



HOW ATTORNEYS MIGHT LESSEN CHILDREN'S RISKS IN DIVORCE

by Elizabeth Dear, MFT

A child going through the divorce of her parents experiences something of an earthquake magnitude. The child suddenly loses orientation, solid footing, and a sense of security. Understandably, children often are at a loss when trying to negotiate the confusing new territory of a family coming apart. Legal proceedings can exacerbate the confusion and increase the duration of uncertainty about custody and visitation, as well as intensify the level of conflict. Alternative procedures of collaborative divorce or mediation can help resolve differences in order to minimize harm to children, and they allow attorneys and therapists to act as stabilizing forces in the turmoil of divorce.

Most parents know that they should not say bad things about the other parent in front of their children, and they know they should not directly ask the child to choose sides. Unfortunately, as Siegel (2006) pointed out, "Parents who hate each other cannot help communicating this to the children." While attorneys can't stop the tide of feelings that have been swelling for years, they can keep in mind that no matter who the client is, everyone – parents, children, and society – will benefit from the children's adjusting well to the divorce. Most parents would probably say they want to avoid harm and minimize the pain for their children as they settle even the most acrimonious of divorces.

Of course, finalizing a divorce does not eliminate sources of conflict between parents, and in many cases, children become the final bat-

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CHILDREN'S RISK IN DIVORCE

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tleground between warring parents, who have no other endorsed reason for ongoing contact. The impact on children usually attributed to divorce results from pre and post divorce conflict between parents as well. "...ongoing, unresolved interparental conflict, whether parents are married or divorced, emerges consistently as a major factor that has negative consequences for children" (Ahrns, 2006). It is certainly not the court experience alone that leads to the 20% to 25% rate of pathology among children who experience the divorce of their parents; however, by working to find common ground instead of prolonging and increasing the conflict, attorneys can reduce the chances of parents engaging in trench warfare with children caught in the middle.

"If a child's effort to love one parent is experienced as disloyalty to the other, the child is put in an impossible situation that threatens attachment and security" (Siegel, 2007). Parents and their allies need to know that supporting a dichotomous view in which the other parent is all bad places children in an untenable position. Children need to know that they can love and be loved by both parents without jeopardizing their emotional security. "Interparental conflict is just bad for kids, and the legal system makes this kind of conflict all but inevitable" (Collins, 2006).

Russell Collins, MFT, and Laura Collins, JD, a psychotherapist/lawyer team who specialize in mediation and child-friendly divorce, point to a 2006 study by Robert Emery, Director of the Center for

Children and Families and the Law at the University of Virginia. Emery found that 12 years after five to six hours of divorce mediation "produced huge differences in important variables, like the amount of contact with the father or non-residential mother" (Collins, 2006). Collins and Collins advocate a model of mediation combining an attorney and a psychotherapist, which is what they provide in Santa Barbara, California.

Keeping up to date with studies on the effects of divorce on children can help attorneys mitigate the negative impact and advocate knowledgeably for their clients. For instance, knowing Marsha Kline Pruett's study that indicates that children by the age of 18 months need overnight visits with their fathers, and that children by age three show signs of lower social and cognitive function if they do not have overnight visits with their fathers, is important to making the best judgments about visitation (Collins, 2006). Being familiar with studies like Baum's (2006), which found evidence that fathers tend to distance themselves from their children due to unresolved mourning for the loss of the marriage and to difficulty separating their roles of husband and father, can aid in recommending or mandating that fathers receive therapy, for example.

Being aware that Kruk (1991) suggests that more adversarial experiences in the court are correlated to fathers becoming less engaged in their children's lives could be used to advocate more mediation rather than prolonged

The following references may assist in your research:

- Ahrons, C. (2006, May/June). Long-term effects of divorce on children. *Family Therapy Magazine*, pp. 24-27.
- Baum, N. (2006). Postdivorce paternal disengagement: failed mourning and role fusion. *Journal of Marital and Family Therapy*, 32, 245-254.
- Collins, R., and Collins, L. (2007). Why mediation is good for kids. Retrieved December 15, 2007 from <http://collinsmediation.com/art-medgoodkids.shtml>.
- Collins, R, and Collins, L. (2006). How therapists can help during divorce: what the new research says. *The Therapist*, 18, 45-50.
- Emery, R. (2004). *The truth about children and divorce: dealing with the emotions so you and your children can thrive*. New York, NY: Penguin Group, Inc.
- Kruk, E. (1991). The grief reaction of noncustodial fathers subsequent to divorce. *Men's Studies Review*, 8(2), 17-21, as cited in Baum, N. (2006). Postdivorce paternal disengagement: failed mourning and role fusion. *Journal of Marital and Family Therapy*, 32, 245-254.
- Ricci, Isolina. (1980, 1997). *Mom's house, dad's house: making two homes for your child*. New York, NY: Fireside.
- Siegel, J, (2007) The enduring crisis of divorce for children and their parents. In N. Webb (Ed.), *Play Therapy with Children in Crisis* (3rd edition, pp. 133-151). New York, NY: The Guilford Press.

court cases. Since the media twists findings into political stances and new research is always emerging, consulting with a researcher in psychology or sociology or marriage and family therapy who specializes in divorce can be a useful aid to those providing legal counsel.

