

A legal note from Marshal Willick about a malpractice risk in old divorce cases involving pensions

I recently saw the former client of a now-sitting judge. The client asked me to review an order. The order had a fixed percentage as the spousal share, but the client had continued working after the divorce, which fact increased the ex-spouse's share to a sum much greater than it should have been. It *should* have been phrased as a "formula order" with the correct denominator to be filled in at eligibility for retirement. There were several other, more subtle, errors as well, altering the earliest payment date and survivorship matters.

Fortunately, we found and corrected the errors, but if we had not done so, the judge could have been sued for malpractice, despite the passage of many years.

The reason it is so dangerous for practitioners who have done just a few of these, often long ago, is how long they can come back to bite you. As detailed in my various CLE materials, the "discovery rule" basically extends until retirement or death the start date of the statute of limitations for pursuing counsel for any errors in retirement orders – and many courts have held that the attorney is 100% responsible for getting it right, *and* that the measure of damages is 100% of any benefits lost. Damages frequently exceed \$100,000 – because the pensions were so valuable to begin with.

The danger is even derivative – the lawyers in this town who have sent QDROs out to the faceless mail order services, or actuaries or other non-attorney preparers, have been held to remain liable for the work product. We correct a few of those preparers' errors each year – some big and some small.

It is that sort of potential that makes these cases so dangerous for counsel – every defective pension division order remains a ticking time bomb for *decades*. In recent years, the great majority of my expert testimony work has been for plaintiffs or defendants in pension and survivorship attorney malpractice cases.

What I advised the judge to do was review his old former case list, and figure out whether he might have prepared similar retirement orders (PERS, military, Civil Service, regular QDRO) – both for the benefit of his former clients, and in an effort to reduce his exposure to possible future malpractice claims.

The lesson for individuals who obtained retirement benefit division orders from someone who might not be entirely informed in the field is to have those orders checked – preferably before retirement, and certainly before anyone dies, at a consultation with this office or someone else who has taken the time and made the effort to be well versed.

The lesson for lawyers is that it is *much* easier (and cheaper, and less stress-inducing) to address such orders before they become a problem – even if that involves opening old case files, and making sure the pension division orders are checked by someone with expertise.

For some years, we have drafted QDROs and other retirement benefit orders for other attorneys around the country, and we formally went into the business of doing so about a year ago. While this has benefited people with current retirement division cases, many people already have orders in place

that were either written incorrectly or are mathematically defective.

So we have started a “QDRO Checkup” service. For a flat fee of \$100, the Willick Law Group will review any defined benefit or defined contribution QDRO for legal and mathematical accuracy. Many such errors can be corrected, and we will advise, if we find an error, what could be done to address it. We will do the same for Civil Service COAPs and military retirement division orders. Details are on the “QDRO Checkup” page of the firm website, http://www.willicklawgroup.com/qdro_checkup.

To visit our web site and review its contents, go to <http://www.willicklawgroup.com/home>. For a large number of articles on the division of military, Civil Service, and other retirement benefits, see http://www.willicklawgroup.com/published_works. And to review our retirement-order drafting service, go to http://www.willicklawgroup.com/qdro_retirement_orders.

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