

Retirement Plans

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October 6, 2008

Vested and unvested retirement benefits are marital property subject to equitable division. *Taylor v. Taylor*, 283 Ga. 63 (2008). With retirement plans special care must be taken to assure that the benefits are properly divided as intended by the parties. The retirement plan may be a defined contribution plan, defined benefit plan, or cash balance plan.

Qualified Plans-

Most retirement plans are governed by the Employee Retirement Income Security Act of 1974 (ERISA). A retirement plan that falls under ERISA is a qualified plan. Retirement benefits under a qualified plan are only assignable pursuant to a Qualified Domestic Relations Order (QDRO). The Internal Revenue Code § 414(p) defines a QDRO as a domestic relations order which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan and meets certain specified requirements. Section 414 (p) of the Internal Revenue Code and ERISA Section 206(d)(3) set forth the requirements for QDROs.

Defined Contribution Plans- A 401(k) is a defined contribution plan. The employee and employer can make pre-tax contributions into an account in the employee's name. There is no defined benefit. It will depend on how the investment performs. The contribution by the employee and employer is only defined. The employee/participant will generally receive statements that reflect the amount of proceeds in the account. A defined contribution plan is easy to divide when the value of the account can be easily determined.

Defined Benefit Plans- The employee's benefit is defined. There is no separate account. A traditional pension falls within this definition. Here, the value of the benefit at any given time can only be determined based on actuarial calculations and assumptions regarding the time of retirement.

Cash Balance Plans- Hybrids of the defined benefit and defined contribution plans.

Non-Qualified Plans-

Plans that do not fall under ERISA are non-qualified retirement plans. Most of the time, they are not assignable. If a retirement benefit is not assignable, parties can agree or court can

order that fund be divided after employee/participant receives the retirement benefit. Simplest solution may be to award non-employee another asset.

Military Retirement Pay-

Military retirement pay is subject to equitable division when contributions to the military retirement were made during the marriage. In *Stumpf v. Stumpf*, 249 Ga. 759 (1982), the court addressed the narrow question of whether evidence of military retirement pay was relevant to the determination of alimony. The trial court relied upon *McCarty v. McCarty*, 453 U.S. 210 (1981) to exclude the evidence of the military retirement pay. In *McCarty*, a case from California, the Supreme Court held that military pay was a "personal entitlement" and that federal law precluded a state court from dividing military nondisability retirement pay. In *Stumpf*, however, the Georgia court held that evidence of military retirement pay was admissible for purpose of alimony determination.

In *McCarty v. McCarty*, the Supreme Court reached its decision based on current federal laws and not on constitutional grounds. In response, Congress passed the Uniform Services Former Spouse Protection Act (USFSPA) 10 U.S.C. § 1408 which allows the state courts to apply community property and equitable distribution principles to military retirement pay. See *Mansell v. Mansell*, 490 U.S. 581, 584, n. 2 (1989); *Powell v. Powell*, 80 F.3d 464, 465 (11th Cir. 1996). The USFSPA does not provide any method for determining the appropriate division of the pay. This would be decided by the state court. The USFSPA does provide for requirements that must be met in order for the Department of Defense to make direct payments of military retirement pay to the former spouse. There are also important jurisdiction restrictions set forth in the USFSPA.

One provision of the UUSFSPA requires that the ex-spouse must have been married to the military member for at least 10 years, with at least 10 year of the marriage overlapping a period of military service creditable to the military retirement pay for there to be direct payment. This does not mean that a state court cannot award the retirement benefits if the marriage lasted less than 10 years. A state court may divide the benefits but the military member would have to cut a check to pay the ex-spouse, rather than having the Department of Defense make the payments.

Surviving Spouse Benefits-

The Settlement Agreement should make it clear whether the non-employee spouse is entitled to any surviving spouse benefits.

In *King v. King*, 225 Ga. App. 298, 483 S.E.2d 379 (1997), the court addressed the claim of an ex-spouse to annuity benefits under the Survivor Benefit Plan (SBP). The husband participated in the SBP as a United States Air Force retiree. The Settlement Agreement incorporated into a divorce decree provided that Sarah King would receive the annuity paid upon

