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WOMEN AT RISK: SECURING RETIREMENT BENEFITS IN DIVORCE

By Elizabeth M. Wells

In most state divorce courts throughout the United States, retirement benefits earned by either spouse that are attributable to the period in which the parties were married are considered to be marital property and thus are divisible by the Court.¹ Statistics indicate that, as of 2009, the divorce rate in the United States was approximately 50 percent.² (Approximately 6.8 individuals out of 1,000 were married in 2009; approximately 3.4 individuals out of 1,000 were divorced in that year.³) Women participate in retirement plans less frequently than their male counterparts.⁴ For those women who do participate in retirement plans, the value of their benefits is on average less than the value of their male counterparts' benefits.⁵

In light of these statistics, in a heterosexual divorce situation it is more likely that the wife will be entitled to a share of her husband's retirement benefits than that the husband will be entitled to a share of his wife's retirement benefits. If both parties have retirement benefits, it is more likely that the husband's retirement benefits will be of greater value than the wife's retirement benefits. Women generally live longer than men.⁶ Thus, it is vitally important to the financial well-being of divorcing women that the retirement benefits earned by their husbands are fully identified, properly valued and equitably allocated during the divorce process. Any flaws in the process may subject these women to substantial financial risk at a time in their lives when they are least able to cope with such risk. The purpose of this article is to provide some very basic information to non-attorneys regarding the steps that should be taken to secure a divorcing woman's share of her husband's (or former husband's) retirement benefits.

A. Obtaining Information about the Retirement Plans
Before determining how to allocate retirement benefits between divorcing

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parties, one must learn what retirement benefits are involved. The attorney who represents the spouse in a divorce who is not the participant in the Plan at issue ("the non-participant spouse") may easily write a letter requesting that the attorney representing the "participant spouse" provide information on all of the participant's retirement benefits. If the participant is aware of all of his retirement plans, and if he, via his attorney, fully discloses all the plans involved, a simple letter request from the non-participant's attorney to the participant's attorney may suffice. If, however, the participant is not aware of all of his retirement benefits, or if the participant does not wish the non-participant to know about all of his retirement benefits, all benefits may not be disclosed as a result of a letter request. The non-participant and her attorney must make a determination as to whether or not it is advisable to do "formal discovery" regarding the retirement benefits. Formal discovery may include, among other methods, written interrogatories to be completed by the participant, written subpoenas to be issued and sent to the participant's employer(s) requesting information, and/or written subpoenas to be issued to other entities (e.g., a financial institution managing IRA funds) requesting information. If the participant does not fully answer interrogatories, or if a subpoena recipient does not fully provide information requested in a subpoena, legal ramifications to the non-disclosing party may ensue.

The information obtained regarding the retirement benefits should include at least the following for each plan in which the participant has accrued benefits:

- Name of Plan
- Most Recent Summary Plan Description (or if the Plan has no Summary Plan Description, a document outlining the basic features of the Plan)
- Date participation commenced
- Date participation terminated (if any)
- Most recent Account Statement or Statement of Benefits (showing at least current benefits accrued, percentage vested)
- Documentation regarding any outstanding loans
- Documentation regarding recent (varies by case) withdrawals
- Procedures for allocation via divorce (if any)
- Model Court Order for allocation via divorce (if any).

Failure to obtain at least the above information before making a determination regarding how to divide the parties' retirement benefits may cause a variety of problems for the non-participant spouse. For example, suppose the parties and their attorneys have decided to save money by skipping "formal discovery." Suppose the parties assumed that the participant's plan was a defined-contribution (DC) plan, and that the non-participant would receive a lump sum of \$10,000 from the Plan immediately after the parties were divorced. Suppose further that the parties' divorce Agreement stated this detail, and suppose that the Agreement was entered by the Court (thus finalizing the parties' divorce).

