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# Mid-Life Divorce: Unique Challenges for Baby Boomers and Older Couples

Strategies for Marital Estate Division, Spousal Support and Retirement Distribution

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TUESDAY, JUNE 7, 2011

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

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Today's faculty features:

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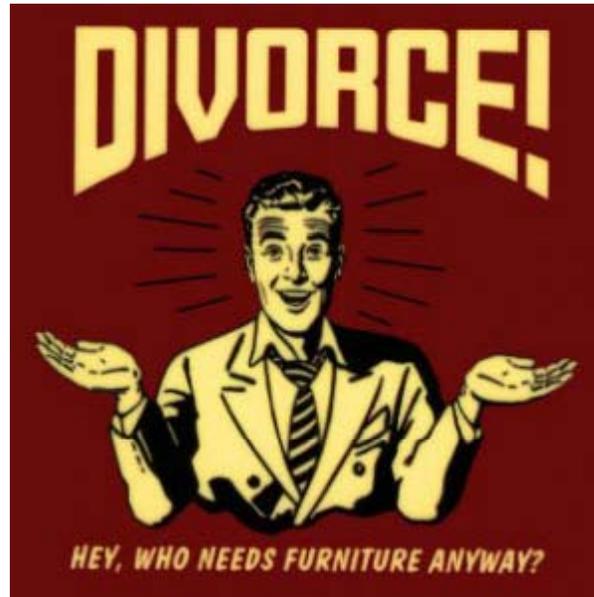
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# Division of the Marital Estate



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# Real Estate

- The Primary Residence

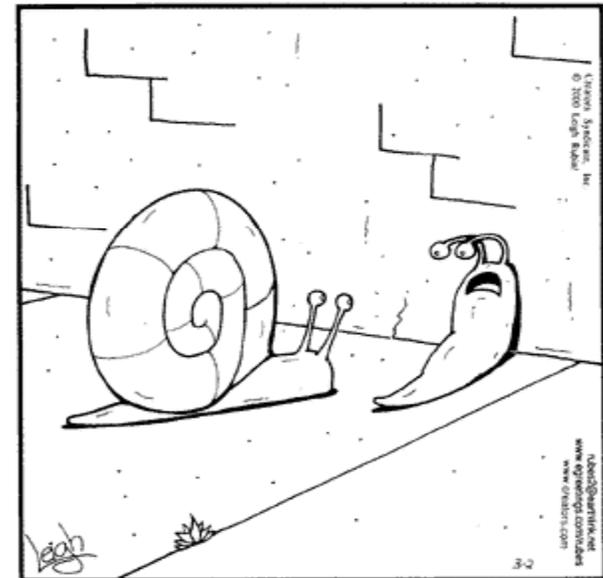
- Establishing Fair Market Value for Division Purposes

- Appraisal
- Market Assessment

- If Sharing Proceeds

- Gross v. Net Equity
- Profit v. Shortfall

- Enforceable, Workable Refinancing / Sales Terms



"Things have been kind of rough since the divorce. As you can see, my ex got the house."

# Real Estate Cont.

- Secondary Residences / Rental Property
  - Same Concerns as Primary Residence
  - Capital Gains Tax Consequences Upon Sale?
    - To exclude profits from sale of home from capital gains tax, must own and live in property as primary residence for at least 2 out of 5 years ending on date of sale.
    - Individual taxpayers who qualify can exclude up to \$250,000.00; married couples filing jointly can exclude up to \$500,000.00.
    - If not used as primary residence for the entire time, gain must be allocated between qualifying and non-qualifying use (non-qualifying portion will result in capital gains; qualifying portion will be exempt up to limits set forth above).
  - If Income-Producing Asset, Should Impact Alimony Considerations

# Real Estate Cont.

## The Oddballs

- Timeshares
  - Valuation
  - Desirability (Really Separable from Value? 😊)
- Lease Purchase Arrangements
  - Valuation (Income Stream Factor)
  - Practical Treatment of Division of Payments, If Applicable

