A legal note from Marshal Willick about how if either spouse has a retirement, the QDRO should be finished simultaneously with the divorce – and how you are not done ***then***, either

I. ALWAYS DEAL WITH THE RETIREMENT BENEFITS ***BEFORE*** FINISHING THE DIVORCE

This is the pet peeve of fellow AAML attorney Charles Abut of New Jersey, as it concerns what he considers lawyerly neglect of what is usually the single most valuable asset in a marriage. He recently posted the following on the ABA family law list serve:

.....

QDRO LITIGATION

Good news: they got divorced in 1995. Bad news: the language of their agreement was ambiguous regarding division of retirement assets. Worst news: by 2005, they still had no QDRO entered after 7 years, thus requiring the next 5 years of trial and appellate litigation.

The antidote to this kind of post-judgment food fight? Get the QDRO approved/entered at the time of the divorce and don't defer it for 15 years of after-the-fact litigation.

Query: who's going to pay the legal and expert fees?

Cully v. Cully, New Jersey App. Div., March 10, 2010

http://www.judiciary.state.nj.us/opinions/a4483-05.pdf

.....

Charlie is entirely right on this. Exactly the same point was made by Barbara DiFranza in her detailed instruction during the Advance Track seminar at the Ely Family Law Conference in March.

But there are still divorce lawyers all over this State (and elsewhere) who just can't, or won't, take the time and make the effort to deal with retirement and pension issues during divorce. As one commentator lamented, "Increasingly, pensions and other qualified retirement plans are the largest assets in the marriage yet very little time is spent discussing the value, terms and conditions and the benefits to each party in a divorce. . . . some attorneys include more language to divide the lawn tools than they do for the division of the pension."

It's true, and it is dangerous for all concerned. If someone should die before survivorship interests are protected by formal court order, a lifetime stream of benefits can be lost.

And counsel looking out for their own enlightened self-interest should pay attention to this point. Now-retired attorney Edwin Schilling of Colorado estimated that 90% of his malpractice consultations involved failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956). My experience has been similar – I have been hired as an expert witness in several such cases in the past several years, in which liability was sought against practitioners who were alleged to have not properly seen to securing retirement or survivorship benefits for a spouse.

And the solution is simple. If a retirement is in issue, obtain expert assistance to draft the orders ***before*** negotiating or litigating the rest of the case. As Ms. DiFranza has observed, the non-employee loses all leverage to negotiate terms once the MSA or decree is completed. Also, discovery is only available under the local rules ***prior*** to the completion of the divorce, and the risk of completely losing retirement or survivorship interest arises at the moment of divorce, and continue escalating with each day that goes by thereafter.

II. THE JOB IS NOT DONE WHEN THE ORDER IS FILED; IF YOU DO NOT FOLLOW UP, VERY BAD THINGS COULD HAPPEN – TO YOUR CLIENT, AND TO YOU

A. THE *KENNEDY* LESSON

In January, 2009, the United States Supreme Court decided *Kennedy v. Plan Adm'r for DuPont Sav. And Inv.*, ___ U.S. ___, 129 S. Ct. 865, 172 L. Ed.2d 662. The case should cause every divorce lawyer to feel some discomfort.

In 1974, Bill designated his then-spouse Liv as beneficiary of his ERISA-based account balance (savings) plan. In 1994, the parties divorced, and the Decree included a provision stating that Liv waived all interests in that plan (and others).

In 2001, Bill died, having never sent the "beneficiary change" form to the pension plan. His heir made a claim, but the plan paid the ex-wife, Liv, anyway, notwithstanding her explicit waiver of the benefits in the Decree. And after eight years of litigation, the United States Supreme Court said the plan was right in doing so, because plan administrators should be able to rely on the documents in their files, without having to look at "extraneous" documents like divorce decrees.

In other words, the highest court in the U.S. has said that the administrative convenience of plan administrators is more important than obeying divorce court orders, or following the intent of parties.

Now the divorce lawyer, who probably thought he had finished his job when he got the waiver put in the Decree, faces a possible malpractice suit from the intended beneficiary for not ensuring that the right form was sent to the plan at the conclusion of the divorce.

B. A HEALTHY AMOUNT OF PARANOIA

A case recently discussed on the QDRONES List-serv involved a divorce and QDRO both drafted and filed with a court in 1995. But the lawyer did not (apparently) ever serve the QDRO on the plan. When the worker retired a few years later, he chose a form of benefit that provided no survivorship benefits for the former spouse.

When the former spouse found out about it, she tried to change the orders, but the retirement plan refused. When the worker dies, her benefits will simply stop. A malpractice action against the divorce lawyer is highly likely.

The lesson? It is necessary to not only draft and ***file*** the order, but to serve it on the plan, and get verification that it ***was*** served on the plan. Anecdotal reports continue to appear of pension plans that pay benefits out contrary to court orders, and when challenged, simply deny having received the orders in the first place.

A little paranoia on the part of divorce lawyers is justified – to get verification of service, and to make sure the client gets a copy of that verification. Filing the proof of service with the court entering the Decree and QDRO is also a good idea.

III. CONCLUSIONS

It is Russian Roulette for divorce lawyers to ***not*** deal with retirement benefits during the course of a divorce. Sooner or later, something will go wrong (for example, if survivorship interests are not secured, it tends to be discovered when people happen to die in an inconvenient order), and the lawyer will look like a target of opportunity. The case law indicates that the scope of damages is whatever funds the client did not receive because of the error.

It is ***possible***, of course, that with adequate CYA letters, etc., lawyers could make it their clients' problems to figure out what to do after the divorce and try to get it done. But it is far better lawyering – in the client's interest and that of the attorney seeking to avoid potential liability – to deal with the retirement benefits at the time of divorce. Doing so means making sure the proper orders are in place at the time of entry of the Decree – and making sure the relevant retirement plans acknowledge getting them.

.....

To visit our web site and review its contents, go to http://www.willicklawgroup.com/home. For more on retirement benefits, divisions, and QDROs, go to:
http://www.willicklawgroup.com/qdro_checkup
http://www.willicklawgroup.com/qdro_retirement_orders
http://www.willicklawgroup.com/military_retirement_benefits.
For a number of articles relating to the division of various kinds of retirement benefits, see the multiple articles posted at http://www.willicklawgroup.com/published_works.

This legal note is from Marshal S. Willick, Esq., 3591 E. Bonanza Road, Ste 200, Las Vegas, NV 89110. If you are receiving these legal notes, and do not wish to do so, let me know by emailing this back to me with "Leave Me Alone" in the subject line. Please identify the email address at which you got the email. Your State would be helpful too. In the mean time, you could add this to your email blocked list. And, of course, if you want to tell me anything else, you can put anything you want to in the subject line. Thanks.