Referring clients to books such as Emery's *The Truth About Children and Divorce* (2004) and *Mom's House, Dad's House*, can provide parents with support in keeping their children's interests at the forefront, and knowing that children of all ages can benefit from play therapy, where they don't have to have words to de-

scribe their confusing emotions, can help an attorney focus on the legal complications and nuances of divorce.

If all parties involved in divorce involving children can look beyond the chaos toward the most desired future for the children, evidence and wisdom advise seeking common ground, counter to much of court proceedings, and carefully considering the best interests of the children. A child can gain a sense of confidence in his ability to move between the worlds of his two parents successfully if given adequate reassurance of how nothing has changed in his parents' love for him and a chance to regain

footing in a sense of family as it has changed.

Attorneys play a critical role in setting or influencing the tone of divorce and can use this power in ways that produce a more positive environment for children to work through the inevitable pain of divorce without encouraging further conflict or adding to the turmoil. While mediation and collaborative divorce seem the clearest ways to minimize conflict, creative attorneys who consider the above information may be able to effect resolution between parents and thereby reduce chaos in the lives of their children.

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DEVELOPMENTALLY-APPROPRIATE CHILD PLACEMENT TIMESHARE SCHEDULES FOR CHILDREN FROM BIRTH TO THREE YEARS OF AGE

by Donna Wilburn M.S., LMFT

When deciding on what placement schedules are psychologically in the best interest of the child for children from birth to three years of age, a professional must take into consideration the developmental challenges, emotional maturity, environmental situation and special needs of the child. What also must be discussed is the emotional health of the custodial parent. A psychological assessment performed by a trained mental health professional is recommended to ensure that the placement is in the best interest of the child. Unfortunately, many custodial arrangements have not taken into consideration what would be in the best interest of the child during the child's emotional development and the child has then developed long-term psychological challenges as a result. The effects of placement schedules early in the child's life are shown to be long lasting and possibly destructive on the relationship the child has with the parents, therefore creating the need for therapeutic treatment later in life.

A theory that has been used to describe some of the psychological challenges that children process is the one developed by Erik Erikson. His theory describes the psychosocial dilemmas encountered during the psychological development of a person from birth to emotional maturity. When children are focused in each stage, their experiences strongly influence the outcome of the dilemma they have encountered. The healthy resolution of each stage will lessen the risk of mental health disorders developing in later years.

Erik Erikson's Eight Stages of Psychosocial Dilemmas (the first two stages cover ages birth to three years).

Stage One: Trust Versus Mistrust (Birth-1): Children are completely dependent on others. Trust: Established when babies are given adequate warmth, touching, love, and physical care. Mistrust: Caused by inadequate or unpredictable care and by cold, indifferent, and rejecting parents.

Stage Two: Autonomy Versus Shame and Doubt (1-3): Autonomy: Doing things for themselves. Overprotective or ridiculing parents may cause children to doubt abilities and feel shameful about their actions.

Erikson referred to infancy as the Oral Sensory Stage (as anyone might who watches a baby put everything in her mouth), where the major emphasis is on the mother's positive and loving care for the child, with a big emphasis on visual contact and touch. When a child can pass successfully through this period of life, she will learn to trust that life is basically "okay" and have basic confidence in the future. If the child fails to experience trust and is constantly frustrated because needs are not met, the child may end up with a deep-seated feeling of worthlessness and a mistrust of the world in general. www.muskingum.edu/~psych/psycweb/history/erikson.htm.

The long-term negative effects of these early disruptions can be seen in young adults in their late teens and early 20s who enter therapy based on their inability to trust relationships, inconsistent work histories, and unre-

solved feelings about their parent's divorce. Incidentally, many studies of suicides and suicide attempts point to the importance of the early years in developing the basic belief that the world is trustworthy and that every individual has a right to be here. In general, it appears there is too much risk in forcing overnight visits at this young age, when short-term inconvenience can possibly prevent long-term problems (Ackerman, 2001).

Not surprisingly, the most significant relationship is with the maternal parent, or whomever is the most significant and constant caregiver. If the child feels this relationship is threatened, they are at risk for developing attachment disorders, anxiety-related disorders or harboring resentment toward the trust-threatening parent, which can lead to depressive symptoms.

