Municipal Pensions in Divorce & The Qualified Florida Domestic Relations Order

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Oftentimes the family law attorney is retained in a divorce where one party is employed with a large municipality and the city pension becomes an issue of contention. Generally the spouse working for the municipality will have a 457 deferred compensation plan or account, similar to a 401(k) in the private sector, as well as a pension plan. The pension plan being of course the plan that pays a monthly pension benefit over the life of a plan participant with the monthly pension benefit being based on years of service and average annual income. Emphasis here will be on the municipal pension plan as the monthly pension benefits typically cannot be divided pursuant to a Qualified Domestic Relations Order (QDRO), or like order, in a divorce nor for purposes of property division.

Because of certain anti-alienation clauses, the large municipal pension plans do not have to accept a court ordered division of the pension benefit. They're on their own and independent of the state's retirement system. Although pensions are considered marital assets, the larger municipal plans are defined as a governmental plan under certain sections of the Internal Revenue Code, ERISA, and REA of 1984[1] and exempt from QDROs. Section 185.25 of the Florida Statutes expands on this as follows:

> For any municipality, chapter plan, local law municipality, or local law plan under this chapter, the pensions, annuities, or any other benefits accrued or accruing to any person under any municipality, chapter, plan, local law municipality, or local law plan under the provisions of this chapter and the accumulated contributions and the cash securities in the funds created under this chapter are exempt from any state, county, or municipal tax of the state, and shall not be subject to execution or attachment or to any legal process whatsoever and shall be unassignable.[2]

Therefore, a problem exists when there are insufficient assets to award the non-participant spouse, in lieu of their one-half of the (marital) pension benefit (property offset). The courts, or the parties, would then have to resort to an alternative solution in either awarding as much as is available in terms of other financial assets, or take it upon themselves to secure a transfer a share of the monthly pension benefit to the former spouse.

With regard to any defined benefit plan (pension), you can either determine and offset the value, <u>or</u> you divide the pension benefit by a court order, or a combination of the two. With municipal or city pensions, the issue of them not accepting Qualified Domestic Relations Orders, or any type of court order to divide the pension benefit as a marital asset, raises a major red flag and possibly some liability concerns. This article describes not only the problems, or issues, with municipal pensions in divorce, but provides some suggestions to resolve these issues now and in the future.

To determine the lump-sum present value of the monthly pension benefit means that one-half of the marital value of the pension is then is offset against other marital assets. In essence, the plan participant spouse retains all of their pension rights and the former spouse receives cash or equivalent asset sufficient to fund their own retirement if they so choose, equal to their one-half share. Therefore the value to the parties should be estimated as opposed to the cost or liability to the plan. The problem with offsetting the value is that there are sometimes insufficient assets to offset the former spouse's one-half share.

For example, many in law enforcement have amassed pension benefits upwards of $70,000, $80,000 or $90,000 per year payable after 20 or 25 years of service, and often beginning in the participant spouse's mid-forties. It does not take much to figure out the present value, based on such a young retirement age, can be quite substantial, especially given the cost-of-living-adjustments (increases) applied annually to the pension benefit. Present value, it should be pointed out, in an economic term which places more emphasis on near-term cash flows, with the later years having less influence on the final present value. Therefore, although statistical life expectancies are used, it does not mean simply adding up the payments, rather such payments are discounted for time. In other words, how much would an individual need to today, say a former spouse, to provide for a cash flow stream equal to their share of the pension benefit? Cost-of-living-adjustments, common with most governmental pension, can increase a present value of a pension 1.5x to 2x's based on a 2% to 3% COLA, sometimes more if the COLA rate is higher. Compare this to a pension in the private sector where most do not offer such increases, hence the term fixed income.

If there exists no solution to the spouse receiving a one-half share with other marital assets, the only alternative is to build it into the Judgment, or create a QDRO-like Order.[3] The order would require the plan participant spouse to pay the former spouse directly his or her share.This order is enforced on the parties and not the plan, as the plan will not take any order, other than a Income

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Deduction Order for alimony or child support, to divide a pension benefit or make direct payments to a former spouse.

For purposes of property division, an enormous amount of risk is incurred by the former spouse. Should the plan participant moves to a different, the former spouse is chasing a judgment. If the plan participant spouse predeceases the former spouse, these municipal pension plans will not typically recognize a former spouse as a beneficiary or surviving spouse under the terms of the plan. The former spouses share then, upon the death of the participant spouse, is either forfeited to the plan, or worse, paid to a subsequent spouse of the plan participant. This, of course, then turns out to be quite inequitable especially in long-term marriages.

