UNDERSTANDING RETIREMENT PLANS IN FAMILY MEDIATIONS

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Role of Mediator

- Passive vs Suggestive vs Instructive
Mediation Scenario

- You are in mediation. The parties have no children, and no assets other than Husband’s defined benefit retirement plan, which was set up by his employer, AT&T, which was recently broken up into several smaller service providers.

- Miraculously, the parties turn the corner toward settlement. Husband makes a good offer for alimony, and that leaves only the issue of division of his retirement account. The parties have statements for a retirement account showing that the husband has a vested pension benefit worth $1,358.59 per month, and a lump sum cash value of $300,000.00. What do the parties do?
Parties, with assistance of mediation, agreed as follows:

(d) Pensions, Profit Sharing and Bell System Savings Plan Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband’s retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount.

No QDRO was done

The participant died in 1987 at the age of 53. The earliest age of retirement under the pension plan was 55.

Ms. Samaroo asked the plan for payment of her share of the pension, and they refused to pay because she did not get a QDRO assigning her a “qualified pre-retirement survivor annuity”

The estate of the deceased husband agrees to entry of the QDRO

The family court agrees to enter the QDRO, but warns that it is the plan that will determine the QDROs enforceability.

Ms. Samaroo joins to retirement plan to the divorce, and the plan refuses to enforce the QDRO. Ms. Samaroo removes the case to federal court.
Issues:

- Is a retirement plan required to provide survivor benefits not specifically provided for in a settlement agreement and/or final judgment after a participant has died?
- Is a retirement plan bound by a QDRO received after the death of a participant that awards a death benefit?

**Holding and Reasoning:** The federal court held that the plan was not bound by the QDRO in this matter, and that the failure to include specific language in the settlement agreement awarding the pre-retirement survivor annuity relieved the plan of liability to pay such benefits. The court reasoned that because the plan necessarily needs to know its actuarial obligations to maintain appropriate funding, that it was incumbent upon Mr. Samaroo and Ms. Samaroo to establish the entitlement to the survivor annuity by having Mr. Samaroo fill out the appropriate plan form and/or to have submitted a QDRO prior to Mr. Samaroo’s death. Further, the lack of any reference to the benefit in the settlement showed a lack of intent by either party to actually award this benefit as part of the divorce.

**Rule:** The failure to include specific benefits in a settlement agreement or final judgment, and to give the plan appropriate notice of benefits payable to a former spouse, may ultimately constitute a complete waiver of these benefits.

**Practical Points:**

- If you do not know specifically what you are dividing and/or you do not have a firm understanding of how to divide it, do not force it. It is imperative that you specifically allocate not only basic pension income, but also all ancillary economic benefits related to the retirement plan in your settlement agreement and/or final decree, and then contract for a plan for the division of the account.
- Plans are self-serving, and they are not to be relied upon as working with or for either party in a case. Do not simply rely on their forms.
- Though QDROs are entered as part of family law cases, and retirement accounts are assets subject to distribution in a family law case, they are primarily governed by federal law, which trumps state law and orders issued by state courts.
Two Actual Malpractice Cases

- Mischaracterization of a Disability Pension as a Retirement Pension
- Failure to have a QDRO administered (signed, but not administered)
Option 1: Reserve on the issue until you can get full discovery and discuss the issue with someone who regularly deals with QDROs.

Option 2: Draft in the alternative, and clearly lay out the parties' intent, and leave open the option to modify the agreement solely as to that issue; make sure that appropriate benefits are covered before agreeing to finalize.

Key cases to consider: Blaine v. Blaine, 872 So. 2d 383 (Fla. 4th DCA 2004); Padot v. Padot, 891 So. 2d 1079 (Fla. 2d DCA 2005); Jones v. Treasure, 984 So. 2d 634 (Fla. 4th DCA 2008); Fritz v. Fritz, 2014 Fla. App. Lexis 5035 (Fla. 2d DCA 2014); Compare this case to Pullo v. Pullo, 926 So. 2d 448 (Fla. 1st DCA 2006) and Russell v. Russell, 922 So. 2d 1097 Fla 4th DCA 2006)
“The parties shall equally divide the marital portion of the husband’s pension plan”

“The Husband has a pension plan formerly with AT&T, which shall be equitably divided between the parties”

“Both parties have retirement plans. The parties agree to offset said plans so that each party receive an equal amount of the total value of the same”
“Husband has a retirement plan with a value of $300,000.00 as of 6/1/13, the date of valuation. Wife shall receive a lump sum of $75,000.00 from this plan. The parties shall divide the remainder of the account equally”

“Wife shall receive her equitable share of Husband’s pension, subject to passive gains”

“Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband's retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount”

“Wife will received one of the marital share of Husband’s pension, which share shall not be taxable to Wife.”
1) **Valuation**: Make sure that you know the actual value of the account on the date of valuation, and that you are aware of any stock options that vest and/or matching that may occur at the end of the year
   - Get Mandatory Disclosures (Statements and Summary Plan Description)
   - Know your vesting schedule

2) **Passive Gains and Losses**: Changes in value from valuation date to date of segregation of accounts; See Hoffman v. Hoffman, 841 So. 2d 695 (Fla. 4th DCA 2003)

3) **Outstanding Loans**: Will they factor into award?

4) **Administrative Fees**: Plan can charge fees for administering a QDRO; usually deducted directly from the plan account(s) of one or both parties
1) Survivor Benefits
   a) Qualified Joint and Survivor Annuity
   b) Qualified Pre-Retirement Survivor Annuity

2) Duration and Benefit Commencement
   a) Shared Interest  b) Separate Interest  c) Lump Sum

3) Amount — Valuation
   a) How do you get a valuation?

4) Cost of Living Adjustments

5) Early Retirement Subsidies/Supplements

6) Social Security Reductions

7) Effect of plan merger (into another plan with different rules, such as a disability pension), buyout, PBGC takeover
   □ Always reserve on the issue of addressing the conversion of the pension
Penalties and Tax Issues

1) 10% early withdrawal penalty

2) 20% withholding

3) Roth 401(k): Withholdings depend on portion that is contributed by employee, earnings on that portion, and portion contributed by employer (pre-tax vs. after tax)

4) IRAs
Two Plans

- FRS Pension Plan (Defined Benefit Plan)
  - Always use a shared interest approach
    - Survivor Benefits may or may not be available, depending upon whether the employee is active or not; four retirement options
  - Deferred Retirement Option Program (DROP)
    - See Pullo v. Pullo, 926 So. 2d 448 (Fla. 1st DCA 2006)
    - Always know the marital portion as of the date of valuation

- FRS Investment Plan (Defined Contribution Plan)
  - Gains/Losses
Entry of QDRO prior to or simultaneously with FJ

How long should drafting take?

Pre-Approval versus Post-Entry Approval
Preparation and Fees

- Who should be responsible for preparing a QDRO?
  - Attorney versus Non-Attorney
    - Liability Issues: Shifting to another attorney

- How should fees and costs be divided?

- Who should be required to contact the drafter?