ALPHABET SOUP: ERISA, REA AND QDROS; PERS, FERS, CSRS AND MBDOS; WHAT YOU DON'T KNOW CAN HURT YOU

by

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BIOGRAPHY

Mr. Willick is the principal of the Willick Law Group, an A/V rated Family Law firm in Las Vegas, Nevada, and practices in trial and appellate Family Law. He is a Certified Family Law Specialist, a Fellow of both the American and International Academies of Matrimonial Lawyers, former Chair of the Nevada Bar Family Law Section and former President of the Nevada chapter of the AAML. He has authored many books and articles on Family Law and retirement benefits issues, and was managing editor of the Nevada Family Law Practice Manual.

In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of pensions, divorce, and property division. He has chaired several Committees of the American Bar Association Family Law Section, AAML, and Nevada Bar, has served on many more committees, boards, and commissions of those organizations, and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. He has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada.

Mr. Willick received his B.A. from the University of Nevada at Las Vegas in 1979, with honors, and his J.D. from Georgetown University Law Center in Washington, D.C., in 1982. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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I. HOW THE HECK DID THIS HAPPEN?

It is at this point a truism that retirement benefits, usually the most valuable asset of a marriage, are divisible upon divorce to at least the degree to which they were accrued during the marriage.[1] This is particularly true of certain kinds of employment, such as the military, in which frequent moves are the norm and there is often less opportunity to accumulate large real estate equity.

What is surprising is the near-universal lack of appreciation of this fact. Most people still working, asked what their most valuable assets are, don't even think to mention their slowly-accruing retirement benefits, even though those benefits are quite commonly more valuable than everything else the parties have put together.

Starting in the late 1960s, some States were coming to recognize the importance of pension, retirement, and other deferred benefits in divorce actions.[2] The 1970s saw the law of property division throughout the country evolve toward "equitable distribution," which increasingly resembled a community property scheme in which divorce courts were to ascertain, and divide, the property acquired by both parties during the marriage.

Most private employee-benefit plans, or "pension plans"[3] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as "ERISA,"[4] codified at 29 U.S.C. § 1001 *et seq*.

The intention of the law was to ensure that employees actually received the deferred benefits that they were promised, due to the perception that there was widespread abuse of employees in the private sector. ERISA and the Internal Revenue Code ("IRC") are the controlling regulatory bodies of law for most private plans. Those laws, and the regulations of the Department of Labor, IRS, and the Pension Benefit Guaranty Corporation, control nearly all pension, profit sharing, stock bonus, and other retirement plans provided by private industry employers.

But ERISA, as originally enacted, did not explicitly contemplate divorce. And then, in the 1980s, all ***kinds*** of developments occurred, nearly simultaneously, affecting the economic lives upon

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[1] *See*, *e.g.*, Annotation, *Pension or Retirement Benefits as Subject to Assignment or Division by Court in Settlement of Property Rights Between Spouses*, 94 A.L.R.3d 176; Marshal Willick, MILITARY RETIREMENT BENEFITS IN DIVORCE (ABA 1998) at xix-xx.

[2] *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974).

[3] A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, "401(k)" plans, and some employee stock ownership plans. It does ***not*** include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

[4] Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

divorce of virtually all folks in America who worked for a living (and their spouses), whether they worked in the private or public sectors.

ERISA provided that pension benefits could not be "assigned or alienated."[5] This created a dilemma in jurisdictions recognizing that retirement benefits constituted valuable community or marital property rights. Many courts found a common law exception for domestic relations orders,[6] but the legal landscape was confused until the passage in 1984 of the Retirement Equity Act ("REA"),[7] which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans. It was that law that created "QDROs," – Qualified Domestic Relations Orders.

At about the same time, similar (but not identical!) developments were altering divorces for those working in the public sector.

Congress reacted to a 1981 case holding that divorce courts could not divide military retirement benefits upon divorce by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982. The declared goal of the USFSPA, at the time of its passage, was to "reverse *McCarty* by returning the retired pay issue to the states."[8] Orders dividing military retirement benefits have come to be known as Military Benefit Division Orders, or "MBDOs."

For those working in the U.S. Civil Service, a retirement system has been in place in some form since 1920, which is the date from which the "old" system ("Civil Service Retirement System," or "CSRS") for those who began service before January 1, 1984, can be traced.

The retirement system is essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death. The entire system was altered for incoming employees in a "new" system

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[5] 29 U.S.C. § 1056(d)(1); Internal Revenue Code ("IRC") § 401(a)(13)(A).

[6] *See*, *e.g.*, *American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2nd Cir. 1979) (alimony order impliedly exempted from ERISA preemption).

[7] Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

[8] "The purpose of this provision is to place the courts in the same position that they were in on June 26, 1981, the date of the *McCarty* decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981 and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision." S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S.Code Cong. & Ad.News 1596, 1611. *See also Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on reh'g.*

("Federal Employees' Retirement System," or "FERS"), for those who began service on or after January 1, 1984.[9] The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP"). In 2001, the defined benefit program was also made available to those in the armed forces. An order dividing Civil Service retirement benefits is required by regulation to be titled "COAP,"[10] and an order dividing a TSP account is a "RBCO."[11]

And, virtually simultaneously, the various States starting cooking up new or refined retirement schemes for those employed by State governments.

