whom the employee had been married that entire time, and summarily divest the spouse of any interest whatsoever in what is frequently the most valuable asset of a marriage.

assured that the lawyers appearing at the hearing[11] would convey just how counterproductive and injurious to community property law the proposal was. Both attorneys appeared at the hearing, and are listed as testifying in opposition to the bill,[12] although Ms. Cooney further testified that legislative action was required because the retirement benefits decisions of this Court "tend to cloud issues rather than clear them up."[13]

But the bill was not killed as the Section was informed. Instead, it was assigned to, a subcommittee, consisting of four members of the Assembly, who apparently met with Ms. Cooney and others.[14] Any input by the attorneys purporting to speak for the NTLA or the Section was apparently unauthorized.[15]

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[11] Valerie Cooney, Esq. and Beverly Salhanick, Esq. of the Nevada Trial Lawyers Association ("NTLA"; now known as the "Nevada Justice Association," having changed its name in 2008. Reference are the organization as it was then named).

[12] *See* Minutes of Assembly Judiciary Committee, March 31, 1995, considering AB 292.

[13] *Id.*

[14] *See* Minutes of Assembly Judiciary Committee, May 12, 1995, considering AB 292. The on-line record is not complete, and does not include any of the exhibits, or even a transcription of the hearing of April, 20, but only the notation that the "tape is on file" with the Legislative Counsel Bureau.

[15] In the Family Law Section's subsequent investigation, all seven of the other NTLA members that should have to vote to back such legislation claimed either that they were in opposition to the bill, or never heard of it. To a member, the reported either hearing nothing or being told the bill was dead in committee, and none reported any vote on it ever being taken to give it support as an "NTLA bill" or "an NTLA

Ms. Cooney did reveal that she was the current spouse of Judge Michael Fondi, but apparently never disclosed that the legislation could be used to undo this Court's decision in the original *Fondi* case and dispossess the earlier former spouse of her interest in the retirement benefits.[16] She also did not reveal that Judge Fondi had already filed a second appeal in this Court relating to those retirement benefits,[17] which could be affected by the legislation.

It is therefore unsurprising that the bill was reported out of subcommittee with the statement that it "was the result of interested parties working together and are in full agreement with the work document and amendments."[18]

The Assembly, however, added a provision indicating that the legislation would only affect cases filed on or after the date of enactment. The 'interested parties' turned their efforts to trying to eliminate that provision of the bill,[19] with Ms.

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supported bill," which apparently is not allowed without such a vote being taken. The Section was opposed to the proposed legislation, basically for the reasons stated by Ms. Salhanick at the first hearing, and had been told the bill was killed.

[16] The earlier spouse had about a 16-year time rule interest in the PERS benefits. *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

[17] No. 26570, filed in January, 1995, and briefed from May to July.

[18] *See* Minutes of Assembly Judiciary Committee, May 24, 1995, considering AB 292.

[19] *See* Minutes of Assembly of Judiciary Committee, June 17 & June 20, 1995, considering AB 292.

Cooney stating that the time-rule was adopted from California, but that it "in reality is not well-suited to Nevada."[20]

The effort to make the legislation retroactive failed, and the bill went to the Senate, where they tried again.[21] This time, Ms. Cooney made the additional incorrect assertion that the time rule does not allow divorces to be finalized, but "requires the parties to return to court to litigate the division and the value of the non-participating spouse's interest."[22] She further asserted that PERS was "unique" based on the early regular retirement dates for police/fire PERS participants.[23]

During the Senate hearings, Ms. Cooney was accompanied by attorney Muriel Skelly, who joined Ms. Cooney's call to make the legislation applicable to previously decided cases as well as newly-filed ones. Ms. Skelly identified herself as "a member of the Executive Council of the Section," but did not disclose that she

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[20] *See* Minutes of Assembly Judiciary Committee, June 17, 1995, considering AB 292. She did not reveal that the rule is followed in every community property State, and the great majority of equitable division States; the only significant variation is in Texas, which employees a "rank and grade at divorce" approach that enormously undervalues the spousal share. *See Grier v. Grier*, 731 S.W.2d 931 (Tex. 1987). For a full explanation of the mathematical error in that approach, see Marshal Willick, Divorcing the Military: How to Attack; How to Defend *(U.S. Army JAG Corps Presentation, Kansas City, MO 2008).