The courts, the attorneys, and the parties have to keep in mind that the whole premise behind retirement plans in the U.S. is to take income that otherwise would have went into the family household and divert it to an account for retirement. This account, or portion of the pension fund, however, can only be in the name of one person. In terms of comparing the retirement accounts or pension plans with other financial assets, the characteristic of the retirement plans or accounts make them no different than a regular savings account. That is, if a spouse without a pension happens to have a rather sizable amount in a savings account, and only in their name, derived from marital income, it would certainly be considered a marital asset.

Assuming an offset to all or a portion of the former spouse's share is not possible, the judgment or QDRO like order should first defined the former spouse's share, account for COLA increases, and provide some method of security, such as life insurance. The judgment should also reserve the right to enter a QDRO, or like order, in the event the municipal pensions eventually accept court ordered divisions. In long-term marriages the courts may consider ordering that the pension payments be directly deposited into a joint checking account, with the former spouse's share drafted out of the joint account into one of their own, and possibly at the same banking institution or credit union. It is in this way that the former spouse then can see what increases, percentage or dollar-wise, was applied to the pension benefit and request their share be adjusted accordingly from year-to-year to reflect a proportionate share of the increase. In effect, the parties are burdened with what the plan should be doing had the pension plan they accepted a QDRO or like order. Because of the risk, a present value should be computed, using reasonable assumptions in determining what the former spouse would be required to fund their own benefit and perhaps be awarded all or a good portion of the 457 deferred compensation plan, which can be divided by a QDRO, while at the same time minimizing their share of the pension benefit, and not to mention the risk. Distribution of assets in this manner will undoubtedly cause the plan participants to put pressure on the pension plan administrators, because perhaps a former spouse was awarded all of the 457 deferred comp plan and DROP proceeds

Currently, the terms of these larger municipal pensions, and Section 185.25, are in direct conflict with the domestic relations laws of the State of Florida, Sect. 61.075. Here enters our discussion on the Qualified Florida Domestic Relations Order (QUFLDRO) which will someday resolve this problem. It was mentioned previously that the municipal pensions are exempt from ERISA, however it does not preclude the state from passing legislation to have all state and municipal retirement plans divisible by QDRO. Many states have passed legislation and are now allowing division of their city, county and state pensions to be divided for marital property purposes.

Take Illinois for example. In 1999 changes in their laws resulted in each and every state, municipal, or county pension within the State of Illinois to accept a QDRO-like order known as the Qualified Illinois Domestic Rela-

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tions Order (QUILDRO). Other states, such as New York, seem to refer to it simply as a "Domestic Relations Order". The QUILDRO, although a start in the right direction back in 1999, still heavily favored the plan participant by not allowing COLAs, nor survivor benefits or a percentage of the pension benefit, and instead only allowed for a dollar amount to be awarded from the monthly pension benefit. Inequities still existed and due to ongoing pressure, the Illinois legislators subsequently amended the laws to allow a division of their pension benefits more in line with QDROs in the private sector, although they have yet to provide for a separate interest, i.e., benefit payable over the life of the non-participant former spouse regardless of whether the participant spouse lives or dies. Illinois pension plan administrators and the QUILDRO laws do, however, allow for percentages to be awarded, pro-rata benefits, pro-rated as of the date of retirement, COLAs, and death benefits to a former spouse. The Illinois legislators still threw the plans a bone, sort-to-speak, in that a plan participant's consent is still required if employment was prior to 1999, thus giving more control over the release of benefits to the plan participant than the courts.

The point here is that if Congress is not going to amend the Employee Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity of 1984 (REA), Sections 1003(b)(1) and 1051 of title 29, United States Code, Florida will have to take a que from Illinois and other states. It is hoped that the Florida Legislature can avoid subsequent legislation and prolong litigation, as what occurred in Illinois, and truly provide for an equitable distribution more consistent with current caselaw and domestic relations laws (Fl. Stat. 61.075) in our own state. That is, allowing a percentage of a benefit to be awarded, as of a particular date, as often seen in settlement agreements, and allow for survivor benefits, or survivor annuity at least based on the former spouse's share, also consistent with caselaw. The legislature would be doing the courts a great favor if the courts were not burden with trying to find other means to get the former spouse's share to them, and without the need for additional life insurance. The number of cases across this state where the courts and the parties are burden with facilitating the division of the pension benefits on their own is insurmountable, giving justification for creation of a QUFLDRO.

As the court in Board of Trustees of the Orlando Police Pension Plan v. Langford, 833 So.2d 230 (Fla.App. Dist.5 12/20/2002), so aptly pointed out:

> Because the Florida Supreme Court has not had an opportunity to address this issue and because it is a recurring problem in resolving family law cases, we certify the following question as one of great public importance: Do the exemptions from alienation, assignment and execution in Section 185.25, Florida Statutes, bar a court from ordering direct payments from a municipal pension plan to a former spouse as part of an equitable distribution of marital assets ordered by a dissolution court or provided for in a marital settlement agreement?

If the answer to the above is yes,

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