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Richard Kilgore v. Eleni Kilgore, 135 Nev. Adv. Op. 47 (Oct. 3, 2019)

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EMPLOYEE SPOUSE BENEFITS BEFORE RETIREMENT
AND DIVORCE DECREE MISTAKES

Summary

NRS 286.510 provides that the eligibility depends on an employee spouse's effective date of membership in Nevada Public Employees' Retirement System ("PERS"), profession, number of years served, and age. The Court determined that the time does not depend on whether the employee spouse's PERS account has fully matured. NRS 125.155 provides district courts with discretion to deny or reduce a non-employee spouse's request for pension payments before the employee spouse's retirement. Further, under NRS 125.150(3), a party can seek adjudication of an asset mistakenly omitted from the divorce decree within three years of discovering the mistake. The Court determined that the district court did not abuse its discretion and affirmed the ruling.

Background

Richard Kilgore and Eleni Kilgore married in December 1992. During their marriage, Richard worked as a marshal for Clark County and Eleni as a teacher for Clark County. They both received retirement benefits through the PERS. In March 2013, they divorced, and the divorce decree ordered for the division of each party's PERS benefits in accordance with applicable case law. However, the divorce decree did not mention vacation or sick pay earned or accrued during their marriage.

In March 2015, Richard became eligible for retirement and Eleni moved the district court to compel Richard to begin paying her share of his PERS benefits. She requested one-half interest in the vacation and sick pay earned and accrued during their marriage. In June 2015, the court temporarily denied Eleni's request because Richard was terminated from his marshal position and had no other source of income. Thus, the court also deferred resolving Eleni's request for vacation and sick pay.

In June 2015, the district court entered a qualified domestic relations order (QDRO) dividing Richard and Eleni's PERS benefits. The QDRO dividing Richard's benefits assigned Eleni the right to receive a portion of the benefits at the first possible date. In January 2016, Richard was reinstated as a marshal. Following his reinstatement, the court ordered Richard to start paying Eleni \$1,2000 per month toward her share for his PERS benefits. The court held a series of evidentiary hearings and status checks to review Richard's financial situation over the course of 2016 and 2017.

¹ By Ariel Williams

In July 2017, the district court concluded the Eleni was entitled to her share of the PERS benefits even though he had not yet retired. After extensively reviewing Richard's financial situation, the court ordered him to pay Eleni \$350 per month toward the judgment. The Court also ordered Richard to pay Eleni for vacation and sick pay that accrued over the course of their marriage. Richard filed a timely appeal, and Eleni cross-appealed.

Discussion

The district court's distribution of Richard's PERS benefits

First, the Court considered whether the district court abused its discretion when it concluded that Eleni was entitled to her community property share of Richard's pension benefits even though he had not retired yet. Richard argued that an employee spouse who chooses to work past eligibility retirement date should not be required to pay the non-employee spouse benefits until retirement. In *Walsh v. Walsh*, the Court held that retirement benefits earned during the marriage are community property.² The Court clarified in *Gemma v. Gemma*³, that the retirement benefits are community property even though they are not vested. Thus, a non-employee spouse is eligible to receive a community property share of pension benefits when the employee spouse is first eligible to retire, regardless of when the employee chooses to retire.

NRS 286.510 provides that the eligibility depends on an employee spouse's effective date of membership in PERS, profession, number of years served, and age.⁴ The time does not depend on whether the employee spouse's PERS account has fully matured. In order to receive payment, *Henson v. Henson* requires that the non-employee spouse file a motion requesting immediate payment of their portion of the employee spouse's pension benefits.⁵ Eleni filed a motion requesting her portion in March 2015. Thus, the district court did not err when it concluded that Eleni was entitled to her community property share of Richard's PERS benefits dating back to March 2015.

Next, the Court considered whether the district court abused its discretion when it reduced the amount of PERS benefits owed to Eleni and ordered Richard to pay \$350 per month. NRS 125.155 provided district courts with discretion to deny or reduce a non-employee spouse's request for pension payments before the employee spouse's retirement.⁶ Thus, the Court concluded that the district court acted within its discretion when it reduced the amount Richard owed to Eleni to a monthly amount it deemed fair.

The district court held a series of evidentiary hearings to ensure fairness under the circumstances of Richard and Eleni's divorce. The district court found that if Richard was required to pay Eleni \$2,455 per month, including \$1,500 monthly child support and his current

² 103 Nev. 287, 288, 738 P.2d 117, 117 (1987).

³ 105 Nev. 458, 461, 778 P.2d 429, 430 (1989).

⁴ NEV. REV. STAT. § 286.510 (2015).

⁵ 130 Nev. 814, 823, 334 P.3d 933, 939 (2014).

⁶ NEV. REV. STAT. § 125.155 (2001).

obligations, he would be unable to afford basic living expenses and forced into early retirement. The court found that this would be contrary to public policy and violate garnishment laws, as he would be left with less than half of his paycheck. The Court concluded that the district court appropriately balanced the public policy and community property interests involved, because they accommodated Richard's financial situation and ensured that Eleni would eventually receive the full amount owed to her.

The district court's division of Richard's vacation and sick pay

Finally, the Court considered whether the district court erred when it concluded that Richard's vacation and sick pay were omitted from the divorce decree and divided them equally between Richard and Eleni. Richard argued that Eleni could have raised this issue at the time of the divorce and because she did not, res judicata precluded the division of this property. He further argued that vacation and sick pay are not community property because they amount to future wages and are earned after the divorce. However, under NRS 125.150(3), a party can seek adjudication of an asset mistakenly omitted from the divorce decree within three years of discovering the mistake.⁷

Approximately two years after the divorce, Eleni moved the district court to adjudicate the vacation and sick pay as omitted assets. Thus, under NRS 125.150(3), Eleni was entitled to file a post-judgment motion for distribution. The Court concluded that the district court did not abuse its discretion when it equally divided the vacation and sick pay earned during the marriage, because it belonged to the community regardless of when the benefits are realized.

Conclusion

Informed by the statutes and public policy, the Court found that the district court properly balanced community property interests and public policy when distributing Richard's PERS benefits. Additionally, applying the applicable statutes, the Court found that the district court did not abuse its discretion when it divided the sick and vacation pay accrued during the marriage. The Court affirmed the district court's ruling.

⁷ NEV. REV. STAT. § 125.150(3) (2017).