[21] *See* Minutes of Senate Judiciary Committee, June 26, 1995, considering AB 292.

[22] *Id.*

[23] *Id.*

was Mr. Wolff's divorce attorney, nor that she represented him in an appeal already filed in this Court that would be directly affected by the proposed legislation,[24] nor that she appearing to assist her client, and espousing a position at odds with that of the Section.

It was only the next day that the Family Law Section discovered that the bill had not been killed in the Assembly, as it had been informed. The Section scrambled to put together a written report to Senator James (chair of Senate Judiciary) as to all the damage the proposed legislation would inflict, but it did not reach him during the next day's (June 27) Committee proceedings, which is why the legislative history for that date says only that "he is awaiting a facsimile from a family law practitioner about a concern with the bill," but when it did not arrive in time, had the Committee vote to pass the legislation.

When the Senate Judiciary Committee was informed of the various problems with the bill, that evening, instructions were given to have it quietly amended, essentially overnight and with no record other than the bill draft itself, but the Section was informed that it could not be killed entirely, apparently as a matter of comity from chamber to chamber. The worst portions of the bill were removed between June

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[24] *Id.* She went further, declaring "I have no personal axe to grind; I have no personal interest in this. I have no financial axe to grind; I have no financial interest in this. All I have is a professional interest from the trenches who does this day after day after day. And I can see great injustice, to both men and to women."

28, and June 30, 1995; it was redirected to apply solely to PERS retirements, and was reprinted, passed, and returned to the Assembly, which concurred in the amendments without other record.

The Governor signed the bill on July 5, 1995, still containing the non-retroactivity provisions, which is why arguments relating to the legislation do not appear in the record of this Court's opinion in *Wolff* in 1996.

The final version of the bill, enacted as NRS 125.155, applies solely to PERS. Section 1(a) requires any divorce order to be based on the "time rule" and Section 1(b) prohibits basing a division "upon any estimated increase" based on post-marital service. Section two states that the divorce court may require that benefits for a spouse not be paid until the participant actually retires, and may safeguard the spousal share, if it does so order, by way of a bond, life insurance, or other security, or (by agreement of the parties only) by increase in the spousal share to compensate for the delay in payments. Section three provides that a spousal share ordered under that statute terminates upon death of either party unless a retirement option providing for survivorship benefits is agreed or ordered, although the phrasing is confusing and appears garbled.

Much of the final version of the bill merely restated existing law - such as codification of the time rule, or the provision permitting a court order "upon agreement of the parties." Much of the rest is simply inapplicable to anything. For

example, paragraph 1(b) is built around the phrase "In determining the value of an interest in or entitlement to a pension or retirement benefit. . . ." The problem is that Nevada divorce courts generally do not "determine a value." Under *Gemma* and *Fondi*, our courts simply divide the retirement itself, whatever its value, equally, so that both spouses share the benefits, and the risks, of whether the benefits will ever appear, and if so in what amount.

Paragraph 1(b) also prohibits the court from basing its determination on any "estimated increase" in value resulting from a promotion or raise as a result of continued employment after the divorce. Of course, the time rule does not "estimate" anything, but simply accords an ever-smaller slice of an ever-enlarging pie to the former spouse, in precise math.

It is possible (but by no means certain) that the language was intended to prevent application of the time rule as used in all other cases, by freezing the spousal share at a hypothetical division of whatever rank and grade had been achieved by the employee at the time of divorce. If so, the statute would apparently emulate the defective Texas variation of the time rule discussed above, and would accord to spouses of PERS members a lesser accrual of the community property of a marriage than everyone else in this State. The language is so unclear, however, that it may not do anything; no known case has ever applied the time rule as Texas would.

The key operative word in NRS 125.155(2) is "may." The provision is an "opt-out" clause - for PERS cases only - to the mandate of *Gemma* and *Fondi* that the spouse is eligible for distribution of his or her share of the retirement at the employee spouse's first eligibility for retirement. The legislative history states that it was intended to undercut the change of Nevada's community property scheme from "equitable" to "equal" in 2003, but just for PERS participants.

