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### Summary of Henson v. Henson, 130 Nev. Adv. Op. 79

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*Nevada Law Journal*

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FAMILY LAW: COMMUNITY PROPERTY IN FORMER SPOUSE PENSION

**Summary**

The Court determined that (1) survivor benefits must be specifically set forth in a divorce decree notwithstanding NRS 286.590, which does not automatically confer survivor benefits and (2) immediate payment of benefits to a former nonemployee spouse must be requested by motion, in accordance with California's approach in *In re Marriage of Cornejo*<sup>2</sup>.

**Background**

Howard Henson and Kristin Henson were married from September 1984 until they filed for divorce in November 1992. The district court entered their divorce decree in July 1995, applying the "time rule"<sup>3</sup> and "wait and see"<sup>4</sup> approach to divide Howard's PERS pension.

Kristin requested and the district court entered a qualified domestic relations order (QDRO) on January 21, 1999, without notice to Howard. The QDRO recognized Kristin as the alternate payee in Howard's PERS plan and included a survivor beneficiary interest. It provided for Kristin to receive 50% of any distributed refund if Howard died before Kristin began receiving benefits.

Though Howard had remarried, the QDRO precluded him from designating his spouse as his survivor beneficiary. Howard did not retire when eligible in June 2003. In 2011, Howard filed a motion to modify the QDRO, saying it awarded a survivor interest to Kristin that was not in the original divorce decree. Kristin then requested a judgment for community property pension payments that she could have received since Howard's eligibility to retire in 2003.

The district court granted Howard's motion to modify the QDRO and denied Kristin's motion for judgment.

**Discussion**

*The amended QDRO was not an impermissible modification of the divorce decree's division of property*

Kristin argued that the divorce decree intended her to be the alternate payee and the survivor beneficiary because of the decree's application of the "time rule" and "wait and see" approach. She argued that the statute<sup>5</sup> that set forth requirements for a QDRO permits a former spouse survivor beneficiary. Howard argued that the divorce decree did not designate Kristin as the survivor beneficiary, and the QDRO did not conform to the decree because it expanded Kristin's benefits to include survivor benefits. The Nevada Supreme Court reviewed the district court's interpretation of the divorce decree *de novo*.

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<sup>1</sup> By Sydney Gambee.

<sup>2</sup> 916 P.2d 476 (Cal. 1996).

<sup>3</sup> *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989).

<sup>4</sup> *Fondi v. Fondi*, 106 Nev. 865, 802 P.2d 1264 (1990).

<sup>5</sup> NEV. REV. STAT. § 286.6703.

The “time rule” from *Gemma* requires the district court to state in the divorce decree the interest a nonemployee spouse is to receive in a non-vested retirement pension.<sup>6</sup> The calculation of the community share depends upon the time the employee spouse was married and earning the pension.<sup>7</sup> The “wait and see” approach gives the nonemployee spouse an interest in the amount ultimately received by the employee spouse, not just the amount accrued at the time of the divorce.<sup>8</sup>

The Court recognized that in modifying the QDRO, the district court improperly applied a statute that came after the divorce decree. NRS 125.155(1) provides that community property interest is calculated based on the number of years the employee was working and earning the pension rather than “any estimated increase in value.”<sup>9</sup> Nonetheless, the divorce decree did not specifically name Kristin the survivor beneficiary, instead mandating that the pension would be divided based on the “time rule” and “wait and see” approach.

Disagreeing with Kristin’s suggested approach, the Court declined to interpret the term “pension” as automatically including a survivorship benefit. Further, the Court noted NRS 286.590 does not mandate a survivor beneficiary. The Public Employees’ Retirement System first calculates the amount the retired employee will receive monthly from PERS for the rest of his/her life.<sup>10</sup> Then, the employee has a *choice* to receive a reduced monthly allowance with a continued payment after death to the employee’s beneficiary (survivor beneficiary).<sup>11</sup> This survivorship benefit is neither required nor automatic.

Because the amount of Kristin’s community property interest depends on the *Gemma* calculation, the choice of whether to have a survivor beneficiary is irrelevant to Kristin’s community property interest calculation. Here, the divorce decree did not explicitly give Kristin a survivor beneficiary interest. The first QDRO improperly made Kristin the survivor beneficiary, and the amended QDRO corrected this and properly reflected the divorce decree.

*The district court did not err in denying Kristin’s motion for judgment*

Kristin also argued that the district court erred when it did not award her a judgment in the amount of her community interest in Howard’s PERS pension benefits since 2003. Kristin relied on *Sertic v. Sertic*, which addressed when a nonemployee former spouse has a right to his or her share of community property interest in a former spouse’s pension.<sup>12</sup> In *Sertic*, the court concluded that a district court may allow a nonemployee spouse to receive his/her community property interest in the pension at the time of the divorce trial. In order to do so, the district court must be able to determine (1) the party’s present community share of the pension plan, (2) whether there are sufficient existing funds, and (3) the parties must agree the distribution would

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<sup>6</sup> 105 Nev. at 461-62, 778 P.2d at 431.

<sup>7</sup> *Id.* at 460 n.1, 461. Specifically, the actual pension plan is multiplied by a fraction – the numerator is the number of months married and the denominator is the total number of months worked and earning the pension. The result is divided by two.

<sup>8</sup> *Fondi*, 106 Nev. At 859, 802 P.2d at 1266 (citing *Gemma*, 105 Nev. at 462, 778 P.2d at 432).

<sup>9</sup> NEV. REV. STAT. § 125.155(1). The statute became effective on July 5, 1995, after the June 1995 divorce decree but before the January 1999 QDRO. However, the QDRO was to enforce the June 1995 divorce decree. The Court recognized that the district court may have reached the correct result, albeit using the wrong reasoning.

<sup>10</sup> *See* NEV. REV. STAT. § 286.551.

<sup>11</sup> NEV. REV. STAT. § 286.590(1).

<sup>12</sup> 111 Nev. 1192, 1194, 901 P.2d 148, 149-50 (1995).

be the final distribution.<sup>13</sup> Importantly, the nonemployee spouse must request at that time that he or she receive his or her community property interest. The employee spouse is not required to pay until a demand is made, and the nonemployee spouse may choose to wait until the employee spouse retires to share in the pension plan at its increased value.

Here, the Court relied on a decision of the California Supreme Court that concluded a nonemployee spouse must make a motion for disbursement of benefits before the employee spouse is required to pay anything.<sup>14</sup> The Court agreed with the California court's approach. Accordingly, if Kristin wanted to immediately begin receiving payments (such as when Howard was eligible to retire), she should have filed a motion. Because Kristin did not file a motion in district court requesting immediate payment, the Court found Howard was under no duty to pay her until such a motion was made. Accordingly, the Court affirmed the district court's denial of Kristin's motion.

### **Conclusion**

The Court concluded that the district court's amendment of the QDRO was not an impermissible modification since it correctly effectuated the divorce decree's division of property. The Court determined that the divorce decree did not specifically make Kristin a survivor beneficiary, and the term "pension" did not automatically include survivor beneficiary interest.

Further, the Court clarified that a nonemployee spouse must file a motion in the district court requesting immediate payment of his or her portion of the employee spouse's pension benefits before he or she is eligible to receive payment if the employee spouse has yet to retire. Kristin did not file a motion requesting immediate payment of benefits.

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<sup>13</sup> *Id.*

<sup>14</sup> *In re Marriage of Cornejo*, 916 P.2d 476, 479 (Cal. 1996).