Suppose that after the Court entered this Agreement, the non-participant requested her benefit from the Plan Administrator, and at that time she first learned that the Plan is, in fact, a traditional defined-benefit (DB) plan. In most traditional DB plans no lump sum payment option is available. To receive her share of benefit from this DB plan in light of no lump sum payment being available, the non-participant must now devise an alternative solution and must obtain the participant's agreement with that alternative solution. If the parties cannot reach agreement, the non-participant must involve herself and the participant in Court proceedings to seek a solution. The cost of retirement-benefits-related "formal discovery" to the non-participant will almost always prove far less than the cost of "undoing" a flawed agreement and seeking a new solution.

Many other problems may occur when the non-participant's attorney fails to obtain full information on the retirement benefits. In some cases, participants have failed to disclose plans of significant value. In these cases the non-participant may never receive her share of benefits, or if she does receive her share, she may receive it only after she expends a significant amount of time (perhaps years) and money. In some cases, the parties assume that the retirement benefits have relatively minimal worth, the non-participant is offered and accepts a share of other assets "of equal value," and later it becomes clear that the retirement benefits were actually worth far more than the parties believed. In some cases the parties assume that the non-participant can receive a lump sum retirement benefit as of the date of the divorce. After the divorce is final they learn that the non-participant can receive a lump sum but only if and when the participant retires, and further that if the participant predeceases the non-participant, the non-participant will receive no benefit at all! This "unfair" result can occur even though the parties' Agreement (signed, sealed and entered by the Court) states otherwise. Clearly it is in the best interest of the non-participant to obtain Plan information BEFORE any written divorce Agreement is finalized and entered by the Court.

B. Obtaining Information about Allocation Options and Procedures

Once a divorcing non-participant spouse's attorney has obtained information about the participant's retirement benefits, the next logical step is to determine the options available for allocating those benefits between the parties.

1. Determining Marital Share

One step in determining the options available is to determine how the relevant state Court defines the marital share of a retirement plan. Although parties may agree to divide their property in a way that does not necessarily reflect that state Court's definition of marital share, the state Court definition is often a good starting point for negotiation. For DC plans, assuming that the parties were married before the participant began participating in the Plan, many state Courts define the marital share as the value of the benefit "as of the date of divorce." Loans and withdrawals may or may not be added back in depending upon the state law in which the divorce occurs and the specific circumstances of the parties involved. Market performance may or may not be relevant again depending upon state law and specific circumstances.

For DB plans, some states determine the marital share similarly to the method of determining the marital share of DC plans as outlined above. Many other states, however, determine the marital share of DB plans by first determining the value of the benefit payable as of the date of benefit commencement (a date that may not occur until years after the date of the parties' divorce) and then by multiplying that value by a fraction which represents the proportion of marital service to total service. Illinois, for example, falls into this latter category.⁷ The non-participant's attorney should have a thorough knowledge of all applicable state law regarding the marital portion and should negotiate for the non-participant in light of that law.

2. "Offset" versus "Reserved Jurisdiction"

Another step in determining the options available for allocation is to decide if it is best to value the plan at issue and "offset" its value against other assets (in effect swapping assets of equal value), or if it is best to do a division of the Plan by having the Court "Reserve Jurisdiction" to divide benefits. Under the Reserved Jurisdiction method, the Court may order the participant to pay benefits to the non-participant when the participant's benefits commence, or the Court may order the Plan itself to pay benefits to the non-participant when the participant's benefits commence or at some earlier or later time.

When the plan at issue is a DC plan, swapping benefits may be a workable solution but only if the differences in asset types are taken into account. For example, it may seem equitable to "swap" a \$50,000 interest in a DC plan for a \$50,000 interest in home equity, but such a swap does not necessarily take into account that whereas it generally costs \$0 for upkeep of a retirement plan, upkeep on a home can run easily upwards of \$10,000 per year. Also income tax ramifications of all asset swaps should be considered. When the parties have insufficient assets to offset the value of their DC plans, the parties often decide to use the "Reserve Jurisdiction" approach.