There has never been a case, apparently, in which a court has ordered a bond to secure payment of a spousal share ordered not paid at eligibility, in accordance with NRS 125.155(2)(a). It is difficult to conceive how such an order might work, as such a bond would require a dollar sum certain to secure an unknown future performance to begin on an unknown future date.

NRS 125.155(2)(b) actually does something - it explicitly permits a court to order private life insurance to make up for the lack of any "pre-retirement survivor annuity" in the PERS system.[25]

Paragraph 2(c) provides that the court may "pursuant to an agreement of the parties" increase the value of the spousal share as compensation for delay in payment. Of course, that is what the time rule does automatically for everyone else.

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[25] In other words, the reality that even if ordered, the survivor's benefits provisions under PERS do not go into effect until and unless the participant actually retires; if the member dies before retirement, the former spouse gets nothing under the statutory scheme, since death benefits are not payable to a former spouse, and survivor's benefits do not become effective until actual retirement.

It is hard to imagine a circumstance in which a PERS participant, having gained the ability to deprive his or her spouse of that automatic "smaller slice of the larger pie" benefit, would ever agree to give it back; there is no known instance of it being used.

Paragraph 2(d) allows a court to order the employee to "provide any other form of security" for actual payment to the former spouse. This, also, has apparently never been done.

Section three provides that any interest created by the court pursuant to this statute terminates at the death of either party unless otherwise provided by agreement or court order. Again, as with section one, that is already the law. And it is hard to make the text following subsection (b) make any linguistic sense with the first half of the paragraph.

The July, 1995, Chair's Column in the Nevada Family Law Report pretty concisely stated the position of the Section leadership on the process and result of enacting NRS 125.155:

> Several members of the Executive Council were instrumental in deflecting what would have been incredibly bad legislation, in the form of A.B. 292. That bill would have significantly damaged the whole scheme of community property by disallowing division of unvested retirement benefits, among other things. It was detected the day before its final vote in the Senate, having passed entirely through the Assembly, and Senate Judiciary, without any notice to the Council whatsoever.
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> . . . .

> The organized family law Bar must become more proactive in the legislative process. Too much, we have allowed private lobbying groups to speak for the family law bar. Experience has shown clearly that those organizations, and their representatives, have political and personal agendas considerably beyond looking out for equity, impartiality, and logic in family law.
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> As noted by Edmund Burke, "All that is necessary for the triumph of evil is for good men to do nothing." It seems to me essential to have a neutral advisory presence in the legislature to prevent the kind of selfish stupidity exemplified by A.B. 292 from becoming the law of this state. We owe it to the system we serve, and to our collective clients, strong and weak, rich and poor, to prevent the statutory law from being twisted to serve the purposes of a few political insiders rather than the public generally.

Six weeks after the effective date of the statute, this Court in *Sertic* specifically ordered that all spousal shares of retirement benefits are to be distributed to spouses upon members' first eligibility for retirement.[26] Accordingly, the Section anticipated a quick court challenge. But the statute in its watered-down form lay, virtually ignored by Bench and Bar for the next 13 years, and the few times it was made an issue at trial it apparently never went up on appeal, until the *Hedlund* disposition.

2. The Question Posed Of Whether a District Court Can Reduce of Halt Payment of PERS Benefits Before Actual Retirement Pursuant to NRS 125.155

Nevada Revised Statute 125.155(2), states,

> The court may, in making a disposition of a pension or retirement benefit provided by the Public Employees' Retirement System or the Judicial Retirement Plan, order that the benefit not be paid before the date on which the participating party retires. . .

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[26] *Sertic v. Sertic*, 111 Nev. 1192, 149-150, 901 P.2d 148, 150 (1995)

A reading of NRS 125.155(2) may be viewed as permissive, and if a court "may" do something, a court can just as easily not do it. The operative terms in paragraph 2 are, for the purposes of the question posed is "in making a disposition."

The term "making a disposition of a pension or retirement benefit provided by the Public Employees' Retirement System" is in the present tense, which should mean at the time of the divorce. Once a Decree is entered, the time for "making a disposition" has passed, subject to an appeal of the Decree or a motion to set aside.

