

The Former Spouse gets half the pension, so what's the problem?

This circumstance should never happen in these times, but unfortunately our firm sees it every day. The section in the marital settlement agreement reads as follows:

“Petitioner is awarded 50% of respondent’s pension through his employment at GM”.

Some attorneys draft more language when dividing the lawn tools than they do for the division of the pension.

- What if the pension included a cost of living adjustment?
- What if the pension included a supplemental benefit?
- What about early retirement supplements?
- What about pre-retirement survivorship protection?
- What about post-retirement survivorship protection?
- What about the participant’s death between the date of the divorce and the date the actual QDRO is properly served on the plan?
- What about the alternate payee’s death prior to a properly served QDRO?

Increasingly pensions and other qualified retirement plans are the largest assets in the marriage. Today we see more debt, houses upside down and couples with little or no money in their bank accounts. Spouses spend hundreds of dollars appraising their upside-down homes. They spend thousands of dollars arguing over their debt, and equal amounts of costs and energy divvying up their knives and forks. Yet they spend very little time discussing the value, terms and conditions of their retirement plans or the benefits of those plans to each other based on the terms and conditions of the Plan.

Discovery, analysis and evaluation should be completed before the negotiation and settlement drafting begins. It is imperative that your settlement agreement spell-out all of the rights and entitlements of the alternate payee. Don’t leave it to a post divorce drafted QDRO to fix the mistakes and omissions left out of the settlement agreement. Not only will opposing counsel object every step of the way, it will be extremely difficult, and in most cases impossible to get the court to allow wholesale changes to the pension award and QDRO draft when including all the bells and whistles that the attorney omitted in the settlement agreement. In fact, you may be setting yourself up for a malpractice claim.

Understanding the terms and conditions of the plan, the benefit options payable and how those options effect the alternate payee’s portion of the plan are paramount. With a clear understanding from a knowledgeable platform you and your client can make well-informed decisions about their post divorce financial future.

The following language is suitable to be included in the final Marital Settlement Agreement if it is your intent to divide an ERISA qualified defined benefit pension plan between the parties including benefits payable over the alternate payee's lifetime, subsidized benefits, death benefits and other miscellaneous benefit options:

Pursuant to IRC Section 414(p), the [petitioner/respondent] is awarded 50% of all accrued benefits or credits in the [correct name of plan] (Plan) with respect to the [petitioner/respondent] as of the date of divorce payable to [him/her] under the same options and conditions of the Plan as is available to the participant. [Petitioner/Respondent] shall be awarded an independent and separate pension which shall mature independently of participant at any time after the earliest retirement age of the participant, or the age the participant would have attained the earliest retirement age under the Plan regardless of whether or not the participant has commenced benefits. However, in the event the Plan will not recognize an independent interest, [petitioner/respondent] shall be treated as the surviving spouse of the participant for purposes of pre-retirement survivor benefits only, pursuant to section 401(a)(11) and 417(c) of the IRC to the extent of the award up to the date of divorce.

In the event the Plan pays a regular, special or temporary early retirement supplemental benefit to the participant, a portion of the supplement shall also be payable to [petitioner/respondent] based on a pro rata share of the benefits awarded in this order and up to the date of divorce. [Petitioner/Respondent] shall receive a prorated share of any COLA's and ad hoc increases applied to the participant's benefit. The intent of this paragraph is to provide the [petitioner/respondent] with a proportionate share of any subsidized benefit, ad hoc increase, cost of living adjustments and supplemental benefit on a pro rata basis determined by the amount of benefits awarded to the [petitioner/respondent] in relationship to the total benefits payable from the Plan.

If [petitioner/respondent] does not receive retirement benefits as provided for herein and pursuant to the terms and conditions of the Plan, or if at any time benefits which should have been paid directly to [petitioner/respondent] under the terms of the Plan cease or the benefits are paid to the participant or another third party, the participant shall make payments out of [his/her] separate income, assets or both, equal in all respects to those payments provided for herein. Participant shall continue to make the payments until said benefits begin or resume directly to the [petitioner/respondent].

The following language is suitable to be included in the final Marital Settlement Agreement if it is your intent to divide an ERISA qualified defined contribution plan equally between the parties.

Pursuant to IRC Section 414(p) the [petitioner/respondent] is awarded an independent interest in an amount equal to 50% of all account balances in the [exact name of plan] (Plan) with respect to the [petitioner/respondent] (Participant) as of the date of divorce or as of the valuation date of the Plan that is closest to the date of divorce, but not after the date of divorce. [Petitioner/respondent] shall be eligible to receive all benefits and options available to the participant under the plan pursuant to IRC Section 414(p) and the terms and conditions of the Plan. The amount awarded to (petitioner/respondent) shall be adjusted for any market value gains or losses from the effective date of the award to the date of valuation for bifurcation. Until such time as the Plan is physically bifurcated the (petitioner/respondent) shall retain the (petitioner/respondent) as the named beneficiary to amount or a percentage equal in all respects to the amount awarded to herein. Upon physical bifurcation of the Plan the (petitioner/respondent) may change the named beneficiary to his/her own choice.

THE ABOVE LANGUAGE IS GENERIC ONLY AND SHOULD NOT BE RELIED UPON IN EVERY SITUATION AND/OR FOR EVERY PLAN. COMPETENT ADVICE SHOULD BE SOUGHT FOR ANY PURPOSE. The interpretation, viewpoints, and opinions presented in this text are those of the author and are not to be construed as the rendering of legal advice, nor is Divorce Financial Solutions, LLC offering such advice.