When the plan at issue is a DB plan, "offsetting" the value of the Plan against any other asset (even another DB plan) can be problematic, particularly when attempting to serve the best interests of a divorcing woman. The "present value" of a DB plan may vary substantially depending upon the assumptions used to calculate the present value. Many attorneys are unaware that present values increase over time even if the participant has ceased actively accruing benefits in the Plan. One of the more common assets used to offset the present value of a DB plan is the equity in the parties' home. As is true with DC plans, such an offset may not be in the best financial interests of a divorcing woman, particularly if she is a non-participant who has no other retirement assets and if the home requires maintenance or repairs. Due to these and other concerns, the parties often decide to divide DB plans via the "Reserved Jurisdiction" method.

3. Reserved Jurisdiction: Via Participant or Direct from Plan

As indicated above, if the parties decide that the plan will be divided using the "Reserved Jurisdiction" method, it must be decided if it is best for the participant to pay non-participant when the participant's benefits commence, or if it is best for the Plan to pay non-participant directly. Because it can be emotionally painful for a participant to pay a non-participant any funds, and because it can be time-consuming and expensive for a non-participant to enforce such arrangements with the participant, when the Court uses the Reserved Jurisdiction method, parties generally prefer that the Plan directly pay the non-participant her share of retirement benefits.

This type of arrangement almost always requires a Court Order separate and apart from the parties' Agreement and/or Divorce Decree (Judgment). Such a Court Order is usually drafted by the

attorney for the non-participant or by a third party retained by the non-participant, reviewed by the participant's attorney or by a third party retained by the participant, entered by the state Court and then forwarded to the Plan. For some plans these Orders are called Qualified Domestic Relations Orders (QDROs). For other plans these retirement benefit allocation Orders have different names.

Divorcing parties and their attorneys have been known to assume that all retirement benefit plans will accept Court Orders mandating the Plan to pay benefits to a spouse or former spouse. Not all plans, however, accept such orders. In Illinois, for example, the City of Chicago Deferred Compensation Plan does accept such Court Orders. But the Cook County Deferred Compensation Plan (Cook County being the county in which Chicago is located) does not accept such Court Orders. This lack of uniformity among plans is yet another reason that plan information should be obtained and reviewed before the non-participant enters into any agreement regarding retirement benefits.

4. Model (Form) Court Orders

If it has been determined that it is best for the retirement benefits to be allocated using the Reserved Jurisdiction method, and if it has also been determined that it is best for the non-participant's share to be paid directly by the Plan, it must be further determined what language will be used in the Court Order that will be sent to the Plan. Many attorneys assume that any model or form Court Order provided by the Plan Administrator (or any Plan Administrator) contains the best language to allocate the benefits at issue. This assumption, however, is often incorrect. Some model Court Orders provided by Plan Administrators (particularly model Court Orders for DC plans) may be very workable, or may be made very workable after careful review and only a few minor changes. This is because DC plans tend to be very similar and because benefit amounts payable to non-participant beneficiaries generally do not vary as a result of the circumstances of the non-participant.

On the other hand, using a DB plan model Court Order to allocate the non-participant's benefits may well result in the non-participant receiving far less of a benefit than that non-participant would have received if a carefully drafted custom Court Order had been used.

For instance, many DB plan model Orders do not address early retirement benefits. In most cases, retirement plan administrators will not allocate early retirement benefits to the non-participant

unless the language of the Order *specifically* directs such an allocation. Thus using a DB plan model Order may result in the non-participant receiving no part of the participant's early retirement benefit. Early retirement benefits in DB plans can be very valuable.