During Stage Two (autonomy vs. shame) is when a child can learn to master skills for themselves. Not only do they learn to walk, talk and feed themselves, children are learning finer motor development as well as the much-appreciated toilet training. Here is the opportunity to build self-esteem and autonomy as the child gains more control over their body and acquires new skills, learning right from wrong.

It is also during this stage, however, that a child can be very vulnerable. If a child is shamed in the process of toilet training or in learning other important skills, they may feel great shame and doubt of their own capabilities and suffer low self-esteem as a result. The differences between parental responses

to the child's skill acquisition can strongly influence their resolution of this stage. The emotional health and emotional control of the parent is crucial during this time in a child's psychological development. The most significant relationships are with parents.

Children birth to age 3 have short attention spans and limited memory. Their perception of time is limited. The time perception of an infant will create difficulty in expecting the arrival of a parent and the child can experience anxiety as a result of not being able to visually see a parent on a daily basis. This anxiety will be more prominent with the lack of availability of the primary caregiver. Parents of infants and toddlers are often overly concerned about overnight visits. The argument against allowing overnight placement for children in this age group is based on Erickson's theories defined earlier. More frequent and brief visits seem appropriate for the child's developmental level. According to the meta analysis of Marc J. Ackerman, it is recommended that children between birth and three years of age have frequent contact at various times during the week with each parent (p. 248).

Due to developmental capabilities, very young children remember and enjoy seeing and interacting with both parents daily yet have difficulty retaining that memory for over two days. The interaction with each parent

should occur at least once every two to three days for at least two hours at a time (Ackerman). This placement schedule serves to reinforce the child's feelings of trust and security during a critical time in psychological development. Some ways to provide this interaction are: visit a baby at childcare, take a child for a daily walk and read or look at a story book with a child, feeding the child, participating in bedtime routines and unstructured floor play. In some families, parents can visit the baby in the other parent's home. In other families, it is best to select a more comfortable environment such as the childcare program or a friend or relative's home. If the parents are involved in a relationship where there is conflict, the child will experience stress reactions related to the parental interactions. Many times having a neutral third party at the site of visitation will create an more relaxed environment for the child.

Sorenson and Goldman (1989) performed research on the criteria used in deciding who will be the placement parent. Ninety-six judges were sampled in the research project. The research demonstrated that seven factors derived from analysis of the data:

1. Social Deviance includes criteria that the primary residential parent must have no felony convictions, no previous psychiatric treatment or hospitalization, and no history of alcohol or drug abuse.

2. Parental Supports describes the resources of the home environment, including having enough money to support the child, seeking a two-parent home, practicing the family's religion, and having community support groups to help in raising the child.

3. Tradition includes criteria that in the past have been considered important for the child (but which may not be a part of the statutes in

determining the custodian): the mother, if the child is 12 years or younger, is the same sex as the child, is biologically related to the child, and has held physical custody of the child from the separation to the divorce.

4. Child's Wishes includes only the child's wishes.

5. Psychological Evaluation includes only the evaluation by an expert witness and a friend of the court.

6. Quality Time is comprised of criteria that determine the time the custodian has available for the child: having evenings and weekends free for the child and not living with someone with whom the custodian is romantically involved.

7. Family Unity consists of criteria describing who makes up the family unit and includes access to relatives and keeping siblings together (Sorenson & Goldman, 1989, p.77).

Research shows that children in joint custody arrangements had less behavior and emotional problems, had higher self-esteem, better family relations and school performance than children in sole custody arrangements. And these children were as well-adjusted as intact family children on the same measures. This effect could be because joint custody provides the child with an opportunity to have ongoing contact with both parents.

Findings indicate that children do not actually need to be in a joint physical custody arrangement to show better adjustment, but just need to spend substantial time with both parents. Also, joint-custody couples reported less conflict, possibly because both parents could participate in their children's lives equally and not spend the time arguing over childcare decisions. Unfortunately a perception exists that joint custody is more harmful because it exposes children to ongoing parental conflict. In fact, the studies in this review found that sole-custody parents reported higher levels of conflict. <http://www.apa.org/releases/custody2.html>.

(cont'd. on page 6)



CHILD PLACEMENT: cont'd. from page 5**The following references may assist in your research:**

Ackerman, Marc J. (2001). *Clinician's Guide to Child Custody Evaluations*. Hoboken, NJ: John Wiley & Sons.

Sorenson & Goldman (1989). Judicial perceptions in determining primary residence; and, In Marc J. Ackerman (Ed.), *Clinician's Guide to Child Custody Evaluations*, Hoboken, NJ: John Wiley & Sons.

In summary, the research and findings show that many complex factors need to be taken into consideration when deciding placement schedules for children under three years of age. Psychological development and physical development of the child are primary concerns. The ability of the child to perceive time and the availability of both parents have a great impact on the way the child processes the divorce itself. In order to avoid

destructive psychological conditions later in life, the placement schedule should be one that enables the child to create and maintain a comforting and nurturing relationship with each parent. Parents in conflict need to be encouraged to seek out resources that will help them to find healthier negotiation skills and resolution for past issues so that they can behave in a way that is truly in the best interest of the child.

