

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

ZULFIYA NICHOLSON,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE LISA
M. BROWN, DISTRICT JUDGE,
Respondents,
and
ROBERT NICHOLSON; AND PUBLIC
EMPLOYEES' RETIREMENT SYSTEM
OF NEVADA,
Real Parties in Interest.

No. 72657

FILED

APR 20 2018

ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

*ORDER DENYING PETITION
FOR WRIT OF MANDAMUS OR PROHIBITION*

This is an original petition for a writ of mandamus or prohibition challenging a district court order declining to consider whether petitioner should be designated as the survivor beneficiary on her spouse's retirement plan.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. *See* NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). This court has discretion as to whether to entertain a petition for extraordinary relief and will not do so when the

petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; NRS 34.330; *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 474-75, 168 P.3d 731, 736-37 (2007). Petitioner bears the burden of demonstrating that extraordinary relief is warranted. *See Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

At issue in this matter is whether a district court has the authority to award a survivor benefit in a member's Public Employees' Retirement System (PERS) pension to the member's spouse as part of a divorce action. In the underlying case, the district court determined that "there is no statute nor case law that would allow it" to declare the survivor benefit to be a divisible community asset. But the district court's examination of this issue was hindered by the parties' failure to present arguments regarding all of the authority pertinent to this question, a deficiency that is repeated in the parties' filings before this court.

The parties' arguments focus on NRS 286.545, which addresses what happens when a nonmember spouse does not consent to a member spouse's chosen retirement plan. *See also* NRS 286.541(1)(c) (requiring a member spouse applying for retirement benefits to submit "a statement of the [nonmember] spouse's consent or objection to the chosen retirement plan"). In particular, NRS 286.545 provides that if the nonmember spouse does not consent by the effective date of the retirement, then PERS must "[n]otify the [nonmember] spouse that the [nonmember] spouse has 90 days to consent or have the member change the member's selection." NRS 286.545(1)(a). In addressing this statute, the parties dispute whether NRS 286.545 allows a nonmember spouse who does not consent to the member spouse's retirement benefit selection to seek court intervention to "have the member change the member's selection."


But in discussing this issue, the parties have failed to present any meaningful arguments regarding the impact of NRS 125.155, which addresses various issues regarding the valuation and disposition of PERS retirement benefits in the context of a dissolution of marriage action.¹ Notably, NRS 125.155(3) provides that “[i]f a party receives an interest in or an entitlement to a pension or retirement benefit which the party would not otherwise have an interest in . . . if not for a [divorce] disposition . . . that interest or entitlement terminates upon the death of either party.” See *Henson v. Henson*, 130 Nev. 814, 819 n.5, 334 P.3d 933, 936 n.5 (2014) (discussing NRS 125.155, but determining it did not apply in that case because it took effect after the parties’ divorce decree was entered). And as the *Henson* court recognized, there are statutory exceptions to the rule that such interests expire upon the death of either party, including “when, pursuant to ‘[a]n order of the court, a party who is a participant in [PERS] . . . provides an alternative to an unmodified service retirement allowance.’” See *id.* (alterations in original) (quoting NRS 125.155(3)(b)). For PERS pensions, the alternatives to an unmodified service retirement allowance referenced by NRS 125.155 are set forth in NRS 286.590, which provides six options for a PERS member to name a survivor beneficiary.

As noted above, it is ultimately the petitioner who bears the burden of demonstrating that extraordinary relief is warranted. See *Pan*, 120 Nev. at 228, 88 P.3d at 844. And given the parties failure to fully

¹While the parties’ filings both in this court and below offer brief references to NRS 125.155, they have not developed any substantive arguments regarding this statute or its impact on the issues presented in this matter.

address all authority pertinent to our resolution of this matter by explaining what, if any, impact NRS 125.155(3) has on the issues presented in this matter, we must conclude that petitioner has failed to demonstrate that our extraordinary intervention is warranted here. *See id.* Accordingly, we deny the petition.² *See id.*; *D.R. Horton*, 123 Nev. at 475, 168 P.3d at 737.

It is so ORDERED.


_____, J.
Tao


_____, J.
Gibbons

SILVER, C.J., concurring in part and dissenting in part:

I concur with my colleagues in denying appellant's petition, but I respectfully dissent as to its rationale in remanding this case back to the district court for further proceedings as instructed by the majority.

I believe that the district court's conclusion was correct. NRS 286.545 does not give a district court the power to force a PERS member, *against their will*, to choose a survivor beneficiary plan proposed by a non-member spouse because the language in the statute is mandatory: PERS

²Our denial of this petition does not preclude the parties from presenting arguments to the district court regarding whether NRS 125.155(3) allows the district court to award a nonmember spouse a survivor benefit in the member spouse's PERS pension as part of a divorce action. And we make no comment on the merits of this issue.

Additionally, given our resolution of the primary issue set forth in this matter, we decline to reach petitioner's remaining requests for relief.

must pay under the terms of the option originally selected by the member. NRS 125.155 does not come into play until after the PERS member has made that choice. Only *then*, do I believe that the district court is tasked with determining the value of the interest in the pension or benefit entitlement, utilizing community property principles.

The Nevada Supreme Court has held,


The employee spouse, however, is *not* required to select an option with a survivor beneficiary interest. See NRS. 285.590. Thus, neither the employee *nor the nonemployee spouse automatically receives a survivor beneficiary interest*, and the only pension benefit the nonemployee spouse is guaranteed to receive is his or her community property interest in the unmodified service retirement allowance calculated pursuant to NRS 286.551 and payable through the life of the employee spouse.

Henson v. Henson, 130 Nev. 814, 820, 334 P.3d 933, 937 (2014) (emphasis added).

Thus, in my view based on *Henson* and the plain wording of NRS 286.545, an employee spouse is free to choose any of the options afforded by PERS regarding a survivor beneficiary. This makes sense, as there are many reasons why an employee spouse may choose a certain option—whether it's based on their own age, or the age and relationship to a potential surviving beneficiary, who may be a spouse or a child.

The district courts are certainly well-equipped to utilize community property principles in pending divorces to equalize the ultimate PERS distribution upon a parties' retirement, based on the member's chosen survivor beneficiary plan. Because I believe the district court's order

was correct in this case, I respectfully dissent as to this court's instructions for further proceedings involving an analysis referencing NRS 125.155.³


_____, C.J.
Silver

cc: Hon. Lisa M. Brown, District Judge, Family Court Division
Hofland & Tomsheck
Attorney General/Carson City
Christopher G. Nielsen, Esq.
Law Offices of Israel L. Kunin, P.C.
Kunin Law Group
Eighth District Court Clerk

³I would also note that because this court is divided on the district court's role in this matter, a published opinion by the supreme court would be helpful in clarifying an issue involving statewide importance. *See, e.g., Valdez v. Cox Commc'ns Las Vegas*, 130 Nev. 906, 336 P.3d 969 (2014) (issuing an opinion to clarify an issue of statewide importance).