DEMYSTIFYING QDRO AWARDS: Understanding Methodologies Used to Determine QDRO Awards with Special Attention to the New Jersey State Systems – A WEBINAR

Matthew Lundy, Esq.
Matthew Lundy Law (Cherry Hill).
Thank you for Logging in. We will begin shortly.

DEMYSTIFYING QDRO AWARDS: UNDERSTANDING METHOLOGIES USED TO DETERMINE QDRO AWARDS
Using The Online Classroom

- All Attendee phone lines are muted.

- Questions may be submitted via the chat room on the bottom right hand side of your screen.

- Questions will be answered as time allows.
Asking Questions – Easy as 1,2,3

1. Type your question here.

2. Send

3. See your messages here.
ATTENDANCE VERIFICATION

PLEASE FAX OR E-MAIL YOUR ATTENDANCE VERIFICATION FORM TO NJICLE

FAX: 732-249-1428

E-MAIL: smilek@njsba.com
SEMINAR MATERIALS AND CLE FORMS

TO ACCESS SEMINAR MATERIALS, ATTENDANCE VERIFICATION AND CLE FORMS PLEASE GO TO:

http://tcms.njsba.com/personifyebusiness/njicle/WebinarInformation.aspx
DEMYSTIFYING QDRO AWARDS:
UNDERSTANDING METHODOLOGIES USED TO DETERMINE QDRO AWARDS WITH SPECIAL ATTENTION TO THE NJ STATE SYSTEMS

By: Matthew Lundy, Esq.
1-855-QDRO-LAW (737-6529)
Matt@MLundyLaw.com
1984; New Jersey Divorce

Parties, with assistance of counsel, agreed as follows:

- (d) Pensions, Profit Sharing and Bell System Savings Plan Husband has a vested pension having a present value, if husband were to retire at this time, of $1,358.59 per month. At the time of husband’s retirement and receipt of his pension he agrees to pay to wife one half of said monthly amount.

No QDRO was done

- The participant died in 1987 at the age of 53. The earliest age of retirement under the pension plan was 55.

- Ms. Samaroo asked the plan for payment of her share of the pension, and they refused to pay because she did not get a QDRO assigning her a “qualified pre-retirement survivor annuity”

- The estate of the deceased husband agrees to entry of the QDRO. The family court agrees to enter the QDRO, but warns that it is the plan that will determine the QDROs enforceability.

- Ms. Samaroo joins to retirement plan to the divorce, and the plan refuses to enforce the QDRO. Ms. Samaroo removes the case to federal court.
Issues:

- Is a retirement plan required to provide survivor benefits not specifically provided for in a settlement agreement and/or final judgment after a participant has died?
- Is a retirement plan bound by a QDRO received after the death of a participant that awards a death benefit?

**Holding and Reasoning:** The federal court held that the plan was not bound by the QDRO in this matter, and that the failure to include specific language in the settlement agreement awarding the pre-retirement survivor annuity relieved the plan of liability to pay such benefits. The court reasoned that because the plan necessarily needs to know its actuarial obligations to maintain appropriate funding, that it was incumbent upon Mr. Samaroo and Ms. Samaroo to establish the entitlement to the survivor annuity by having Mr. Samaroo fill out the appropriate plan form and/or to have submitted a QDRO prior to Mr. Samaroo’s death. Further, the lack of any reference to the benefit in the settlement showed a lack of intent by either party to actually award this benefit as part of the divorce.

**Rule:** The failure to include specific benefits in a settlement agreement or final judgment, and to give the plan appropriate notice of benefits payable to a former spouse, may ultimately constitute a complete waiver of these benefits.

**Practical Points:**

- If you do not know specifically what you are dividing and/or you do not have a firm understanding of how to divide it, do not force it. It is imperative that you specifically allocate not only basic pension income, but also all ancillary economic benefits related to the retirement plan in your settlement agreement and/or final decree, and then contract for a plan for the division of the account.
- Plans are self-serving, and they are not to be relied upon as working with or for either party in a case. Do not simply rely on their forms.
- Though QDROs are entered as part of family law cases, and retirement accounts are assets subject to distribution in a family law case, they are primarily governed by federal law, which trumps state law and orders issued by state courts.
Hypothetical: Paula (“P”) is a Participant in the New Jersey Teachers’ Pension and Annuity Fund (“TPAF”). She started participating in TPAF on August 1, 1996. She got married to Alan Parsons (“AP”) while in service on August 1, 2006. The parties file for divorce on August 1, 2016, which is also the date on which P retires. Thus, the were ten years of service prior to the marriage, and ten years of service during the marriage.