# Business Interests

- Valuation

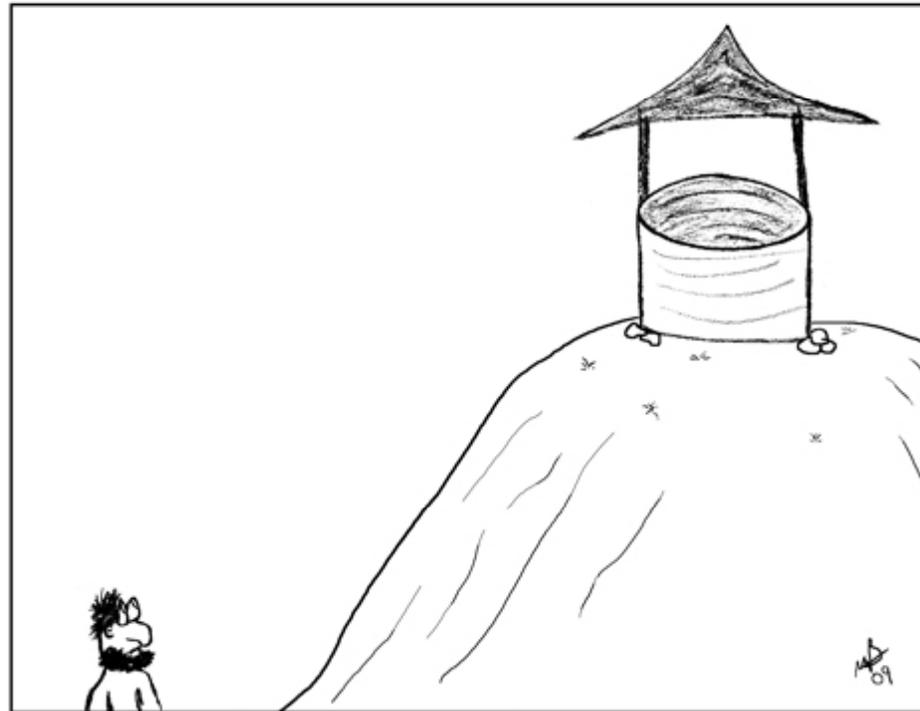
- Fact-Finding Exercise  
Where Use of Expert  
Testimony is Key

- Three Principal  
Methodologies:

- 1) Market Approach;

- 2) Income /  
Capitalized  
Earnings Method;

- 3) Cost Approach  
Method.



Jack looked sadly up the hill at the well. Jill had taken both in the divorce.

# Valuing the Corporate Intangible: Goodwill

- Personal Goodwill

- What to look for:
  - “Key man” Employee;
  - Buy-Sell Agreement Contains Covenant Not to Compete
- Usually treated as non-divisible / non-marital
- May be taken into account for alimony purposes

- Corporate Goodwill

- What to look for:
  - Immutable Value (location, product, size of staff that eliminates “key man” factor);
  - Marketability for Sale
- Treated as divisible / marital
- Cannot take into account for alimony purposes without “double-dipping”

# Investment Accounts

- Critical to keep fair allocation of cost basis when dividing, so one party is not unfairly saddled with disproportionate tax consequences upon sale.
- Represent “liquidity” in division of marital estate, but not the same, from a tax perspective, as post-tax dollars.

# Division of Debt

- Common component of equitable division in our current economy
- Consumer Debt
  - If represents acquisition of an asset, party keeping asset also keeps debt
  - BUT: legal allocation versus practical reality
- Tax Debts
  - Realized
  - Unrealized



IF YOU DO YOUR JOB WELL, CLIENT  
WON'T FEEL LIKE THIS . . . .