As another example, many DB plan model Orders contain language limiting the non-participant's share of surviving spouse benefits to a percentage or amount of the benefit earned by a certain date (the Accrued Benefit), or to a certain percentage of the projected benefit. If the parties agree or if the Court so orders, however, the relevant law may mandate that the non-participant divorcing spouse receive *any or all* of the participant's benefit that is or will be payable from the Plan. Most relevant law contains *no inherent time or percentage limit* regarding the benefit that may be awarded to the non-participant. Thus using a DB plan model Order may result in the non-participant receiving less of benefit than was agreed on by the parties or less of a benefit than was ordered by the Court.

As an additional example, many DB plan model Orders mandate that the non-participant take the benefit in a certain form and/or at a certain time (e.g., a single life annuity payable at the participant's earliest retirement age). The relevant law, however, may indicate that the non-participant is permitted to take her benefit in any form (other than a Joint and Survivor Annuity with a subsequent spouse), and at any time on or after the participant's earliest retirement date. Thus, using a DB plan model Order may result in forcing the non-participant to take a form of benefit or taking the benefit at a time that is not the most financially advantageous to her.

The examples above indicate only some of the many ways in which DB plan model Orders may reduce the non-participant's benefits by significant amounts. Under certain circumstances, these reductions do not result in corresponding increases to the participant's benefit. For these and other reasons, model Court Orders (and particularly DB plan model Court Orders) should only be used to allocate non-participant retirement benefits if they are used with extreme caution.

C. Retirement Orders to be Entered **With** (Not After) the Divorce Agreement (or Judgment)

Women are at risk if their attorneys do not obtain sufficient information on all the plans at issue, and/or if their attorneys do not understand all the optional methods whereby retirement benefits can be allocated between

divorcing parties. But perhaps the greatest risk to divorcing women who are entitled to receive a share of their spouse's or former spouse's retirement benefits is the risk that their attorneys will not enter the Orders allocating their share of retirement benefits until *after* the parties' divorce Agreement (or Judgment) has been entered by the Court.

An example of the problem with this "after the date of divorce" procedure can be illustrated using plans covered by Title I of ERISA (plans subject to QDROs). In an ERISA DC plan, as long as the parties are married, if the participant spouse dies, unless the non-participant spouse has waived this right in a signed and notarized writing, the non-participant spouse will be the named beneficiary and will receive a death benefit at least equal to the participant's account balance. In an ERISA DB plan, as long as the parties are married, if the participant spouse dies, unless the non-participant spouse has waived this right in a signed and notarized writing, the non-participant spouse will be entitled to receive (at some point, even though it may be years after the participant's death) the surviving spouse benefit of the qualified survivor annuity (either the pre-retirement survivor annuity (QPSA) or the survivor portion of the joint and survivor annuity (QJSA)). Once the parties are divorced, however, these automatic protections for DC plans and for DB plans are no longer assured.

To illustrate, in Case #1, assume the parties have decided that wife is to receive 50 percent of husband's retirement benefits as of the date of divorce and are working out the details of the allocation. The Court has not yet entered the parties' Agreement. Wife's attorney has insisted that the Agreement will not be entered until the QDROs have been drafted and preliminarily approved by the Plan. In Case #2, the parties also have decided that wife is to receive 50 percent of husband's retirement benefits as of the date of divorce. These parties too are working out the details of the retirement benefit allocation. However, in Case #2, the Court entered the parties' Agreement on March 1, 2011, the date as of which the parties were divorced. The parties' divorce Agreement states that wife is to receive 50 percent as of March 1. Assume the participants in both cases die on March 2, 2011.

In Case #1, because of surviving spouse protections, the wife is automatically considered to be the participant's surviving spouse. For the DC plans at issue, wife will receive the balance of the participant's account. For the DB plans at issue, wife will receive (perhaps at a later date) an annuity payable every month until the date of her death. Thus, in Case #1, wife will receive a share of each of these plans.

