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Negotiating a "surviving spouse" or "independent interest" technique in securing a lifetime stream of income for your client via QDRO.

It has been mentioned numerous times that survivor benefits are separately negotiated benefits independent from the division of the marital interest in the plan. Survivor benefits are not free to secure, they have a cost to the plan and a cost (via reduction in the stream of payments) to the participant, if elected, or court ordered. Therefore, survivor benefits that are issued should be addressed in your MSA. A clear and concise understanding of the Plan's survivor benefit options can substantially increase the amount of benefits payable to either party through negotiation. On the other hand, a lack of understanding will in most circumstances leave substantial amounts of benefits unallocated and potentially forfeited to the Plan.

There are a couple of advantages to a former spouse when using the "survivor spouse" technique. They are:

- A greater lifetime stream of income assuming that the order is divided by a percentage
- Potential to receive benefits immediately after the death of the participant and without a reduction for premature commencement of benefits as opposed to waiting until the participant's earliest possible retirement age to commence benefits

There is one advantage to the participant when using the survivor spouse technique. It is:

- In the event of a premature death of the non participant spouse prior to the commencement of benefits, the percentage awarded to the non participant spouse may revert to the participant

There are no disadvantages to a former spouse when using the survivor spouse technique of providing a lifetime stream of income. However, there is one distinct disadvantage to the participant. It is:

- A decrease in the gross benefit payable due to the cost of the "survivor benefit" and thus a decrease in the amount of benefit payable to the participant.

By maintaining a shared interest technique, none of the benefits accrued by the participant will be forfeited to the plan. If the plan has a pre-retirement survivor annuity, benefits could commence to the non-participant spouse shortly after the death of the participant. In many circumstances, the non-participant spouse will actually receive the same amount of benefits that would have been payable at a later date. All ERISA plans must offer a post-retirement survivor benefit at least equal to 50% of the participant accrued benefits.

There are no distinct advantages to the non-participant spouse when using an independent interest QDRO. However, there are a couple of advantages to the participant spouse when using an independent interest. They are:

- A greater lifetime stream of income assuming that the order is divided by a percentage
- The benefit is unencumbered and allows for survivor benefits payable to a subsequent spouse

The disadvantages to a participant and non-participant in using an independent interest are numerous. They are:

- In the event of a premature death of the non-participant spouse, prior to the commencement of benefits, the awarded portion will in most cases be forfeited to the plan. Potential benefits are forfeited and cannot be recovered by either party.
- In the event of death, disability and/or termination of employment of the participant will not trigger benefits payable to the non-participant spouse. The non-participant spouse will in most circumstances be required to wait until the date the participant *would have* attained the earliest retirement age to commence benefits.
- The reduction necessary to provide a lifetime stream of income to the non-participant spouse is paid from the non-participant spouse's benefits. They are actuarially adjusted to account for age and gender, because females live longer than males. If there is a large discrepancy in age, the reduction could be substantial.

Pensions are promises of future benefits, and there is not an existing account balance like a 401(k) or Profit Sharing Plan. To receive a pension the participant must be alive at the time of benefit commencement. Pensions are paid based upon age, years of service and average salary in most circumstances. Pensions do not discriminate between genders while they accrue. However, when they are divided via a QDRO, age and gender matters.

Conclusion: In pretentious litigated cases, it is unlikely you will strike a negotiation regarding survivor issues, advantages and disadvantages to either party. The easiest path to settlement is an independent interest QDRO. However, in a cooperative case, a thorough analysis of the options within the Plan may increase the size of the pie and avoid any pension assets from being reclaimed by the Plan due to the premature death of either party.