The stipulated Decree of Divorce in this matter was entered on March 13, 2013.[27] 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").[28]

Two years later, 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.[29]

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[27] 1 JA-000002

[28] 1 JA-000003-1 JA000004

[29] 3 JA-000518 to 3 JA-000522

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."[30] 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."[31]

The time in which to enter an order suspending payments from the pension would have been at the entry of the Decree of Divorce. Here, there was no order from the district court suspending or halting payments from Richard to Eleni upon his first eligibility for retirement. The QDRO that both parties signed[32] was unambiguous in that payments to Eleni were to commence at the earliest possible date.

In addition, in *Holyoak v. Holyoak*, Docket No. 67490 (Order of Affirmance, May 19, 2016) this Court reaffirmed *Gemma* and its progeny that "a non-employee spouse has a right to his or her share of the employee spouse's benefits starting from

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[30] 3 JA-000520

[31] 3 JA-000520

[32] In *Rivero v. Rivero*, 125 Nev. 410, 429, 216 P.3d 213, 227 (2009), 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 in the parties' agreement.

the date of eligibility for retirement. *Id.* at 464, 778 P.2d at 432." *Id.* at page 5. The Court again stated in *Holyoak*, "this court has repeatedly held that the nonemployee spouse has a right to her share as soon as the employee spouse is eligible to retire." *Id.* at 6.

Not only is there no authority for a district court to halt payments under NRS 125.155, after entry of a Decree, there is long standing authority of 20 plus years, in the form of *Sertic*, *Wolff*, and *Holyoak* for which this Court has stated that the nonemployee spouse has a right to his or her share upon first eligibility for retirement.

The disposition of the benefits was made upon the filing of the Decree. The time for halting payments, if it could occur, would have been at the entry of the Decree. Any ambiguity was eliminated in the Qualified Domestic Relations Order 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."[33] Such an order would be in keeping with the longstanding case law in *Sertic*, *Wolff*, and *Holyoak*.

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[33] 3 JA-000520

B. IF REDUCING OR HALTING PAYMENT OF PERS BENEFITS BEFORE ACTUAL RETIREMENT IS INCONSISTENT WITH THE POLICY UNDERLYING GEMMA v. GEMMA, 105 Nev. 458, 779 P.2d 429 (1989), AND ITS PROGENY

The district court reducing or halting payments ***is*** inconsistent with *Gemma v. Gemma*, 105 Nev. 458, 779 P.2d 429 (1989) and its progeny.

As this Court set out in *Sertic*, clarifying the holdings in both *Gemma* and *Fondi*, the normal distribution of a spousal share of a pension is upon the employee spouse's "first eligibility for retirement," and 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. This is the rule in all community property states, and many other states around the country.[34]

The purpose of *Gemma, supra*, and its progeny is to ensure that the non-employee spouse is not divested of their share of the community property of the marriage. The requirement of equal division of community property is stated right

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[34] *See, e.g., In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received "or at least until the earner is eligible to retire").

on the face of NRS 125.150(1)(b) and this requirement of equal division and has been acknowledged by this Court in at least two recent opinions.[35]

At any point in time in which the non-employee spouse is deprived of their share of community property the requirements of NRS 125.150(1)(b) for an equal division are being violated. As this Court has directed, any language in a divorce decree that could be interpreted more than one way should be construed to conform to the law unless there is extremely clear proof of an intention to do otherwise.[36]

Richard does not even suggest the existence of any contrary authority. Instead, he contends that it is "unfair" that he should have to ensure that Eleni gets her community property share of the retirement because he believes he might be inconvenienced, even though notwithstanding the law that community property be equally divided, *Sertic, supra* holds for payment upon first eligibility, ignores what every other community property state holds, and that he agreed to in the Qualified Domestic Relations Order he reviewed and signed that Eleni should receive her share as soon as possible.

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[35] *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996); *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Op. No. 77, Oct. 31, 2013).

[36] *See, e.g., Walsh v. Walsh*, 103 Nev. 287, 738 P.2d 117 (1988) (in the absence of express language specifying otherwise, the phrase "one-half of [James'] pension with the United States Government" was construed as referencing the pension earned during marriage).