In Nevada, state public employees fall under the Public Employees Retirement System ("PERS"), which in its modern form has existed since 1975, but was entirely revised and reorganized in 1993. Those who put the Nevada PERS regulations together chose to (confusingly) use the same titles, etc., as are in the federal ERISA law, and even copied some of the statutory language from the far larger, and more complex, federal law. However, a state pension plan (such as PERS) does ***not*** fall within ERISA, and the federal statutes do ***not*** apply to the plan, or to the benefits. Instead, there is an entirely different set of (State) laws that govern distribution of PERS benefits.

All those developments laid the groundwork for the confusion now seen. Those practicing law before the mid-1980s were overwhelmed with a mind-boggling array of new plans, opportunities, rules, requirements, and acronyms, while at the same time the benefits regulated by those plans contained an ever-increasing percentage of the actual wealth owned by most people.

The result is a legal landscape where few parties appreciate the importance of retirement benefits, even relatively few lawyers understand what they are and how they work, and the result is massive confusion, delay, and accidental loss in family law, estate planning, and every other field touching upon the property of husbands and wives. It also created a cottage industry of folks claiming to "help" with all these assets and programs, the large majority of whom are mere form peddlers with no real clue of what they are doing or how anything works, who often make things worse.

Still, knowledge of a relative handful of critical concepts by lawyers, estate and financial planners, and others, can make all the difference between adequately addressing a client's concerns – or failing to do so.

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[9] *See* 5 U.S.C. §§ 8331, 8401; Pub. L. 99-335 (1986).

[10] "Court Order Acceptable for Processing." 5 C.F.R. § 838.803.

[11] For "Retirement Benefits Court Order."

II. TERMINOLOGY AND CONCEPTS

A. "QDRO" - Qualified Domestic Relations Order under ERISA and PERS

B. Participant - P or Member; Alternate Payee - A/P (aka Nonmember)

C. DB -Defined Benefit Plan, e.g. PERS

D. DC - Defined Contribution Plan/Account Balance Plan

E. Separate interest vs. shared benefit stream

1. What that does to survivorship

F. Pre-tax vs. post-tax assets: don't mix and match

G. IRAs don't need QDROs

H. Consider offsets if multiple retirement benefits

I. The "time rule"

1. Possible exception for DC plans, and why

J. Anticipate death

1. What if the employee dies?

2. What if the non-employee spouse dies?

K. Immediately get and read the SPD (Summary Plan Description)

L. Consider increase or decrease in value of plan before distribution

1. ALWAYS specify an "as of" date

2. Freeze

3. Adjust for gains and losses

4. Consider loans – in, out?

M. The Gillmore principle – division at eligibility

1. "The employee spouse cannot by election defeat the nonemployee spouse's interest in the community property by relying on a condition within the employee spouse's control."

2. Same principle as for disability protections

III. THINGS TO LOOK FOR BEFORE & DURING MARRIAGE

A. It may, or may not, be possible to affect benefits by way of waivers in prenupts, postnupts, or otherwise[12]

B. Consider starting entirely new retirement plans – makes tracing/ownership simpler

C. Beneficiary designations – review and watch them upon marriage

IV. THINGS TO LOOK FOR DURING DIVORCE

A. In every case:

1. Whether there is a retirement to divide

2. How much (time rule or tracing)

3. Is there a possible survivor's benefit?
   a. Who gets it?
   b. How much?
   c. Who pays for it and how?

B. Prepare the QDRO ***before*** the divorce is final

1. Loss of bargaining power, availability of discovery, possibility of new "surviving spouse" – (and much higher legal fees)

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[12] *Hagwood v. Newton* (4th Cir. 2002) 282 F.3d 285. Even though a husband waived his rights to his wife's retirement benefits in the parties' prenuptial agreement, he was nevertheless entitled to collect those benefits upon her death. Under ERISA, in order for a spouse's waiver of survivor benefits to be effective, it must be signed by a spouse before a notary or plan agent after the parties' marriage.

C. Who should prepare – fox and henhouse

1. QDRO mills, quality, price, and liability

D. Watch for early retirement bonus/subsidy

E. PERS

1. Know that police/fire and "regular" are different
   a. Different retirement eligibility dates
   b. Different survivorship options

F. Holds, stays, JPIs and TROs

G. *Kennedy*

1. Can't rely just on divorce decree

2. Must follow up with proper paperwork, where possible, or could lose no matter what papers say, and professionals (CPAs, lawyers) get sued
   a. Verify receipt of the retirement order

H. *Carmona* – it may be "unfixable," requiring offsets

I. Reserve jurisdiction

1. Reservation of spousal support (alimony) jurisdiction

J. Be creative: QDRO uses –"support" QDROs, security QDROs

K. California's provisional QDRO: designed to be used with all judgments where a QDRO has not yet been entered. It should work for both ERISA and government plans; whether defined benefit or defined contribution.

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