

SURVIVORSHIP BENEFITS NOT SO SIMPLE ANYMORE

The following is provided courtesy of Contributing Editor Garrick G. Zielinski, CFP, and CDFA. Mr. Zielinski is President of Divorce Financial Solutions, LLC specializing in retirement plan valuations, QDRO's and divorce financial counseling. You can reach Mr. Zielinski at 414-294-4755 or e-mail him at Garrick@DivFinSolutions.com

Numerous retirement plan sponsors have made changes to the way they view divorce agreements and pension plan divisions by court order. As many of us have understood for centuries, when a participant places his/her plan into "pay-status" and a surviving spouse election is made, that election was assumed forever irrevocable. In fact, the vast majority of ERISA plans still adhere to this rule. Numerous plans, however, have adopted provisions that will allow a reversion from a joint and survivor annuity to a single life annuity pursuant to a court order. Some of the drafts are referred to a zero percent QDRO's while others simply require a subsequent court order to make the change. The affect of the revision is an increase in benefits payable to the participant and perhaps the alternate payee, albeit survivor benefits payable to an alternate payee are voided. In other words, the alternate payee's benefits would cease being paid at the participant's death, or not paid at all if the participant dies prior to the alternate payee. Survivor benefits are an asset and there is a cost, in the form of a reduction to the gross annuity, to provide a survivor benefit to a spouse and/or a former spouse. Under ERISA plans, survivor benefits are protected and a court order is required to change them if allowed by the terms and conditions of the plan. Under an ERISA governed plan, it would be difficult at best for a participant to get a survivor benefit removed without the assistance of the court.

A substantial number of State court orders are drafted under the mistaken belief that ERISA applies to government retirement benefits. Sections 1003(b)(1) and 1051 of title 29, United States Code, exempt federal, state, county and city plans because they are "governmental plans" as defined in section 1001(23) of title 29, United States Code.

ERISA created the term "qualified domestic relations order" (QDRO) to describe a court order that summarizes the division of retirement benefits under ERISA plans. QDRO's are not acceptable orders when dividing government benefits. All federal government plans such as the Federal Employees Retirement System (FERS), Civil Service Retirement System (CSRS) and all the Military branches have their own set of rules and requirements for dividing benefits incident to a domestic relations action. Most state plans have rules governing their plans, but many county and city plans have yet to adopt rules governing the division of their plans.

The provisions of law that govern FERS benefits are in sections 8401, 8424, 8444, 8445, 8467, and 8470 of title 5, of the United States Code. The provisions of law that govern CSRS are found in sections 8341, 8342, 8345 and 8346 of title 5, United States Code. The regulations covering both FERS and CSRS are in part 838 of title 5, Code of Federal Regulations.

Attorneys frequently prepare domestic relations orders regarding these plans (commonly referred to as a COAP) based on the assumption that they can provide any type of benefit, or any benefit option to a non-employee spouse that is also available to the employee spouse. For example, the primary difference between ERISA plans and federal government plans is that under ERISA the non-employee spouse may begin to collect benefits at the date the employee spouse is eligible to collect benefits, regardless of whether or not the employee spouse actually begins to collect a benefit. The lack of availability of this benefit in a federal government plan can have serious consequences to your non-employee spouse client and affect the negotiation of the settlement agreement.

For example, Section 8444 and 8445 of title 5, United States Code, permits State courts to award a former spouse entitlement to a survivor annuity in the event that the employee predeceases the former spouse. There are a few traps regarding survivor benefits in a COAP that could forfeit your client's survivor benefit. The first trap is without question the most common of all. Under Section 8444 and 8445 if the non-employee spouse remarries prior to her age 55, he/she will lose entitlement to the survivor benefit.

Another little known hazard also exists. If a Federal employee covered under FERS or CSRS terminates his/her employment from Federal service and delays his/her retirement commencement (referred to as deferred vested annuity) date, the employee is neither an "active employee" nor a "retiree" and thus survivor benefits are not payable under the Act. This is a dangerously often overlooked circumstance. On the other hand, if the participant is a member of Congress, a statutory exemption exists for former spouses who were married to members of Congress.

In short, no matter how good the COAP there remains a possibility that the non-participant spouse will lose his/her survivor benefit award if the Federal employee quits Federal employment and deceases prior to the commencement of his or her retirement annuity.

What is the solution to this dilemma? The attorney should seek protection by including a provision in the judgment to protect the former spouse's ownership share of the pension benefits using a separate term life insurance plan and/or look toward the Federal Employees' Group Life Insurance (FEGLI) for court ordered security. FEGLI coverage includes basic coverage, standard optional coverage and additional optional coverage. Under 5 CFR Part 874 an assignment via a COAP of FEGLI coverage includes all Federal employees and former employees.