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NET OPERATING LOSSES AND CAPITAL LOSSES: HOW THEY MIGHT BE TREATED AS MARITAL ASSETS

*by Melissa Attanasio, CFP®, CDFATM
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One of the more obscure types of marital property is the benefit of unused net operating losses and capital loss. Individuals (including those filing joint returns) are allowed to apply a net operating loss ("NOL") to income in years when there was taxable income, by carrying it back to the two years immediately preceding the loss year and then, to the extent the NOL has not been absorbed, by carrying it forward for the next 20 years. An election may be made to forego the carry-back period, and this would be done when the benefit of carrying forward the NOL is expected to be greater than carrying it back.

Probably, more common than NOLs are capital loss carryovers. Capital losses cannot be carried back, but only carried forward - indefinitely, until totally absorbed. The capital loss carryovers are applied against future capital gains. However, in any event, up to \$3,000 of existing capital losses (or of capital losses in excess of capital gains) is deductible against taxable income in any future year.

Unused NOLs and capital loss carryovers should be considered as marital assets, as tax benefits will most likely be derived from these losses by one or both spouses. The question arises as to

when the tax benefits will be derived. It may be that, by the time the division of the property has been determined, a tax return has been filed for one or more subsequent years (or maybe for prior years in the case of an NOL) and the tax benefit has been fully realized. However, if unused NOLs or capital losses exist when the property division is being determined, then consideration should be given to valuing the future tax benefits that will be realized from these losses.

For federal income tax reporting purposes, NOLs and capital losses are attributable to the spouse who incurred

them, as set forth in the Regulations to the Internal Revenue Code. Thus, if either type of loss arises from one spouse's separate property asset, then that loss will be attributed to such spouse on his/her tax return in future years (or in the prior two years if an NOL is carried back). Generally, it would follow that the tax benefit of such loss is separate property *unless* the property that gave rise to the loss is deemed to be a marital asset. Just because title is held in the name of one spouse and, for tax purposes, the loss derived from that property is attributable to such spouse, for family law purposes the other spouse could very well have a marital interest in the property. Such interest, for example, could be the result of contributions of funds or other assets made (either from separate property or a share of community property) or based on a quantum merit situation.

If, for example, community earnings were used for improvements to a rental real property and for payments on an amortizing mortgage on the property, but one of the spouses is not the legal owner (e.g. the property was owned by the other spouse at date of marriage and title remained in that spouse's name), then a *Malmquist v. Malmquist*, 106 Nev. 231, 792 P.2d 372 (1990) formula would probably be used in determining the spouse's marital interest in the property. If that property had losses that created or contributed to an NOL (or a passive loss carryover, a discussion of which is beyond the scope of this article), or a loss on disposal was part of an NOL, the tax benefit of the loss would be allocated to the respective spouses in a manner that corresponds to the allocation under the

Malmquist formula. Then, the spouse who is not the legal owner of the property and thus is not entitled to use the NOL carryover would receive an equalizing adjustment for one-half of the difference between the value of the total tax benefit that the other spouse will receive less the value of the tax benefit as allocated to that spouse. (See below about determining the value of the tax benefits.) Using numbers, if spouse A owns property that created an NOL of \$150 and the value of the tax benefit is \$50, but, because of spouse B's contribution toward the property, B's interest in the property results in B sharing in \$45 of the NOL, then (for simplicity) the tax benefit to B is \$15. The tax benefit to be allocated to A is, of course, \$35; thus one-half of the difference between the \$50 actual tax benefit that A will receive and the \$35 that is A's marital interest in the benefit is a reduction in A's column and an increase in B's column as reflected on the marital balance sheet.

Now, to complicate matters somewhat, whether a NOL (or capital loss) is allocated as above, or whether such losses are derived from community assets (in which case any carryovers, or carrybacks, would be split equally for tax purposes), a disparity can occur in the relative values of a carryover as allocated between the spouses. This is because, in the foreseeable future, the respective spouses may be in different tax brackets and/or only one of the spouses is more likely to have large capital gains against which a capital loss carryover will be of greater benefit. Thus, such a disparity in the relative values of the loss carryovers between the spouses should be considered when determining the division of the property.

In arriving at relative values from the benefit of the carryovers, some assumptions will need to be made. Those include: (1) the estimated future income tax brackets of the respective spouses, (2) for capital losses, not only do the future income tax brackets need to be considered, but also the estimated amount of capital gains of each spouse, and (3) the timing of the absorption of the NOL and of the capital loss. Once

the estimated timing and the extent of the absorption of the losses are determined, the tax savings from utilizing the losses can be calculated and then the amounts of those future savings discounted to their respective present values. Then, based on the allocation of the tax benefits, these discounted present values of the husband's and wife's tax benefits can be placed in their respective columns on the marital balance sheet.