As addressed, accordingly it is inconsistent with *Gemma, supra*, and its progeny for the district court to reduce or halt Eleni's payments from Richard upon his first eligibility for retirement.

C. IT APPEARS RICHARD MAY HAVE NOT ADDRESSED THE ISSUES AS DIRECTED BY THIS COURT

As indicated, in this Court's Order Directing Supplemental Briefing, each party was to discuss (1) whether a district court can reduce or halt payment of PERS benefits before actual retirement pursuant to NRS 125.155, and (2) if doing so is inconsistent with the policy underlying *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989) and its progeny.

However, in his Supplemental Brief, Richard still framed the issue as ***"the district court erred in finding that it lacked discretion in requiring Appellant to begin making payments on Respondent's community property share of his divided retirement assets before he has developed the account to full maturity."*** (Emphasis in the original). Appellant's Supp. Brief at page 2, lines 5-7.

Richard then makes reference to legislative discussions that never ended up being part of the ultimate version of NRS 125.155. Richard also failed to include or reference the legislative history detailed by the Family Law Section of the State Bar in their Amicus Curiae brief filed January 2, 2009, as part of the documents filed leading up to the *Hedlund* disposition.

Richard refers to *Sertic, supra*, and claims that this Court noted that a district court "'may' order distribution to the husband upon the wife's first eligibility to retire." Appellant's Supp. Brief at page 5, lines 19-20.

Richard fails to include this Court's complete holding from *Sertic*. This Court stated in *Sertic* in the sentence immediately following the sentence cited by Richard, "If Mona does not elect to retire when she first becomes eligible, she ***shall*** be obligated to pay to Mark what he would have received if she had retired." *Id.* at 149. (Emphasis added). The discretion that Richard claims is there in *Sertic* appears not to exist.

Richard refers to *Henson v. Henson*, 130 Nev. Adv. Op. 79, 334 P.3d 933 (Oct. 2, 2014), and claims that this Court held that NRS 125.155 did not apply because the Decree was entered prior to the passage of the statute. Appellant's Supp. Brief at page 5, line 25, through page 6, line 2. It appears that Richard may have failed to accurately state the *Henson* holding.

The reference by this Court in *Henson* to NRS 125.155 not applying appears to refer to only a survivor benefit. This Court stated,

> Initially, we note that the district court improperly relied on NRS 125.155(1) in amending the QDRO because that statute was not in effect when the divorce decree was entered.[5] Therefore, we must consider whether the divorce decree awarded Kristin a survivor beneficiary interest because a QDRO must conform to the divorce decree.

Id. at 936.[37]

Richard also cited to *Hedlund v. Hedlund*, 281 P.2d 1180 (2009) for the claimed permissive nature of NRS 125.155. Richard omitted indicating that *Hedlund* is a nonpublished decision.

Under the Nevada Rules of Appellate Procedure, Rule 36(c)(2), a party may cite to for its persuasive value, if any, an unpublished disposition issued by the Supreme Court on or after January 1, 2016.

The amendment of NRAP 36(c)(2), came in after Supreme Court Rule 123 was repealed which removed the longstanding prohibition against citing so-called unpublished dispositions. The now repealed well-known Supreme Court Rule 123 provided that, with only narrow exceptions, "[a]n unpublished opinion or order of the Nevada Supreme Court shall not be regarded as precedent and shall not be cited as legal authority."

The *Hedlund* decision was issued in 2009. Richard cited to and argued the *Hedlund* case for at least persuasive value. Therefore, Richard's reliance upon the *Hedlund* opinion should be seen as a violation of the Nevada Rules of Appellate Procedure Rule 36(c)(2) and reference to *Hedlund* by Richard, from page 6, line 20, through page 7, line 8, should accordingly, be disregarded or stricken in its entirety.

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[37] Footnote 5, of the opinion appears to confirm the same as well.

Richard then cites to the *Holyoak v. Holyoak*, Docket No. 67490 (Order of Affirmance, May 19, 2016) for the proposition that "this Court has repeatedly noted the discretionary authority vested in the district court with the adoption of NRS 125.155. Appellant Supp. Brief at page 7, lines 9-1.