Mr. King's death pursuant to the SBP. Mr. King divorced Sarah King and re-married Joyce King. Sarah sued Joyce seeking imposition of a constructive trust over the SBP annuity benefits being paid to Joyce. After the divorce between Mr. King and Sarah, neither took action necessary under the SBP to notify the military of the divorce agreement to implement an election designating Sarah as the beneficiary of the SBP. Consequently, upon Mr. King's death, the Air Force began making the annuity payments to Joyce. The trial court held that since the annuity was awarded to Sarah as part of the marital property, she had a right to receive the annuity. The Georgia Court of Appeals found that the SBP annuity was marital property subject to equitable division. 225 Ga. App. at 300. The court, however, explained that the right to claim entitlement to a SBP annuity was also governed by and subject to the conditions set forth in the SBP at 10 U.S.C. §§ 1447-1455. The SBP provided a requirement for Mr. King to notify the government in writing of his election designating his former spouse as the beneficiary of the SBP annuity within one year of the date of the divorce decree. Upon his failure, Sarah was entitled to notify the government that she had been designated the beneficiary pursuant to the agreement and decree. Because neither informed the government of such election, Joyce became the designated spouse beneficiary of the SBP annuity after one year of marriage to Mr. King. 225 Ga. App. at 301 citing 10 U.S.C. § 1447(3) (A). The court of appeals recognized the changes to the FSPA following *McCarty v. McCarty*, supra. The court of appeals note that nothing in the FSPA granted the same power to the states with respect to the award of annuity benefits for former spouses under the SBP. Moreover, the SBP provisions specifically set forth the conditions under which a former spouse awarded SBP benefits in a state court may be elected as the beneficiary and become entitled to receive the annuity benefits. 225 Ga. App. at 302. Finally, the court of appeals recognized that Congress had declared that an annuity under the SBP "is not assignable or subject to execution, levy, attachment, garnishment, or other legal process." 225 Ga. App. at 302 citing 10 U.S.C. § 1450(i); *McCarty v. McCarty*, supra.

In *Hipps v. Hipps*, 278 Ga. 49 (2004), the Supreme Court of Georgia affirmed the trial court's award of "the right to any survivor's benefits available as a result of [his] military service. The Husband was ordered to pay Wife \$1,000 per month in permanent alimony so long as she does not remarry until she dies and the survivor's benefits. The decree also contained a provision for a property settlement. The Husband contended that the retirement account was separate property. All of Husband's contributions to the military retirement pre-dated the marriage and thus, the account was separate property and not subject to being equitably divided. The trial court, however, did not make a division of the proceeds in the account or the monthly amount that was payable to Husband. Rather, the trial court awarded the monthly alimony of \$1,000 and in addition, a survivor's benefit, which took the form of an annuity and was contingent upon her outliving Husband. The Supreme Court of Georgia noted that alimony can be awarded either from the spouse's earnings or from the corpus of his estate, as by granting the recipient spouse the title or use of property. Next, the Husband relying on *King v. King*, supra, argued that the award deprived him his right under federal law to elect his beneficiary. The court in *Hipps*, rejected this argument noting that the trial court was authorized to require Husband to name Wife

as beneficiary and if Husband failed, Wife was entitled to take the necessary steps to ensure his compliance. The court distinguished King noting that in King the deficiency was in failing to comply with the administrative requirement for election of a beneficiary. 278 Ga. at 51. Finally, since the survivor's benefits were awarded as alimony, Wife was only entitled to receive those benefits if she outlived Husband and remained unmarried.

Railroad Retirement Act Benefits-

Retirement benefits under the Railroad Retirement Act of 1974 (45 U.S.C. § 231) may be subject to equitable division depending on whether they are Tier I benefits or Tier II benefits. *Lanier v. Lanier*, 278 Ga. 881 (2005). Tier I benefits are the equivalent to benefits covered by the Social Security Act, 42 U.S.C. § 401 et seq. and are not considered marital property subject to division. *Lanier*, 278 Ga. at 882. Tier II benefits are similar to a private pension, are tied to earnings and career service and are subject to distribution as marital property.

Social Security Benefits-

Social security benefits are not considered marital property subject to equitable division. *Rabek v. Kellum*, 279 Ga. 709; 620 S.E.2d 387 (2005) citing 42 U.S.C. § 407(a).

State and Local Government Plans- These plans cannot be divided. In *Bryant v. Employees Retirement System of Ga.* 216 Ga. App. 737; 455 S.E.2d 839 (1995), the court of appeals held that although state employee benefits are subject to equitable division, such benefits are not assignable and can only be collected from the spouse after receipt.

IRAs and SEPs-

Individual Retirement Accounts (IRAs) and Simplified Employee Plans (SEPs) do not need to be transferred by QDRO. They can be transferred by "trustee to trustee transfer" and should not have tax consequences. The financial institutions that hold the funds generally will have forms that will be executed to accomplish the transfer.