In conclusion, attorneys should be mindful of the need to consider including in marital estates the assets that can arise from both tax refunds resulting from the carryback of NOLs and the future tax benefits of carryovers of NOLs and capital losses. Also, consideration should be given to potential benefits from other available carryovers, such as for charitable contributions, invest interest expense and certain tax credits.

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GOVERNMENT PENSION DIVISIONS: WHAT COULD GO WRONG?

By Bob Butler

Every day a Nevada lawyer or paralegal writes up a marital settlement agreement that incorrectly and, occasionally with permanent fatal flaws, attempts to award a spouse an interest in a pension. Sixteen million employees of various government agencies participate in 2,500 government pension plans. This review ignores railroad, military and disability benefits. What follows then is a very quick review of the law on division of government pensions and some cases to illustrate what could go wrong.

Private v. Public: QDRO or No?

Private plans have to be qualified by labor and the Internal Revenue Service, but public or government pensions are under federal, state and local law. Federal civil employees have their pensions divided by orders found to be "acceptable for processing." Nevada by statute calls a PERS Order a QDRO.

Curiously, none of these orders discussed here are really QDROS. A QDRO is originally the order used for the private sector pension plan, not the government sector. Nonetheless, each of the orders mentioned here are covered in *The Complete QDRO Handbook 2d ed.* (2004) by David Clayton Carrad, who suggests that the term QDRO has become universal language for an order dividing a retirement. In Washoe County, the document code for a pleading of the type (3732) is covered under the generic description "QDRO."

Do They Have a CSRS or FERS Pension Governed by OPM?

Normal federal employees, with the CIA and NSA as exceptions, participate in Civil Service Retirement System (CSRS) or Federal Employees Retirement

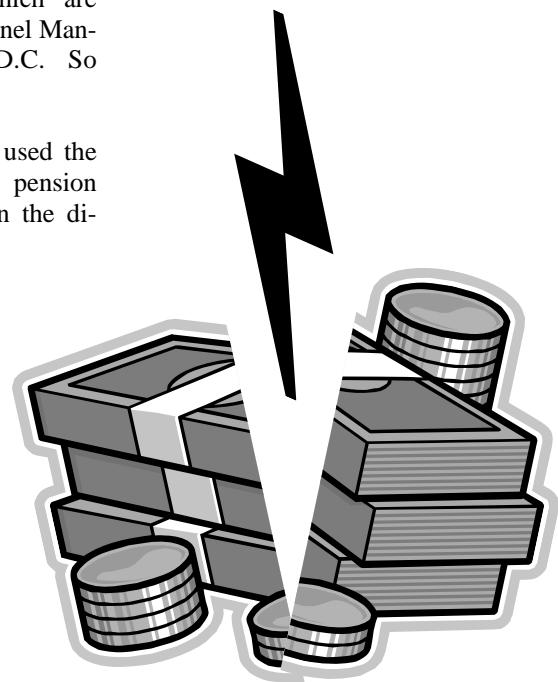
System (FERS) pensions. The major differences are the time when the federal service began, the amount of survivorship benefits that is available to a spouse, and whether the employee is a participant in Social Security. The Office of Personnel Management (OPM) approves orders dividing these pensions. They say they won't prequalify an order like Nevada PERS will. The OPM Handbook for Attorneys warns scrivener's not to do a number of things which will result in an order's rejection. The handbook counsels against the use of language such as "community property portion" or "marital share" because the U.S. Code does not define the rights of spouses.

Even when granted, a spouse may lose rights if he/she remarries prior to age 55. The CSRS and FERS use orders called "Court Order Acceptable for Processing" (COAP) which are served on the Office of Personnel Management in Washington, D.C. So QDRO no, COAP yes.

A 20-year-old Nevada case used the language "one half of James' pension with the U.S. government" in the divorce decree. There's no clue that OPM balked at the language, but the spouse appealed to the Nevada Supreme Court, arguing that even the separate property portion of the pension had been awarded to her. See *Walsh v. Walsh*, 103 Nev. 287, 738 p.2d 117 (1987). The *Walsh* court held that only the community portion of the benefit was meant to be divided. Other states have repeatedly held that such a

decree cannot be amended once final and that one half means half of the entire pension.

The OPM handbook also warns that failure to cover pre-retirement death benefits designations, post-retirement survivor's annuities (normally elected upon retirement), and the division of the member's annuity in the original order dividing assets is a fatal blow to a former spouse's survivor annuity. An amended order does not cure this flaw. A reservation of jurisdiction by the trial judge (which occurs daily in Family Court) will not cure a fatal defect. Let's see how it works. In a steady stream of decisions since *Newman v. Love*, 962 F.2d 1008 (1992 Fed. Cir.), the courts have held an amendment to a divorce decree granting survivor rights is not valid if done after the member's death or retire-



ment.

