

**PENSION PROBLEMS
PITFALLS AND SOLUTIONS
IN DIVORCE**

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Dodi Walker Gross

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**Waiver of Pension Rights
in connection with Divorce**

What's the issue with waivers?

- Context:
 - Waiver pursuant to:
 - property settlement agreement
 - equitable distribution order
 - pre-nuptial agreement
 - Spouse gives up rights to pension
 - just to spouse's pension?
 - survivor rights too?
- Case law

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**US Supreme Court and PA Case Update
Waiver of Pension Rights – Divorce**

- **Case Law Summary in Chapter One**
- **Beneficiary Designation —**
 - U.S. Supreme Court – *Kennedy vs. Plan Administrator for Dupont Savings and Investment Plan* – Jan. 2009
 - plan documents govern if plan contains procedure for making and changing beneficiary designation even if former spouse waived rights
 - Third Circuit – *Prudential Ins. Co. of America v. Pryor* – June 2009
 - after a disclaimer, pre-printed designation controlled over plan default provisions

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Waiver of Pension Rights – Divorce
(cont'd)

- Tenth Circuit – *Smith v. New Mexico Coal 401(k) Personal Savings Plan* – June 2009 (not PA case but consistent)
 - plan cannot rely on beneficiary designation alone if aware of conflict of whether participant was married at time of death (wife filed for court validation of common law marriage)
- **ERISA Pre-emption of State Law – Plan not a Party**
 - *In re Estate of Paul J. Sauers* (PA Super, April 2009)
 - PA's redesignation statute is not pre-empted – it protects plan administrator but doesn't preclude suit by estate against the ex-wife who had waived her interest

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Waiver of Pension Rights – Divorce
(cont'd)

- *Hall v. Hall* (EDPA Sept. 2009)
 - consistent with *Sauers* and holds that the determination is a state court matter
- **Prenuptial Agreement Waivers**
 - *Robins v. Geisel* (NJ District Court, Oct. 2009)
 - waiver must be executed after marriage and in accordance with plan procedures
 - *Strong v. Dubin* (Appellate Div. of NY Supreme Ct., May 2010)
 - waiver can be made via prenuptial agreement with respect to rights to pensions but not survivor benefits
 - see also, Treas. Reg. 1.401(a)-20, Q&A 28

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Waiver of Pension Rights – Divorce
(cont'd)

- **Separation Agreement waiver**
 - *Staelens v. Staelens* (MA Jan. 2010)
 - follows *Kennedy* – H didn't change 401(k) designation after divorce and agreement not sufficiently specific where it just said H keeps his pension
 - *Hess v. Wojcik-Hess* (NDNY Jan. 2010)
 - estranged wife did not give written consent to beneficiary designation as surviving spouse even though separation agreement contained waiver of claims or interest
- Query—When valuing marital interest and waiving rights, is it just to pension *or* pension and surviving spouse benefits?

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Waiver of Pension Rights – Divorce
(cont'd)

- **Divorce Decree Waiver Post-Retirement and Post-Commencement**
 - *Zangara v. International Painters and Allied Trades Industry Pension Fund* (WDNY March 2010)
 - H wanted plan to increase his pension due to W's waiver
 - plan didn't have pop-up feature
 - plan procedures not followed and waiver ineffective, followed *Kennedy*

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DOL Final Regulations on QDROs

- DOL issues final rule relating to the Time and Order of Issuance of DROs (Chapter 8 of materials)
 - issued June 10, 2010, effective August 9, 2010
 - finalizes interim final rule from March 2007
 - PPA required DOL to clarify these issues (reaction to cases including *Kennedy*)
- DRO cannot be disqualified solely because –
 - DRO is issued after or revises another DRO or QDRO, or
 - of the time at which it is issued (*e.g.*, after death of participant)

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DOL Final Regulations on QDROs
(cont'd)

- Cannot require type or form of payment not otherwise provided
- DRO can amend prior DRO issued to same parties (to increase or decrease award); cannot assign benefits already assigned to another AP; new 18-month period begins
- NOT required to:
 - notify Plan of DRO before participant's death
 - issue DRO before divorce
 - issue DRO before the participant's annuity starting date

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DOL Final Regulations on QDROs
(cont'd)

- DRO issued after annuity starting date cannot require reannuitization of the payments – can only award a portion of the payments being made – unless plan permits otherwise (new example added)
- DRO received after annuity starting date cannot award a portion of a survivor benefit payable to another beneficiary (e.g., 50% j/s to current spouse)
- DOL will update its QDRO handbook

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Separate Interest or Shared Interest

- Terminology – what do these words mean?
- How the benefit is paid to the AP – typically only if defined benefit
 - as a portion of each payment to participant (**shared interest**)
 - as a stream of payments over APs life (**separate interest**)

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Separate Interest or Shared Interest
(cont'd)


- Does the death of the participant impact the payments to AP?
 - if yes, shared interest
 - if no, separate interest
- Cannot have a separate interest for AP if P has already commenced payments (unless plan permits)

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Separate Interest or Shared Interest (cont'd)

- When does separate interest arise?
 - cannot require prior to "earliest retirement age" unless plan permits
 - see technical analysis in Chapter 3 of materials
 - should name AP as surviving spouse in case of P's death before the earliest retirement age
 - some plans don't permit this
 - need to clarify how death benefit is calculated

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Earliest Retirement Age

- Earliest Retirement Age – defined in IRC 414(p) of ERISA 206(d)(3)
 - earlier of:
 - date participant is entitled to a distribution; and
 - later of:
 - participant's age 50
 - earliest date participant could begin receiving benefit if separated

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Earliest Retirement Age (cont'd)

- General Rules of Thumb:
 - age 50 is earliest distribution date for active employee in 401(k) plan
 - early retirement age/service is earliest distribution date for active employee in defined benefit plan

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Separate Interest or Shared Interest
(cont'd)

- What happens if AP dies before P and before ERA?
 - if separate interest – balance should be forfeited, *BUT*
 - many DROs provide for reversion to P

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Subsidies, Supplements, Enhancements


- Plan cannot pay more than the unsubsidized benefit unless participant is in pay status and receives subsidy – use deferred vested calculation
- PA Divorce Code rules
- Window and other incentive retirements
- Disability retirements
- Social Security Supplements
- Special Payments

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PPA Funding Restrictions


- Pension Protection Act of 2006 imposes restrictions on underfunded defined benefit plans; as amended by WRERA
- See materials in back of book – not updated for recent changes but sufficient for today
- AFTAP – adjusted funding target attainment percentage – sufficiency of plan funding – annual funding notice

WRERA: Worker, Retiree and Employer Recovery Act of 2008

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PPA Funding Restrictions (cont'd)

- 80%–100% AFTAP
 - no restrictions except for lump sum if company is in bankruptcy
- Less than 80%
 - restriction on plan amendments increasing benefits
 - restriction on lump sum payments

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PPA Funding Restrictions (cont'd)

- Less than 60% (at-risk)
 - no unpredictable contingent event benefits
 - no plan amendments increasing benefits
 - no lump sums
 - no additional benefit accruals
- Restrictions may be lifted if additional contributions are made or security posted
- Pre-PPA and still –
 - Lump sums are restricted for Top 25

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