That assertion by Richard may not be completely accurate. The only opinion that *could* be cited to for persuasive or precedential authority is *Henson, supra*, and that reference dealt with a survivor benefit, not discretion. Rather than Richard's assertion of "repeatedly," the correct assertion may be that NRS 125.155 has been cited to one time, in an opinion for citable persuasive authority only, that a district court has discretionary authority under NRS 125.155 in making a disposition of PERS pension benefits.

Richard further claims that he was "not fully vested" in his pension at the time the district court made its decision. Appellant's Supp. Brief at page 7, lines 15-16. The claim by Richard may be seen inaccurate as a matter of law. 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 often years of service, or the member's death, whichever occurs first.[38]

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[38] *See* NRS 286.6793 which states,

1. The retirement allowance for a member who:

Richard states that the monthly interest on the judgment against him is 3.62 percent per month which comes out to 43.44 percent annually.[39] Appellant's Supp. Brief at page 8, line 11, and footnote 1. The monthly interest rate cited by Richard is inaccurate and he failed to provide any reference to the record substantiating the same. The Court may take judicial notice that the judgment interest rate is the prime rate plus two percent. *See* NRS 17.130(2). The interest tables are published two times per year pursuant to NRS 99.040(1) by the Nevada Division of Financial Institutions. Richard's claim of interest of 3.62 percent per month may be disregarded.

(a) Ceased being an active member before July 1, 1989, vested on the date that the employee completed 10 years of accredited contributing service; and

(b) Is active on or after July 1, 1989, becomes vested on the date that the employee completes 5 years of accredited contributing service.

2. Benefits for survivors offered pursuant to this chapter become vested on the date that the employee completes 10 years of accredited contributing service or becomes entitled to begin receiving benefits or on the date of the member's death, whichever event occurs first.

3. Unless otherwise specifically provided by the amendatory act, any change in the provisions of this chapter is retroactive for all service of any member before the date of vesting, but no change may impair any vested allowance or benefit.

4. Upon the termination or partial termination of the System:

(a) Except as otherwise provided in paragraph (b), all accrued benefits that are funded become 100 percent vested and nonforfeitable.

[39] 3.62 percent per month times 12 months = 43.44 percent.

Richard continues claiming that he is entitled to an "offset" from Eleni's pension. Appellant's Supp. Brief at page 9, lines 7-8. Richard fails to provide any legal authority for the proposition he continues to make.

In summary, Richard (1) did not address the questions posed by this Court in the April 29, 2019, Order directing him to address the issues posed, (2) has failed properly state the *Sertic*, *supra*, holding in its entirety, (3) has failed to accurately state the *Henson*, *supra*, holding, (4) cited to *Hedlund*, *supra*, a pre-January 1, 2016, disposition as at least persuasive authority, (5) incorrectly cited to *Holyoak, supra* as being one of repeated examples where this Court has noted that district courts have discretionary authority with the adoption of NRS 125.155, and (6) incorrectly claimed the he was not "fully vested" in the PERS retirement.

CONCLUSION

WHEREFORE, Respondent/Cross-Appellant, Eleni Kilgore, asks that this Court conclude that,

1. A district court cannot reduce or halt payment of PERS benefits before actual retirement pursuant to NRS 125. 155, and

2. If a district court does so, the district court is inconsistent with the

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policy underlying *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), and its progeny.

DATED this 25th day of May 2019

Respectfully submitted
PAGE LAW FIRM

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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 words. The brief is 28 pages in length and contains 6,652 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 25th day of May 2019

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CERTIFICATE OF SERVICE BY ELECTRONIC FILING

I hereby certify that I am an employee of the PAGE LAW OFFICE and that on the 26th day of May 2019, I did serve by way of electronic filing a true and correct copy of the above and foregoing RESPONDENT/CROSS-APPELLANT'S SUPPLEMENTAL BRIEF on the following:

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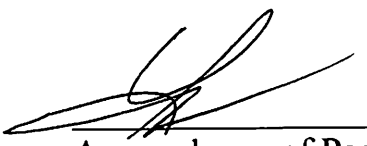

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