The husband in *Warren v. Office of Personnel Management*, 407 F.3d 1309 (Fed. Cir. 2005), worked for the USDA until retirement. He elected the reduced lifetime annuity to provide a survivor's annuity for his wife. Three years later they divorced. The decree and the 1997 QDRO awarded 50% of benefits available on divorce. No mention of survivor annuity was in either order. The Office of Personnel Management (OPM) reviewed the COAP. The OPM said the order was unacceptable for processing. Hoping to correct the omissions of survivor benefits, a later 1999 QDRO was submitted. Because the 1999 QDRO amended the 1997 QDRO, OPM rejected it. In litigation the circuit court said OPM had it right. A modified order is not valid if made after the retirement or death of the employee to the extent that the modification involves an annuity. The wife lost her annuity even after he elected to provide it for her. How did this happen?

A divorced spouse is entitled to a survivor annuity if elected under 5 U.S.C. §8339(j)(3) or awarded in a decree or court order. The statute requires that it be expressly provided for, though there are no magic words. The Warrens had papers which were drafted without the assistance of a lawyer. Ms. Warren's prior right to a survivor annuity elected at retirement was then terminated upon divorce because of a faulty decree. See 5 U.S.C. §8339(j)(5)(a) and *Holder v. Office of Pers. Mgmt.*, 47 F.3d 412, 415 (Fed. Cir. 1995).

More trouble arose in *Rafferty v. OPM*, 407 F.3d 1317, 1333 (Fed. Cir. 2005), because a survivor annuity was lost. The wife originally petitioned the divorce court saying she wanted her marital share of pension benefits. The Colorado judge awarded her pro rata share of retirement benefits, reserving jurisdiction to enter a COAP or other necessary order. Two months later, she asked the court to award her a survivor annuity. She was granted a COAP which contained a survivor annuity. Unfortunately for her, this COAP con-

stituted an improper modification of a prior court order only months old which was silent as to a survivor annuity. OPM and ultimately the court of appeals turned her down, ruling her order was an improper modification of the initial divorce decree, *Rafferty*, p. 1333. A valid COAP must be the initial order dividing property.

The lesson to be learned is to write the decree as if your life depended on it. Someone coming along later may not be able to fix that which you've broken.

Is There a Federal TSP?

Completely separate from the defined benefit pension is the defined contribution program known as the Thrift Savings Plan (TSP) run by the Federal Retirement Thrift Investment Board. Thrift Savings Accounts are the equivalent of a private sector 401(k) or deferred compensation arrangement. Because OPM doesn't know who is in the plan, a divorce lawyer has to do some discovery. The clue that the employee is currently participating in a TSP (state or federal) is to find the contribution itemized on a paycheck. In circumstances where the employee had an account and then later ceased participation, more discovery will be needed to develop the information as the pay stub no longer shows a deduction. Under current law these accounts are available to military, civilian government employees, Guard and Reserve on active duty. There are millions of TSP participants.

The TSP board has its own special order, a "Retirement Benefits Court Order," and the Federal Retirement Thrift Investment (TSP) Board freezes the account while it reviews the order to see if it qualifies per 5 cfr 1653.3. If it does, they send a written decision. Service of a divorce court order on an agency other than TSP – for example the Employee's Agency – is not service on TSP. A word of caution: on the TSP website I counted nine separate addresses; get it right before the money is withdrawn or borrowed against by the employee.

TSP only calculates benefit balances on the last day of the month, so an agreement or decree that relies on another date is going to create problems.

Was it a Nevada Public Employee's Divorce?

Divorces for members of Public Employees Retirement System of Nevada (PERS) are governed by NRS 125.155(1)(a), which requires the court to base its division on the number of years of married service. Annual statements sent to the employee set forth the number of years of service credit which are then compared to the length of the marriage. Nonetheless, divorce lawyers repeatedly leave this calculation undone and omitted from a decree in the hopes that some later lawyer crafting the QDRO is omniscient and will know more about the case than the divorce lawyers! The ratio of service during marriage to total service determines the percentage of the community and is an essential element of any settlement conference or trial statement. With the calculation in front of the judge it is less likely to be misstated in the decree. Omission of this information from the decree is asking for trouble when a QDRO cannot be crafted from the information in the settlement agreement or decree.

Under *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989), the required division of a retirement plan should be based upon dates of service during marriage pursuant to the "time rule," the preferred method. By comparison the time rule would not be the correct approach to divide money contributed to a TSP. Similarly, money put into an IRA before marriage would be divided by determining when and how much money was contributed.