Therefore, one half of the pension is marital as of the date of marriage, and one half being assignable to AP, 25% of the gross monthly payment is the amount assignable.
Same facts as before, except that instead of having a TPAF benefit, P has an AT&T 401(k). On the date of marriage, the 401(k) is worth $100,000.00. On the date of filing of the complaint, the 401(k) is worth $200,000.00.

Assuming no outstanding loans, and assuming the parties agree not to trace the non-marital portion, then one half (50%) of the 401(k) was earned during the marriage, which is the marital portion.

So one half of 50% is 25%, as of August 1, 2016, and then subject to passive gains/losses.
Assume same facts from slide 3, except that P is not retiring on the date of filing of the complaint. How should the assignment be phrased?

Traditional Coverture Fraction = Credit Earned While Married divided by total credit

- Usually this is expressed either in whole years, or in whole months, depending on how the plan tracks service credit. NJ plans uses years and month.
So the award to AP would be stated as follows:

AP is assigned a portion of the P’s retirement benefits in an amount equal to 50% of the marital portion of P’s Accrued Benefit under the Plan as of P’s benefit commencement date. The Marital Portion shall be determined by multiplying P’s Accrued Benefit by a fraction (less than or equal to 1.0), the numerator of which is the number of months of the Participant’s credited service in the Plan earned during the marriage (from August 1, 2006 to August 1, 2016), which specifically equals 10 years and 0 months, and the denominator of which is the number of years of service credit the member has accrued at retirement.

In addition, the Alternate Payee shall not be entitled to a proportionate share of any cost-of-living adjustments made by the Plan to the Participant’s overall benefit.

In the event that the Participant leaves employment prior to commencing their benefit and applies for a refund of the contributions, the Alternate Payee shall not be entitled to a proportionate share of any such refund.
Immediate Offset: calculate the hypothetical present value of a future stream of annuity (a defined benefit pension), in consideration of prevailing interest and mortality rates

Deferred Distribution: divide marital portion of defined benefit pension at actual time of payment (split annuity and other ancillary economic benefits)
The Benefits of Deferred Distribution (continued)

1) Parties share equally in a real-life, non-hypothetical benefit, and are therefore on level footing with respect to a particular asset (cash does not equal a future payment in reality)

2) Participants frequently retain a reversion interest (NJ PERS and other state and municipal plans typically only permit a shared interest payment with right of reversion)

3) Guaranteed benefit for life (make sure survivor benefit is in place)

4) Share risk/reward of pension growth/reduction (e.g. legislative changes, PBGC takeover)
So why use immediate offset?

1) Sever ties

2) Some plans do not permit QDROs/DROs (e.g. all government defined benefit plans from the State of Georgia)

3) A way offsetting small marital portions

DO NOT USE immediate offset/present value to 1) reduce number of QDRO or 2) to save money
When Cash is Lacking for an Immediate Offset

- *Whitfield v. Whitfield*, 222 N.J. Super. 36 (App. Div. 1987): The present value offset distribution method is only appropriate when there are sufficient other marital offsets against which to offset the non-pensioner’s equitable distribution interest in the pension, or sufficient income available to facilitate a reasonable buyout.

- If you want to offset and there is not enough cash:
  1) Utilize other property (such as debt) or reduce equalization
     - Consider inequity
  2) Reduce present value (use it as a negotiation point rather than as a firm present value)
  3) Don’t force the offset
1) Failure to identify specific plan or plans that are subject to division

2) Failure to spell out “marital portion”; do not use generic language or refer to “the Marx formula”

3) Failure to identify/incorrect identification of ancillary economic benefits (form of benefit, valuation date, gains/losses, effect of loans, administrative fees, COLA, survivor benefits, early retirement subsidies, effect of conversion to disability)
Why You Should not Include the Present Value of a Pension in a Property Settlement Agreement

- **Abel v. Abel** 2008 N.J. Super. Unpub. LEXIS 3047:
  - PSA said: the parties have the following retirement plans:
    - Husband (First Energy) Defined Benefit Pension valued…at $91,049.76…
    - Wife shall be entitled to fifty (50%) percent of the marital portion of Husband’s GPU Defined Benefit Pension and shall be named survivor beneficiary. A Qualified Domestic Relations Order shall be prepared to effectuate this distribution
  - Proposed QDRO proposed coverture division (using the Marx formula), but defendant objected because it didn’t include a lump sum assignment
  - Appellate court finds ambiguity and remands to court to determine deferred distribution v. immediate offset payout
Software Tools for Determining Value and Drafting QDRO