I WAS TAKEN TO  
DIVORCE COURT  
AND  
ALL I HAVE LEFT IS  
THIS LOUSY SHIRT

# Mid-Life Divorce: Unique Challenges for Baby Boomers and Beyond

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# SPOUSAL SUPPORT ISSUES IN MID-LIFE DIVORCES

## Introduction

Each state has its own statutory scheme for alimony, spousal support or spousal maintenance, all of which generally focus on one spouse's needs and another's ability to pay. Because the statutory schemes differ, a similar marital fact pattern can create dissimilar results in different states. In most states, an award of spousal support following a trial will not be set aside unless it is an abuse of discretion by the judge or not supported by at least some supporting evidence.

*See generally*, Leslie Anne Shaner, DIVORCE IN THE GOLDEN YEARS: ESTATE PLANNING, SPOUSAL SUPPORT, AND RETIREMENT ISSUES FOR CLIENTS AT MIDLIFE AND BEYOND, American Bar Association: 2010.

# Premarital Agreements or Postnuptial Agreements

- *Premarital Agreements*
  - Is there a premarital agreement?
  - Is there a choice of law issue?
  - Is the Agreement valid, or can it be challenged?
  - Defining criteria regarding spousal support?
- *Postnuptial Agreements*
  - Does your state recognize postnuptial agreements?
  - Does your client have a postnuptial agreement from another state?
  - Is there a definitive choice of law provision?

# TYPES OF SPOUSAL SUPPORT

## *Temporary Spousal Support*

Temporary spousal support, also called *pendente lite* support, is awarded during the pendency of a dissolution proceeding. For divorces involving mid-life or elder-aged clients, this can be a significant consideration for one or both spouses.

## *Permanent Spousal Support*

An award of permanent spousal support is established in a final judgment or a settlement agreement (marital, property, separation). Permanent spousal support is much more likely in a long-term marriage, which depending on the state, means a marriage of from 10-20 years, or to support a spouse suffering severe medical, physical or emotional needs.

## *Rehabilitative Spousal Support*

Rehabilitative spousal support is intended to provide a spouse with a stream of income for a period of time during which the spouse may be able to become self-supporting through work experience, additional training or further education. The court may reserve jurisdiction to change the amount of spousal support or to extend or shorten the period of payment.

*Garman v. Garman*, Slip Copy, 2011 WL 1844057 Tenn. Ct. App. (2011); *Meyr v. Meyr*, 195 Md. App. 524, 7 A.3d 125 Md. App. (2010); *Cartee v. Cartee*, 239 P.3d 707 Alaska (2010).

# *Less Common Types of Spousal Support*

***Reimbursement spousal support*** is a type of support given to a receiving spouse to reimburse the spouse for a particular contribution to the other spouse (*e.g.*, one spouse works to support an attorney while he or she attends law school). *See, e.g., Gonzalez-Posse v. Ricciardulli*, 410 N.J. Super. 340, 982 A.2d 42 N.J. Super.A.D.2009; *In re Marriage of Lee*, Slip Copy, 2011 WL 227573 Iowa App.,2011.

***Bridge-the-gap support*** is intended to meet short-term, post-divorce support for specific needs for a spouse transitioning into single life. Some jurisdictions treat BTG support as modifiable, and some as non-modifiable lump-sum support. *See, e.g., Biskie v. Biskie*, 37 So.3d 970, (Fla.App. 1 Dist.2010); *Green v. Green*, 672 So. 2d 49, 51 (Fla. Dist. Ct. App. 1996).

# Method of Distribution or the Payment of Spousal Support

## *A. Periodic Payments*

Periodic payment of spousal support refers to the payments of an amount at designated intervals, usually monthly, for a period of months or years. These payments remain modifiable through a post-decree hearing, or where permitted by statute, may be non-modifiable. Periodic payments usually continue until the designated term ends, until the paying spouse dies or the remarriage or death of the receiving spouse.

## *B. Lump-sum Spousal Support*

Lump-sum spousal support is paid to the receiving spouse in a single amount at a designated time or through periodic payments of a specified amount over a defined period of time. For mid-life and elder-aged clients, the downsides may include (i) inability of the receiving spouse to seek a modification of support, and (ii) the possibility that the lump-sum funds may be mismanaged or be insufficient to provide the lifetime support that is anticipated. *Coker v. Coker*, 685 S.E.2d 70 (Ga. 2009)(absent evidence of payor's ability to pay, court should not order lump-sum award to wife).

