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## THE SURVIVOR BENEFIT

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Since 1976, Michigan court decisions have treated a spouse's vested retirement benefits as a marital asset. By 1985, the Michigan legislature enacted MCLA 552.18 which specifically provides that a party's right in a vested pension, annuity or retirement benefit which accrued during the marriage is to be considered part of the marital estate, subject to distribution by the court. MCLA 552.18 also provides that non-vested retirement benefits can be included in the marital estate when deemed "just and equitable" by the trial court.

Retirement benefits have been distributed to the parties in judgments of divorce either by means of a Qualified Domestic Relations Order (QDRO) or by calculating the present value of the retirement benefit and awarding that value to one of the parties as part of their property settlement. One method may be more suitable than the other for use in a particular case. Both methods for distributing retirement benefits are routinely used in domestic relations cases.

When the present value method is used, one party will receive the "present value" of the future retirement benefit while the other party receives another asset or assets of similar value. The risk to the party who receives the present value of the future retirement benefit is that that party may not live long enough to retire and realize the value of that asset. To those unfortunate parties, an award of the present value of future retirement benefits was illusory. Despite this risk, the courts have repeatedly endorsed the present value method as an acceptable means of distributing retirement interests to the parties.

The QDRO method of dealing with retirement benefits divides the amount of the expected monthly retirement benefit between the ex-spouses using the so-called "coverture fraction". Upon retirement, each monthly retirement benefit is multiplied by the "coverture fraction", divided by two, and then distributed between the Plan Participant and the former spouse. In QDROs, the Plan Participant spouse is referred to as the "Alternate Payee".

The denominator of the "coverture fraction" is the number of the Plan Participant's credited years in the Plan; the numerator of the fraction is the number of years of the marriage. When appropriate, the court may also include in the numerator some or all of the Participant's years in the Plan earned before the marriage. In addition to the QDROed share of the monthly benefit, the Plan Participant may receive that portion of the monthly benefit earned before the marriage and that part of the monthly benefit attributable to credited years in the Plan after the marriage.

The QDRO method apportions the risk of realizing this marital asset equally between the parties. While it tends to be more expensive involving the negotiation of the provisions of the QDRO, the drafting of the QDRO, communication with the Plan Administrator, and finally entering the QDRO with the court, under this method neither party is forced to accept the entire risk of realizing the value of a future benefit. There are, however, some pitfalls that await the unwary practitioner.

Most QDROs now contain a provision which elect a "survivor benefit".

This additional benefit election has become routine. If a "survivor benefit" election is not made, the Alternate Payee's benefits would terminate upon the Plan Participant's death. The survivor benefit election provides for the continuation of the payment of monthly retirement benefits to the Alternate Payee after the Plan Participant's death.

While, on its face, a QDRO with a survivor benefit election appears to divide the retirement benefit earned during the years of the marriage equally between the parties, the result may be an unequal division of that portion of the marital estate. In most cases, the election of the survivor benefit, without more, will result in the unequal distribution of that portion of the retirement benefit which has been included in the marital estate. Depending upon the amount of the monthly benefits involved and the respective ages of the Plan Participant and the Alternate Payee, the survivor benefit election can result in the Alternate Payee receiving tens of thousands of dollars of additional value.

When a survivor benefit election is made, the monthly retirement benefit available when the Plan Participant retires is reduced. This reduction reflects the internal calculation by the Plan Administrator to allow for the continuation of the payment of monthly benefits to the Alternate Payee *after* the Plan Participant's death. When the survivor benefit election is made, the Plan continues payments to the Alternate Payee after the death of the Participant. Because only a finite amount of funds are earmarked for each Plan Participant's retirement benefit, the payment of monthly benefits must

be reduced at the “front-end” of the payment schedule in order to fund those payments to the survivor at the “back-end” after the Participant’s death. The net effect of this actuarial device is that the Plan Participant will receive a significantly reduced monthly payment during his or her lifetime while the Alternate Payee will receive not only a portion of that reduced monthly payment attributable to the marriage, but also a continuation of monthly benefits after the death of the Plan Participant.

