



5 TIPS FOR DIVIDING RETIREMENT ASSETS

By Judith A. Deer, Esq.

1. OBTAIN DOCUMENTS.

- A. ___ Determine in the early stages of discovery if any pension benefits exist. If so, obtain:
- ___ A copy of account statements.
 - ___ A copy of the Summary Plan Description (SPD).

These documents are critical to determine what benefits are available to your client through the Plan. For example, a Plan may not have survivor benefits, or may only have limited survivor benefits, in which case you may need to negotiate differently for your client. You do not want to find this out after the Marital Settlement Agreement (MSA) has been entered into and it is too late to negotiate.

2. DETERMINE THE TYPE OF PLAN.

- A. ___ Is the Plan a Defined Contribution Plan? For example, 401(k), 403(b), Savings Plans or ESOP.
- B. ___ Is the Plan a Defined Benefit Plan? For example a traditional Pension Plan or a Cash Balance Plan.
- C. ___ Is the Plan a Non-Qualified Plan? These can be either a Contribution or a Benefit Plan and must be resolved in the MSA. Most of these Plans are not subject to division so be sure to determine the value of the account to secure an offset for the value from some other revenue source.

3. DIVIDING A DEFINED CONTRIBUTION PLANS.

- A. ___ Determine the valuation date i.e. the date of the filing of the Complaint or another agreed upon date. Determine if there are pre-marital funds, and if so agree upon one of the following methods to credit the Participant for the pre-marital amount:
- ___ Coverture fraction evaluation. Where an evaluation of the coverture fraction determines the marital portion. This will take into account earnings and losses over the entire period of the account. The coverture fraction is a fraction in which the numerator is the number of months of employment that took place during the marriage, while the denominator is the total number of months of employment as of the valuation date.

- ___ Value of account as of marriage date. Determine value of the account as of the marriage date and the parties agree upon a percentage (i.e. 4-5%) of growth on the pre-marital amount.
 - ___ Agree to utilize the services of an accountant to determine the pre-marital amount. This is recommended for high balance accounts.
- B. ___ Determine if there is a loan balance against the account and negotiate whether or not the loan is to be shared by the parties or whether the Participant is responsible for repayment.
- C. ___ Negotiate whether or not the Alternate Payee's awarded amount should be subject to market earnings or losses.
- D. ___ The MSA should contain language that specifically states the method of distribution.
- ___ Percentage. The MSA would generally state "50% of the Participant's account balance as of the date of filing of Complaint." Be sure to include whether or not the percentage is subject to earnings or losses through the date of distribution and who is responsible for the loan.
 - ___ Straight dollar amount. A straight dollar amount is often utilized when the fund is being used to offset other assets, if a credit is being given to "equalize" other account or if pre-marital assets exist in the account. The MSA should state the specific dollar amount to be distributed and should state whether or not earnings or losses should be assessed against that amount and from what date.

NOTE REGARDING EQUALIZING ACCOUNTS. Be cautious when "equalizing" various contribution accounts between the parties particularly with high balance accounts. Only consider equalizing accounts into which no post-Complaint contributions have been made or where the account performances are somewhat similar. If accounts are to be equalized, be sure to state from which account the distribution is to be made and if earnings or losses should be assessed against the awarded amount.

4. DIVIDING A DEFINED BENEFIT PLAN.

- A. ___ Determine if the Participant is in Pay Status (retired and collecting pension from the Plan). The answer to this question will dictate how the pension can be divided.
- B. ___ If the Participant has retired, be sure to obtain a statement from the Plan to determine the form of benefit elected by the Participant at the time of retirement. How the Participant is receiving the benefit may impact on your decisions regarding division of the pension. Once retired, the Alternate Payee can only share in the benefit being distributed to the Participant. Any survivor choices made by the Participant at the time of retirement are irrevocable.

- C. ___ Is the Participant a member of a State or local government Plan? If so, be sure to include a Retirement Option (survivor) in your MSA which the Participant must choose at the time of retirement. Also, be sure to negotiate the Pre-Retirement Insurance and Return of Contribution.
- D. ___ If the Participant is not in Pay Status, be sure to include in your MSA that the pension will be divided as a “separate interest” pursuant to “the Marx formula.” Also, be sure to negotiate:
- ___ Early Retirement Benefits. These benefits are sometimes provided by a company as an early retirement incentive to older, long time employees. The MSA should specifically state that “the Alternate Payee is entitled to his or her proportionate share of any employer-provided early retirement subsidy, supplement, incentive and/or cost of living adjustment.”
 - ___ Cost of Living Adjustments. This benefit is not often found in private Plans; however, is frequently in government Plans. To ensure that the Alternate Payee shares in this benefit, it needs to be stated directly in the MSA.
 - ___ Qualified Pre-retirement Survivor Annuity (QPSA). A MSA should state that “if necessary for the Alternate Payee to receive his or her share of the awarded amount of the pension, the Alternate Payee shall be treated as the Participant’s surviving spouse for purposes of receiving a monthly Qualified Pre-Retirement Survivor Annuity (QPSA).”

NOTE REGARDING MSA LANGUAGE. If you do not know specific Plan provisions or allowances, which is frequently the case, I recommend that, at a minimum, the MSA should state the parties’ intentions. For example, while you may not know the exact Retirement Option under a State Plan, you know that the parties intend for the Alternate Payee to continue received the awarded benefit even if the Participant should predecease the Alternate Payee. State that intention in the MSA.

5. FILE THE QDRO AS SOON AS POSSIBLE

A prompt and early preparation of a QDRO with filing of the QDRO at the time of the Divorce is recommended. Even if you are not sure if you will be dividing the pension assets, it is well worth the investment for your client to have the QDRO available at the time of the divorce to protect their interests.

If you cannot get the QDRO prepared and pre-approved early in the process it is not necessary to obtain pre-approval by the Plan in order to file the QDRO. In fact, ERISA is written such that it anticipates that the originally filed QDRO may not be approved by the Plan and provides for an 18 month “hold” on the account to allow for revision and refile of the QDRO. This “hold” on the account protects the former spouse from losing the pension post Divorce. The serving of a filed Order on the Plan is the only method which ensured that a “hold” is placed on the account. Without this hold, if the Participant should die, remarry, retire, or leave the pension Plan subsequent to the divorce, the pension could be lost to the former spouse.