# *Spousal Support Criteria: Factors to be Considered*

- Many state statutes include at least some of the factors proposed in the *Uniform Marriage and Divorce Act* (AZ, CO, IL, KY, MN, MO, MT, & WY); some states provide no specific statutory criteria other than consideration of the marital circumstances, fairness or reasonableness; and some states look to case law for guidance (AL, GA, HI, IN, MA, MI, MS, ND, OK, OR, SD, UT, & WY). Typically, such factors include:
  - Age
  - Health of both spouses
  - Duration of the marriage
  - Standard of living enjoyed during marriage
  - Earning capacity
  - Contributions of each spouse to marriage
  - Fault (*e.g.*, adultery, cruelty, impotency, alcoholism, drug abuse, and other addictions)
  - Waste or dissipation of marital/community assets

# Problematic Issues in Mid-Life Divorce

*Consideration of the nature and value of property to be awarded*

Most spousal support determinations consider, at least in part, the property awarded to the receiving spouse. Though not a “substitute” for spousal support, the nature of the property, whether the property will enable the receiving spouse to be self-sufficient, and whether the property is income-producing often is a considered factor in spousal support awards.

## *Age and Health of Each Spouse*

- Age
  - *Evidentiary Consideration*: Matters concerning the age beyond which persons are incapable of competing in the labor market can be the subject of judicial recognition. See 29 Am. Jur. 2d, Evidence § 83.
- Health
  - Physical health
  - Mental health
  - Emotional health
  - Complicating Factors: alcoholism, drug abuse, addictions
  - *Evidentiary Consideration*: Educate the court regarding specific illnesses or physical limitations and the effects on earning ability.

## *Earning Capacity for Each Spouse*

- Education
- Training
- Skill set (*i.e.*, are skills outdated)
- Employment history
- Consideration of disabilities or illness
- *Evidentiary Consideration*: Never assume the court knows the skills needed in your client's job or the effects that age, illness or physical limitation have on performance of such job.
- Vocational Experts
  - Budgeting
  - Assessing earning capacity or ability
  - A plan for an unemployed job seeker

## *Lifestyle of the parties impacted by present economy*

- Real property values have significantly declined for most real estate and retirement accounts
- Reductions in force and downsizing of jobs
- Reduced values of stock/bond portfolios and value of stock options
- Diminished travel due to increased prices of gasoline and travel costs
- Reduction of discretionary luxuries (*e.g.*, club memberships, dining out)

## *Costs of insurance for mid-life & elder divorces*

- *Health Care Insurance (Medical, dental, vision)*  
COBRA Limitations:
  - Applies only to employers with 20 or more employees
  - Is available for only 36 months after divorce
- *Disability* – May not be able to qualify or may be cost-prohibitive
- *Life* – May not be able to qualify or may be cost-prohibitive
- *Long-term care* – Easier for 50 and 60 year olds to qualify and afford– consider as a possible settlement option

## *Security for payment of spousal support*

- *Insurable interest in payor's life. In re Marriage of Hall, 225 P.3d 764 (Kan. Ct. App. 2010)*(Ex-wife had insurable interest in ex-husband's life, as long as she was entitled to receive spousal and child support, so court could order husband to cooperate with wife to obtain insurance on his life at her expense).
- *Insurance provisions to consider in providing security for support:* policy ownership, irrevocable beneficiary designation during period of support, payment of premiums, prohibition of loans against policy, reduction in coverage and/or ability to name additional beneficiaries as the support obligation provided for a term-of-years or lump-sum amount declines.