The monetary impact that such an election has varies with the ages and sexes of the parties. The wider the gap in the life expectancies between the Plan Participant and the Plan Participant’s spouse, the greater the disparity between what each would receive in the way of retirement benefits when a QDRO has a survivor benefit election. Men have a shorter life expectancy than women. On average, women live seven years longer than men. Because most men marry women who are their age or younger, a survivor benefit election, without more, has the tendency to confer a greater portion of the total value of the pension included in the marital estate to the former wife. Mathematically, the same disproportionate distribution of benefits would result if the wife was the Plan Participant married to a husband who was significantly younger than her. Statistically, however, the latter scenario is less likely to occur.

Assuming that it is the parties’ intention to use the QDRO to create an *equal* division of the retirement benefit earned during the marriage, the parties have two methods by which they can correct any inequality which might result from a survivor benefit election. These two methods are the “single life annuity” option and present valuing the survivor benefit. The survivor benefit can always be present valued; not every plan offers the single life annuity option.

In plans which provide the single life annuity option, the election of the survivor benefit in tandem with the selection of the single life annuity option, will ensure that each spouse receives an equal distribution of the retirement benefit included in the marital estate. The single life annuity is an actuarial device which equally divides the total projected pension benefit subject to the QDRO,

reconfiguring each half as a life annuity for each party. The Plan would then pay to each party an amount of money each month during that party’s entire lifetime. The amount paid each month varies with that party’s longevity as determined by actuarial tables.

In those plans which provide for the single life annuity option, the difference between the ages and sexes of the Alternate Payee and Plan Participant is no longer an issue. Neither party is penalized. In addition, the selection of the single life annuity will allow the Alternate Payee to receive benefits prior to the Plan Participant’s actual retirement. This makes the Alternate Payee less dependent upon the Plan Participant’s retirement agenda.

The trial court may not order a retirement plan or a Plan Administrator to do anything which the Plan does not by its own terms permit. As a result, in order to opt for the single life annuity method of “equalizing” the retirement distribution between the parties, the single life annuity must be a Plan option.

In those cases where the single life annuity is not available, the parties can still “equalize” the award of benefits. This can be accomplished by present valuing the survivor benefit in the same manner as retirement benefits have in the past been valued by the trial courts. Present valuing the survivor benefit identifies the amount of additional value which the Alternate Payee will receive. The additional value which the Alternate Payee receives can then be offset against the value of another asset awarded to the Plan Participant. This method is the logical corollary of the use of the present value method to value retirement benefits to Plan Participants. As noted earlier, the present value method, even with its inherent risks, has repeatedly received approval from Michigan’s appellate courts.

Counsel who represent clients in cases involving retirement benefits should secure a copy of the retirement plan summary to determine whether the single life annuity is available for the Alternate Payee. If the single life annuity is available, then that provision should be coupled with the survivor benefit election to avoid inadvertently or accidentally conferring an additional

benefit to one of the parties at the expense of the other.

In those plans in which the single life annuity is not available, counsel should ask the benefit experts to calculate (a) the present value of the Participant’s retirement interest for the coverage period without the survivor benefit, (b) the present value of the Participant’s retirement interest with the survivor benefit election for the Alternate Payee, and (c) the present value of the survivor benefit to the Alternate Payee. These calculations should also reflect both before and after-tax assumptions. With that information, counsel for both parties can be prepared to negotiate an “equal” division of the retirement benefits which are to be included in the marital estate, or, in the alternative, to evaluate the additional benefit which the Alternate Payee is receiving in the QDRO.

A trial court is charged with making an equitable distribution of all of the property in the marital estate. An equitable distribution does not mean that the division of the marital estate must be equal between the spouses. However, to reach an equitable distribution of the marital estate, the court, counsel and the parties must know the value of each asset that is being distributed. Should the parties wish to have an equal division of the retirement benefit, then present valuing the survivor benefit, or selecting the single life annuity in those plans where it is available, represent two methods for “equalizing” the distribution between the parties while preserving the survivor benefit election.

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