Survivorship Benefits in Retirement Plans: Are They Available To Divide and Who is Entitled?

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A court order dividing/awarding retirement assets is problematic if the parties do not understand what they received or if the plan administrator says it cannot be done. Survivorship benefits in pensions are the most misunderstood. Sometimes the parties, their legal counsel and the courts make assumptions regarding the nature of survivor benefits. The only way to avoid the cost of re-opening divorce cases because of these assumptions is to have all the information before reaching agreements.

The most critical information for a defined benefit pension is to know if the member or plan participant is already retired, if he/she has already elected a survivor annuity for his spouse, and if that designation is irrevocable upon divorce, and if he/she did not elect a survivor annuity when he retired, can it be elected as part of the divorce decree. In addition, it is important to know if the election of a survivor annuity is automatically revoked upon divorce such as in the Civil Service and Federal Service pensions.

The most important information for a defined contribution account is to understand the impact of beneficiary designations: are they revoked upon divorce or not. Make sure the parties understand that the designation should be updated/changed once the decree is final no matter what the divorce decree states.

Four cases demonstrate the problems that can occur when the parties do not fully understand what is there to divide and how to make sure it is divided as intended.

1.Former spouse survivor annuity already elected is revoked upon divorce in federal and civil service pensions unless you award it in the first order dividing property in the divorce or the retiree elects the survivor annuity within two years of decree.

See McKenzie v. Office of Personnel Management (OPM) and Leonard W. McKenzie, 113 M.S. P.R. 240, (2010). The Office of Personnel Management administers civil and federal service pensions. (CSRS and FERS)When a party disagrees with an OPM decision regarding one of those pensions, they can appeal to the Merit Systems Protection Board. In this decision, the administrative law judge held that OPM was wrong when it denied a former spouse survivor annuity to the former spouse. OPM denied the application because the **first order** dividing marital property (decree of dissolution) did not have any language referencing the former spouse survivor annuity and the member had retired. (See 5 U.S.C. Section 8341 (h) (4) and 5 C.F.R.Section 838.806)

The ALJ agreed that the language needed to be in the first order. However, the member in the plan can elect a former spouse survivor annuity if he does so within two years of the entry of the decree. The ALJ decided that the member had elected the former spouse annuity post dissolution when his attorney prepared and presented to the Court a Retirement Benefits Order awarding the former spouse the survivor annuity.

2. Survivor Benefits Belong to a Spouse, not children of spouse. These benefits could not be awarded to children.

See Hamilton V. Washington State Plumbing & Pipefitting Industry Pension Plan, 433 F.3d.1091, 2006. This case involves a surviving spouse and a former spouse's children dispute over the survivor benefits of

the participant after he had died before he retired. The participant divorced his first wife Linda in 1996. In their decree, the parties agreed that he would name their children as beneficiaries under the pension in lieu of life insurance, which he was presently unable to obtain. However, he remarried and then died at age 49. His current wife Mary received the survivor benefits. The still minor children did not because only spouses or former spouses (if awarded via QDRO) are eligible for the pre retirement surviving spouse annuity. Linda should have protected the children by using a qdro naming her as alternate payee and awarding her a pre-retirement surviving spouse annuity.

3. The plan participant or member of an ERISA pension has retired and elected a survivor annuity for his wife prior to the divorce.

See Carmona v Carmona, 603 F.3d. 1041 C.A.9 (Nev.) 2010. This is a 29-page opinion and is the result of the parties spending over $300,000 in attorney fees. However, in short, it stands for the following: the right to a survivor annuity in an ERISA pension plan vests in the current spouse at retirement and it is irrevocable even if a divorce later occurs. In this case, the husband retired in 1992 during the marriage and elected a survivor annuity for his wife (Janis) in two pensions. The parties later divorced and the parties believed she had waived her right to the survivor annuities in both pensions in the divorce decree. In fact, they agreed each would keep their own pensions and the husband paid her $1500 to equalize what they believed to be the values of the pension benefits. Lupe remarried and believed his current wife; Judy would receive the survivor benefits if he dies. However, Janis decided she should receive the benefits after he died.

The Court of Appeals 9th District's 29 page opinion painstakingly analyzes ERISA provisions regarding surviving spouses and and concluded that Janis was correct: the divorce decree was not a valid waiver of plan participant's her right to the surviving spouse benefits under a qualified joint and survivor annuity (QJSA). If they intended to waive it, both Lupe and Janis needed to waive the rights to the survivor annuity prior to Lupe retiring. Nothing in the plan documents required the plan administrator to redirect surviving spouse benefits to participant's current wife, who was not, at time of retirement a current spouse.

ERISA permits a transfer of a surviving spouse benefits only if a QDRO expressly assigns the benefits to a former spouse prior to retirement. ERISA does not authorize the reassignment of surviving spouse benefits to a future or subsequent spouse.

4. Beneficiary designations associated with defined contribution account must be updated post –divorce in order to effectuate the terms of the divorce decree.

See Kennedy v. Plan Adm'r for Dupont Saving and Investment Plan, 555 U.S.285, 129 S. Ct. 865 U.S. (2009). This U.S. Supreme Court opinion is a warning about dividing defined contribution accounts: remind your client to update and change beneficiary designations. The parties, William and Liv, divorced in 1994 and the decree contained language that Liv was divested of all rights to all of William's retirement accounts. William did not, however, execute any plan documents removing Liv as the beneficiary of his 401k type savings plan account (DuPont Savings Investment Plan), However, under the "the terms of the plan," § 1132(a)(1)(B), Liv is the named beneficiary and is entitled to the proceeds in spite of her waiver of the benefits. While the language of the decree may have been a federal common law waiver, the rule that plan administrators should be able to rely on plan documents is central to ERISA.