# AMOUNT & DURATION OF SPOUSAL SUPPORT

- *How much?*
  - State statutory scheme
  - Projected monthly income and expenses
  - Must be accurate and credible
- *How long?*
  - State statutory scheme
  - Permanent, rehabilitative, bridge-the-gap
  - Medical, physical or emotional needs

## *Imputing income to either spouse*

- Error not to consider Husband's bonuses and contributions to 401(k). *Drew v. Drew*, 27 So. 3d 802 (Fla. Dist. Ct. App. 2010).
- Intermediate-balancing test to determine earning capacity, instead of actual earnings, where Husband voluntarily moved and left previous job. *Pullen v. Pullen*, 222 P.3d 909 (Ariz. Ct. App. 2009).
- Court imputed income where Husband failed to use best efforts to obtain employment to hinder Wife's transition to separate life. *Parnell v. Parnell*, 239 P.3d 216 (Okla. Civ. App., 2010).
- Wage and occupation information statistics from the U. S. Department of Labor, Bureau of Labor Statistics, provide valuable information as to median hourly, mean hourly and mean average wages. The information is available on a national, regional and local basis.

# MODIFICATION OF SPOUSAL SUPPORT

## Ability to Modify Spousal Support

- Is it modifiable? Does the state statute permit non-modification by written agreement? *In re Marriage of Waldren*, 217 Ariz. 173, 171 P.3d 1214 (2007) (*en banc*).
- Does a written separation/settlement agreement specifically state in writing that spousal support will be non-modifiable?
- Ambiguous non-modification provisions may subject spousal support to modification.
- Unambiguous non-modifiable provisions are enforceable. *Flaherty v. Flaherty*, 990 A.2d 1274 (Conn. App. Ct. 2010); *Rose v. Rose*, 795 N.W. 2d 611 (Mich. Ct. App. 2010).

## *What mid-life factors may constitute a substantial change of circumstances to modify spousal support?*

- Retirement
- Early retirement
- Termination of employment
- Disability (Permanent or Temporary)
- Illness
- Loss of earning ability (*e.g.*, lost skills)

Were any of the foregoing considered at the time of divorce and were they included as factors at trial or when the marital settlement agreement was executed? Was it foreseeable, and if so, is it a “substantial change of circumstance”?

Is the change of circumstances going to be continuing or temporary?

Is the change material?

Is the change of circumstances voluntary or contrived to reduce support?

# Mid-Life Divorce: Unique Challenges for Baby Boomers and Older Couples

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# **ERISA COVERAGE**

## **Applicable to Plans Established by:**

- Any employer engaged in commerce or industry;
- Any employee organization representing employees; or
- Both.

## **ERISA COVERAGE (CON'T)**

- Not Applicable to government plans, church plans, Worker's Compensation or Unemployment Compensation, plans outside the U.S., and excess benefit plans.
- Administered by the U.S. DOL, IRS, the Treasury & PBGC – Employee Benefits Security Administration (EBSA)

# **BENEFITS ARE NOT AUTOMATIC**

- Put learning about the parties' retirement benefits on the front burner whether or not there may be a waiver of retirement benefits.
- Allows you to (1) engage in meaningful negotiations; (2) present to a Court evidence about a retirement plan; and (3) prepare a QDRO.
- Each type of ERISA retirement plan affords different types of benefits.
- If these benefits are not included in agreements and/or final decrees, they may be lost.

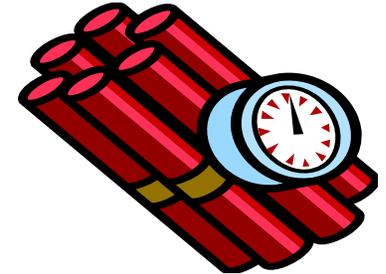
# QDROs

- Create or recognize the existence of an AP's right to receive all or a portion of a P's benefits under a plan;
- Relates to the payment of child support, alimony, or marital rights to a spouse, former spouse, child, or other dependent; and
- Pursuant to State domestic relations law.

## MALPRACTICE CONCERNS

- Failure to draft a QDRO at the time of divorce;
- Failure to draft a QDRO and participant quits job;
- Failure to draft a QDRO and **participant retires;**
- Failure to draft a QDRO and **participant dies;**  
Failure to have a plan administrator approve QDRO – **Mistake # 1**; and
- Failure to audit old QDRO files.