In Case #2, because the parties are no longer married, former wife is arguably no longer entitled to surviving spouse protections. For the DC plans at issue, former wife is at risk that former husband named another

party (a sister? a girlfriend?) as his beneficiary. If former husband's beneficiary designation has been changed, the DC Plan Administrator may argue that the benefit should be paid to the participant's new designated beneficiary. Even if former wife presents the DC Plan Administrator with a copy of her divorce Agreement and/or her divorce Order, even if the former wife prepares a QDRO, the Court enters the QDRO, and the former wife forwards that QDRO to the DC Plan Administrator, the Administrator may argue that former wife is entitled to no benefit. Former wife may eventually succeed in obtaining her portion of the participant's benefit, but probably only if she commences court action against the designated beneficiaries who received the participant's DC plan funds. Such court action may prove lengthy and expensive.

In Case #2, for the DB plans at issue, former wife is at risk no matter what action was or was not taken by the participant. The Plan may raise an argument that has been raised successfully in several Courts around the United States. This argument runs that under ERISA a plan may only pay 1) the participant; 2) the surviving spouse of the participant; or 3) an Alternate Payee via a QDRO. As the participant is deceased the Plan cannot pay the Participant. As the participant was not married upon his death there is no surviving spouse. Thus the Plan cannot pay a surviving spouse. As there is no QDRO in place, there is no Alternate Payee. Thus the Plan cannot pay the Alternate Payee. If there is no participant to pay, no surviving spouse to pay and no Alternate Payee to pay, there is no benefit to pay. Thus, in Case #2, the former wife may receive no part of these benefits despite language to the contrary in the parties' Agreement, an Agreement which was signed, sealed and entered by the Court. And even if the former wife prepares a QDRO, the Court enters the QDRO, and the former wife forwards that QDRO to the DB Plan Administrator, the Plan Administrator may argue that no benefit is payable to the former wife.

These same problems may occur in many non-ERISA plans when Orders allocating retirement benefits are not entered until after the parties' divorce Agreement is finalized and entered by the court.

D. Conclusion

In a more perfect world, attorneys who represented women in divorce cases would possess a superior knowledge of retirement benefits, of the law relating to retirement benefits, and of the special risks women face regarding retirement benefits. These attorneys would use their knowledge to do everything possible to be certain that all retirement benefits earned by their clients' husbands were identified, properly valued and equitably allocated. These attorneys would not delegate their duties regarding these retirement benefits to non-attorneys who have little or no understanding of or training in the relevant law.

Alas, as the world we inhabit is less than perfect, some attorneys who represent women in divorce cases do not possess more than a modicum of retirement benefit expertise, and thus do not possess the requisite skills to ensure that the retirement benefits assigned to their women clients pursuant to divorce are properly secured. If divorced women, divorcing women, and financial professionals who work with these women have some basic information regarding the proper steps to take in the allocation of retirement benefits in divorce, these individuals may be able to identify situations where a divorce attorney may not be taking (or may not have taken) the steps necessary to properly secure a woman's share of her husband's retirement benefits. The sooner a woman learns that a potential problem may exist, the more likely the potential problem can be addressed and resolved before any irreversible financial loss occurs.

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¹ For example, in Illinois see 750 ILCS 5/503.

² *National Vital Statistics Reports*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System. Volume 58, Number 25, Aug. 27, 2010.

³ *Ibid.*

⁴ U.S. Department of Health and Human Services. Administration on Aging http://aoa.gov/AoAroot/Aging_Statistics/Profile/2007/18.aspx.

⁵ Women's Institute for a Secure Retirement. [http://www.wiserwomen.org/index.php?id=250&page=Women Face Unique Challenges When Planning for Retirement](http://www.wiserwomen.org/index.php?id=250&page=Women+Face+Unique+Challenges+When+Planning+for+Retirement)

⁶ *National Vital Statistics Reports*. U.S. Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System. Volume 58, Number 21, June 28, 2010.

⁷ See for example, *In re Marriage of Wisniewski*, 286 Ill.App.3d 236 (Ill. App. 4

Dist., 1997)

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