Who is a Surviving Spouse?

In California, Family Code §2610 requires the divorce court to ensure that each party receives the party's full community share of a retirement in

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This Year's Theme:



PENSION DIVISIONS: (cont'd. from page 9)

cluding all survivor and death benefits. No such reminder about survivor and death benefits exists in Nevada or in many other states. Unfortunately, the result is that it is rare for a property settlement agreement to contain the bargain of the parties on this subject. In each instance, the cost of the annuity should be addressed. *O'Hara v. State ex. Rel. Public Employees Retirement Board*, 104 Nev. 642, 764 P.2d 489 (1988), demonstrates how the survivor options work. There the retiree did not elect any survivorship option available under PERS, meaning that the employee and spouse decided to gamble on the worker bee's longevity. They lost when the employee died two months after retirement. Any pre-retirement death benefit, i.e., the return of his contributions, was eliminated when he submitted his retirement papers. Thus the only potential residuary payment to the wife would have been an selection of options two through six, allowing a surviving spouse an annuity.

Survivorship Options Are Not Free!

I have never seen a state or federal plan that did not mirror the private sector's protection for pre- and post-retirement survivor's benefits. Nevada has six options for survivorship

in the PERS scheme. The higher the percentage of survivor's benefits, the higher the cost. Because this protection for a spouse does not benefit the employee once retired, it is rational that a divorce settlement address the retirement option and the party responsible for the cost of survivor benefit.

Pre-retirement death benefits come at no cost, but these benefits are paid to a beneficiary designated in personnel records (who could be a new flame) regardless of any court order served on PERS.

Did They Have a State Thrift Savings Plan?

Presumably the parties have completed enough discovery to word the decree with the ratio or the amount of money contributed to any Thrift Savings Plan per NRS Chapter 287. These deferred compensation accounts are not tracked by PERS and the only clue that they are in the plan is a payroll deduction. The deductions go directly from payroll to an agent, such as Fidelity, Vanguard, Nationwide and others. They are deferred compensation arrangements similar to a savings or 401-type plan. Contributions before marriage can be compared to contributions during marriage to set up a ratio. The parties can agree on a rate of return or do discovery to learn what the actual return on investment was. These do not have a survivorship element as they are paid on death to a designated beneficiary (meaning designated in the member's personnel records).

University Employees May Be Exempt from PERS?

By statute, some professors and other university employees are excluded from the system and thus participate in competing arrangements, such as TIAA-CREF (see NRS 286.297). PERS will have no records for these parties either.

Discovery of the TIAA-CREF account statement is critical to compute the size of the benefit. Such a statement should be attached to the settlement conference statement or trial statement for the judge's benefit.

What Should the Decree Say?

A decree should state the amount of service before and during marriage or state that a spouse had x number of years and months of service under a defined benefit plan. Saving the computation for later begs the question: are the parties to litigate following divorce or conduct discovery after a divorce to set forth a formula or ratio?

Use of the words *community* or *marital share* is pointless because the military won't accept it, the federal government Office of Personnel Management won't accept it, nor will any plan administrator guess at what that share is. Community ends in Nevada by statute with a settlement or a decree. Use the ratio, because NRS 125.155(1)(b) for public employee pensions prohibits guessing and estimating in regard to future increases, promotions, and raises.

Conclusion

All government pensions are regulated by lawmakers and approved by bureaucrats. Thus, government agencies can be downright flippant when it comes to rejecting orders and denying benefits. I was asked by a colleague the other day if "Nevada was going out of its way to make pension division difficult." "No," I replied, "they are working hard in Carson City to make this all work." That being so, pension division remains as treacherous as a spider web.

Bob Butler, Esq., loved by his peers and well-respected for his work on retirement accounts, passed away suddenly in December. This article is a reprint from the Washoe County Bar Association's Writ. He will be missed.

QDRO TRICKS AND TRAPS

By Marvin Snyder

The preparation of a Qualified Domestic Relations Order (QDRO) begins with the items dealt with in the Decree of Divorce, or in the Property Settlement Agreement. This is where the problems begin. Rarely will the divorce documents contain sufficient details for the QDRO drafter to use in a particular plan. Set forth below are some of the traps set by the unwary writer of the divorce:

1. The divorce confuses defined benefit (DB) pension plans with defined contribution (DC) plans. You cannot divide an account in a defined benefit plan in cash, because there is no such thing. You could order a defined contribution plan to pay an annuity-form of benefit, but that would be very unusual.
2. After determining whether the plan is a DB or DC, you have to know if it is a corporate plan, a governmental plan, a military plan, or whatever. Each of these are handled differently.
3. Nevada law isn't clear on DC plans, but it is codified for DB plans at NRS 125.155. Then there is case law for DB plans in *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989) and in *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990). But, a close reading of statutory law and case law indicates an internal contradiction.
4. NRS 125.155 appears to limit the marital property of a pension as of the date of divorce. However, the cases use the "Time Rule," which applies to the pension at retirement with pay and service counted at the later time. The attorney advocate for one side or the other should consider the application of whichever approach is most favorable for the client.
5. The Time Rule, when it is being used, applies more to a DB plan than to a DC plan, but it may be applicable in the latter in some cases, e.g., if the employee had an account balance in the DC plan before the date of marriage.
6. A feature of DC plans is that the balance is not "dormant." The amount in the account changes daily. Ignoring contributions made after the date of divorce (which are always the separate property of the employee), what should be done about net investment gains and losses in the account after the divorce before payment to the spouse? In representation of the employee-spouse, you may consider attempting to limit and freeze the spouse's award as of the date of divorce. For the non-employee spouse, you would want the QDRO share of the account to continue with investment results until ultimately distributed to your client.
7. Many DC plans now impose an internal administrative cost to processing a QDRO. The QDRO may indicate that the costs be borne solely by the employee, by the spouse, or shared. The cost itself is subtracted by the plan from the account.
8. For a QDRO on a DB plan, it must be structured as either a "separate" interest or a "shared" interest. In a "separate" interest, the plan treats the spouse almost as if the spouse had been an employee, with most of the rights under the plan being retained. For example, the spouse can elect early retirement. In "shared" interest, the spouse's QDRO benefit is merely an appendage to the employee's pension. The spouse has no choices in a "shared" DB QDRO.
9. Usually, in a "shared" DB QDRO, the spouse will be named as a post-retirement survivor beneficiary to receive a death benefit if the retired employee dies first. This is not required, so it should be reviewed to see if it is warranted. Otherwise, the death of the retired employee ends the spouse's benefit. This survivorship costs money, so the spouses may decide to take more money during lifetime and forgo the survivorship option.
10. In a "separate" DB QDRO, the spouse usually is not named as a beneficiary for the retired employee's death because the spouse is receiving his or her own separate pension which continues regardless of the death of the employee. As an attorney advocate for the spouse as client, you may try to include the spouse as such a beneficiary - a form of "double dipping" which is allowable.
11. Some thought should be given to death before retirement of either spouse. Depending on the type of plan, it may be possible for one or the other to benefit from the other's premature demise.
12. In the Nevada Public Employees Retirement System (PERS), at retirement there are "Options" available concerning post-retirement survivor benefits. Each of these are different and provide advantages and disadvantages.
13. PERS allows only one Option, and only one named beneficiary. The QDRO controls the election of the Option and the designation of the beneficiary. This is a sensitive subject, not often found in detail in the divorce papers. An advocate for the employee or for the spouse will want to be very careful on this point.
14. After retirement from PERS, the retiree will begin to receive cost of living (COLA) increases in the monthly pension benefit. The QDRO must state whether or not the spouse shares in COLA as well. Naturally, if so, this additional amount is taken from the retiree's pension.

Continued on back cover

QDRO Tricks & Traps: (cont'd. from page 11)

15. If a PERS employee-spouse should die before retirement, there would be no benefits at all for the non-employee spouse (except in a special case), and the QDRO cannot control this problem. The special case is where the PERS employee dies unmarried before retirement, with the former spouse named on the standard PERS pre-retirement beneficiary form.

16. Something can be done in PERS or other cases where the spouse is not to be a survivor benefit beneficiary. That would be for counsel for the parties to negotiate a “sweetener” in the pension benefits payable while both are alive (the parties, not counsel). For example, in a 50% situation, the QDRO could be written to give, say, 55%. That way, while alive, the spouse gets extra money in exchange for getting nothing when the retiree dies.

17. Can the spouse get money early, before the employee? In a DC plan, the answer is almost always “yes.” In a DB plan, it depends. The answer is “no” in military, federal, and state plans. The answer is “yes” in corporate and union DB plans, if the QDRO is on a “separate” interest basis.

18. Can the spouse have a beneficiary if the spouse dies before receiving benefits from the plan? In a DC plan, the answer is almost always “yes.” In a DB plan, it depends on the plan, varying from plan to plan. It is suggested that the possibility be written in the divorce papers on the proviso if acceptable by the plan.

Marvin Snyder, a frequent NFLR contributor, presenter for the State Bar of Nevada, nationally-acclaimed author on pensions, and a great friend to the Family Law Section, is a consulting pension actuary in Las Vegas, specializing in the preparation of QDROs on a statewide basis. He can be reached at (702) 869-0303.

Articles Are Invited!

The next NFLR is expected in March, 2008. Please contact **Bob Cerceo** at bobcerceo@aol.com with your proposed articles. We're targeting articles between 350 words and 1500 words, but we're always flexible if the information requires more space.

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