- Family Law Software: familylawsoftware.com
- Easy Soft: easysoft-usa.com
 Mostly private sector

Subjecting to funding and insurance standards (PBGC protection)

Offer both pre- and post-survivor benefits
  - NJ plans do not have pre-retirement survivor benefits for former spouses—just return of contributions with interest

Most offer separate and shared interest options for defined benefit plans

Must honor QDROs
Various Offset Schemes for 401(k) plans that involve cash, pension, TPAF pensions and the house

1) Always consider tax effect (pre-tax v. post-tax assets)

2) Hypothetical:

- House: $700,000.00 (principle residence 20 years)
- Pension: Present value of $1,200,000.00
- 401(k): $600,000.00
- Cash: $200,000.00
MCLE CODE

Please record this code for your MCLE forms:
PENSIONS161412
Tax Considerations

1) 10% early withdrawal penalty

2) 20% withholding, plus withholding for state income tax

3) Recipient: Spouse/former Spouse v. Child
A Discussion of relevant case law, Including the Risoldi and Abel cases and why you need to understand them

Abel: See slide 13

*Marx v. Marx*, 265 N.J. Super. 418 (1993): seminal case regarding use of coverture fraction, which explains that date of retirement is the proper date to determine the final amount assigned

*Risoldi v. Risoldi*, 320 N.J. Super 524 (App. Div. 1999): Explains coverture fractions (frozen v. traditional), and states that assignment of a portion of the pension generally includes a proportionate share of cost-of-living adjustments (currently COLAs are suspended for state plans)

*Panetta v. Panetta*, 370 N.J. Super 486 (App. Div. 2004): the court held that where one spouse contributed to social security during the marriage, the other spouse who did not is entitled to an offset against the other spouse's share of his federal pension. In other words, in cases involving non-participants in social security (who are becoming less common as these types of plans disappear), the non-participant can ask for an offset of the marital portion of the pension based on their non-participation in social security.
New Jersey Department of Treasury published extremely helpful fact sheets explaining the state’s various pensions, which you can find at: http://www.state.nj.us/treasury/pensions/fact-sheets.shtml

See fact sheets:
- Fact Sheet #5: To understand the different survivor options available and their costs
- Fact Sheet #42: Effect of divorce on pension and survivor benefits
- Fact Sheet #83: Explains special rules for DROs for state plans in New Jersey

For NJ PERS, normal age is usually 60, 62 or 65, and is based on a formula multiplying highest average 3 years of salary times years of service/55 (see: http://www.state.nj.us/treasury/pensions/estimate-pers.shtml)
Practice Pointers: Timing

- Why you need to hurry when it comes to getting these orders done
- How long should drafting take?
- Must supply administrators with a certified copy of the Final Judgment
Simultaneous entry of order with final decree

Must supply pension administrators with a certified copy of the final decree

Completion of Military Pension Orders generally takes 90 days from the date that the military receives the pension, and completion of COAPS can take 6-60 months. Plan accordingly.
Who should be responsible for preparing the order?

- Attorney versus Non-Attorney
  - Liability Issues: Shifting to another attorney

How should fees and costs be divided?

Who should be required to contact the drafter?
State in your engagement letter that:

- you do not handle QDROs or similar orders used to divided retirement accounts;

- if a QDRO is necessary, it will require a separate fee to be paid by the client; and,

- a retirement account or a claim to the benefits under same may be at risk if the client does not seek and obtain a QDRO immediately upon the execution of a settlement agreement or entry of any Final Judgment or other ordering necessitating a QDRO.
Thank you

The webinar has ended.

The program handbook, relevant CLE forms and additional materials for this program can be accessed at:

http://tcms.njsba.com/personifyebusiness/njicle/WebinarInformation.aspx

Please hang up your telephone now. Thank you for attending.
Matthew Lundy, Esq. was born in South Florida, and earned his B.A. from Duke University, and his J.D., with honors, from the University of Florida. Following law school, Matthew worked in a law firm handling primarily domestic relations and family law litigation, along with estate planning. It was during this time that Matthew began to develop a reputation as a young lawyer with a special skill for handling complicated legal issues. As a result, Matthew took on the strenuous task of building a practice across state lines and taking numerous bar exams in addition to his regular workload to grow his practice and knowledge of the law in his chosen practice areas. Within two years of beginning his practice, Matthew was not only trying cases, but also publishing scholarly articles in a variety of legal journals and traveling around the country conducting seminars for judges, attorneys, and other professionals.

Matthew has been honored as a "Rising Star" by Super Lawyers Magazine, and as an "Outstanding Young Lawyer" by the American Registry.