# **QDRO'S ARE TICKING TIME BOMBS!!!**



**QDROs that were never prepared; QDROs that were prepared, but never approved by the company; QDROs that were prepared and approved, but that exclude the requisite survivorship coverage to secure a share of a pension; QDROs that bear no relationship to the parties' or a court's actual intent.**

# Defined Contribution Plans

- Savings plans, 401(k) plans, profit sharing plans, stock purchase plans, and money purchase pension plans

A “defined contribution plan” (individual account plan) is a **pension plan** which provides for an **individual account for each participant** and for benefits based solely on the amount contributed to a participant’s account, and **any income, expenses, gains and losses**, and any forfeitures of accounts of other participants that may be allocated to a participant’s account.

## DCP Checklist

- Refer to participant's total account balance;
- Coverage formulas do not apply;
- Include gains and/or losses;
- Include a *pro rata* allocation of benefits;
- Include provisions for loans;
- Include contributions made after a valuation date;
- Include a commencement date and form of payment;
- Include payment of administrative fees; and
- Include provisions for death of either party.

# DEFINED BENEFIT PLANS

- Hourly rate pension plan, salary-based pension plans, career average salary plans, floor offset arrangement plans, and cash balance pension plans.

A “defined benefit plan” means a **pension plan** other than an individual account plan that provides a benefit derived from **employer contributions** that is based partly on the balance of the separate account of a participant. Basically a “defined benefit plan” **promises to pay each participant a specific benefit at retirement**. The basic retirement benefits are usually based on a **formula that takes into account factors such as the number of years a participant has worked for an employer and a participant’s salary**.

## SEPARATE VS. SHARED INTEREST

A separate interest QDRO divides a P's benefits into 2 separate parts – one for the AP and one for the P and provides that the **AP receives lifetime benefits that are actuarially adjusted on the AP's life expectancy.**

A shared interest QDRO is based on a P's life expectancy. Benefits are received by an AP only “if, as, and when” benefits are received by a P. **A shared interest QDRO must be used if a P is retired.**

# **ADVANTAGES & DISADVANTAGES SEPARATE INTEREST QDROS**

## **Advantages for AP:**

- ✓ Can elect to receive benefits at any time on or before P's earliest retirement age
- ✓ Can select any form of available benefit under plan

## **Disadvantages for AP:**

- ✓ AP not eligible for early retirement benefits if AP elects to commence benefits early

## **Advantages for P:**

- ✓ Can select any form of available benefit under plan / not limited to select reduced joint and survivor annuity

# **DEFINED BENEFIT PLANS**

## **ADDITIONAL BENEFITS**

### **Qualified Preretirement Survivor Annuity (QPSA):**

All ERISA governed DBPs offer QPSAs. This is a benefit for a surviving spouse in the event that a P dies prior to retirement. Generally, it is a reduced 50% annuity.

### **Qualified Joint & Survivor Annuity (QJSA):**

All ERISA governed DBPs offer QJSAs to eligible Ps who do not die before the annuity starting date. A QJSA provides an amount after a P's death of between 50%-100% of the amount payable if both were living in an annuity for a surviving spouse.

## TIPS ABOUT QPSAs

- ✓ *QPSAs are the only survivorship benefit available under a separate interest QDRO!*
- ✓ *Fully subsidized by employers*
- ✓ *Can be included in a shared interest QDRO*
- ✓ *Language in PSA or Final Decree must be specific about the inclusion and amount of the QPSA being awarded*
- ✓ *Does AP get monthly award & QPSA?*

# DEFINED BENEFIT PLANS

## ADDITIONAL BENEFITS

- **Cost of Living Adjustments** / applied at no cost to either the P or the AP
- **Temporary or supplemental benefits** provide monthly income either on a temporary basis or for life where participants have taken early retirement, typically at a reduced monthly benefit from what they would receive at normal retirement age.
- **Early retirement subsidies** permit employees to retire prior to the normal retirement age with either a full or actuarially reduced benefit.
- **Early retirement window programs** offer employees an opportunity to retire with increased benefits than they would receive under a plan's standard early retirement plan. The division of these benefits applies where a separate interest in defined benefit plans is selected.

