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Divorce After Retirement, Part Two Valuing the Survivor Benefit *Marriage of Sonne*

Linda Russano Morra
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When pensioners retire, beneficiaries may be set in stone – as Carmona v. Carmona showed – so I recommend that family lawyers thoroughly research pension plan election forms and QDRO procedures early in divorce proceedings. They might find surprises – as lawyers discovered in Marriage of Sonne, 185 Cal. App. 4th 1564 (2010). With detailed knowledge about pension plan provisions, family lawyers can negotiate better deals for their clients and, more importantly, deals they can implement.

Family lawyers should be armed with information about what they can and cannot change about retirement benefits, and what types of QDROs will or will not be accepted by pension plan administrators if they obtain a QDRO after a pensioner retires.

First, separate interest QDROs are beyond reach once the pensioner has retired and made an irrevocable retirement election. At that stage, it is too late for a QDRO to order the plan to establish a separate benefit to be paid over the ex-spouse's lifetime. As we saw in *Carmona*, however, if the pensioner elected a joint and survivor annuity, divorce after retirement will not disturb this election, and the former spouse will receive the full survivor benefit if he or she survives the pen-

sioner.

Second, if the pension plan is paying the pensioner a straight life annuity, the ex-spouse can share in the pension during the pensioner's lifetime. But once the pensioner dies, the pension ends and no more benefits are payable. These rules may seem black and white, but they actually have shades of gray, as demonstrated in *Marriage of Sonne*. That case involved the California Public Employees' Retirement System (CalPERS). CalPERS is not an ERISA-covered plan, but this case demonstrates an important point nonetheless.

In *Sonne*, the pensioner had elected a form of benefit that paid a survivor annuity. This resulted in a reduction in his pension. Here's an illustration of how this worked. Assume Gordon Sonne's monthly benefit is 100% community property. If it were payable for his lifetime only, the benefit would have been \$2,000 per month. But since he elected a joint and 50% survivor annuity with his spouse, Theresa Sonne, his pension was reduced to \$1,700 per month during his lifetime, with \$850 per month payable to Theresa if she survived him. The \$300 per month reduction in his pension represents the actuarial cost of

Attorneys

- Alex M. Brucker
- Linda Russano Morra
- Meredith J. Sesser
- Cathryn B. Sportsman
- Jeremy M. Pelphrey

T: (310) 475-7540

F: (310) 470-4806

W: www.pensionlawyers.com

the survivor benefit.

The trial court equally divided the community property interest in Gordon's lifetime pension, allocated the full actuarial reduction in the pension to Theresa, and awarded Theresa the full survivor benefit, with no other equalizing payment to Gordon. Gordon objected. He hired an actuary who calculated that the present value of the reduction in Gordon's pension was about \$120,000 whereas the actuarial value of the survivor annuity payable to Theresa was about \$400,000. Gordon argued this was not an equal division of community property.

The court of appeal agreed with Gordon and rejected the trial court's methodology, holding that the court had abused its discretion in not apportioning the survivor benefit, as Family Code section 2550 and *Marriage of Lehman*, 18 Cal. 4th 169 (1998) require.

Whether you represent the pensioner or the spouse, make sure to examine these issues carefully. In particular, be extremely careful in advising your client if he or she, or the opposing party, will be making a retirement election during the divorce proceedings. Usually it's best to wait until the settlement. Not doing so could come back to haunt you later in the negotiation or after the case is settled, as it did for the parties and their lawyers in *Carmona* and *Sonne*.

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