# TIPS FOR DEFINED BENEFIT PLANS

- Always refer to accrued benefits, except for cash balance pension plans;
- Always consider using the coverature approach for division;
- Always consider the advantages and disadvantages of using separate versus shared interest QDROs;
- Always consider awarding cost of living adjustments;
- Always consider awarding early retirement benefits;
- Always consider awarding QPSA benefits; and
- Always consider awarding QJSA benefits.

# WAIVERS OF RETIREMENT BENEFITS BENEFICIARY DESIGNATIONS

*Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322, 149 L.Ed.2d 264 (2001)

- ✓ Preempted Washington revocation upon divorce statute
- ✓ ERISA supercedes state law dealing with qualified retirement plans
- ✓ Beginning of plan documents rule

**The Development of Federal Common Law**

## WAIVERS (CON'T)

*Kennedy v. DuPont Savings and Investment Plan*, 555 U.S. \_\_\_, 129 S.Ct. 865, 172 L.Ed.2d 662 (2009)

It is the “**plan documents rule**,” **as opposed to federal common law developed throughout the federal circuits**, that governs who takes survivorship benefits if the required designations are not changed following divorce. **Whatever provisions are made for survivorship benefits that are contained in plan documents will be strictly adhered to when clients fail to correctly follow the required procedures.**

# **OTHER TYPES OF RETIREMENT PLANS**

## **EXECUTIVE COMPENSATION**

### **Excess Benefit Plans:**

- ✓ Excess benefit plans
- ✓ Supplemental Executive Retirement Plans
- ✓ Deferred Bonuses
- ✓ Vested Trusts
- ✓ Stock Option Plans
- ✓ Phantom Stock Plans
- ✓ Stock Appreciation Rights
- ✓ Golden Parachutes
- ✓ Silver, Tin and Pension Parachutes

# **OTHER TYPES OF RETIREMENT PLANS**

## **IRAs**

- Traditional IRA
- Roth IRA
- Individual Retirement Annuity
- Employer & Employee Association Trust Account
- SEP-IRA
- SIMPLE – IRA
- SPOUSAL IRA
- ROLLOVER IRA
- INHERITED IRA
- EDUCATIONAL IRA

# MILITARY RETIREMENT

- ✓ 20 years of active or qualifying reserve service
- ✓ Basic benefit
- ✓ VA disability ratings
- ✓ Cost of living adjustments
- ✓ Survivor Benefit Plan
- ✓ Eligibility for TRICARE
- ✓ Eligibility for commissary use
- ✓ Language in PSA or FD must be specific
- ✓ Consider outsourcing preparation of language and orders

# FEDERAL RETIREMENT BENEFITS

- ❑ Civil Service Retirement System
- ❑ Federal Employees Retirement System
- ❑ Thrift Savings Plan
- Cost of Living Adjustments
- Refund of Member Contributions
- Survivorship Coverage
- ✓ Language in PSA or FD must be specific
- ✓ Consider outsourcing preparation of language and orders

# STATE RETIREMENT PLANS

- ❖ Use extreme caution in this economy
- ❖ Use discovery methods
- ❖ Read plan materials for available benefits
- ❖ Cost of Living Adjustments
- ❖ Refund of Member Contributions
- ❖ Survivorship Coverage

# **SOCIAL SECURITY BENEFITS**

## **42 U.S.C. § 416(d)(1) 2011 – 10 YR. RULE**

### **Basics of Social Security Entitlement:**

- The primary worker is entitled to Social Security benefits;
- Divorced wife has filed an application for Social Security benefits;
- Divorced wife is 62 or over;
- Divorced wife has not remarried; and
- Divorced wife is not entitled to Social Security benefits, or is entitled to Social Security benefits based on a primary insurance amount which is less than one-half of her husband's primary insurance amount.