Disability, Death and Related Topics of Cheer

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DISABILITY, DEATH

and

RELATED TOPICS OF CHEER

PART ONE – DEATH[1]

by

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[1] The materials below were largely derived from a seminar entitled *A Covenant with Death and an Agreement with Hell: Death Benefits in Private and Federal Retirement Systems* (Legal Education Institute, Vail, Colorado, January, 2000); the original materials were reprinted in the American Journal of Family Law, vol. 14, No. 1 (Aspen Law & Business, Spr., 2000). The following was the footnote to the original title: A.H. Grimke, *William Lloyd Garrison* (1891), ch. 16, recounting the resolution adopted by the Massachusetts Anti-Slavery Society on January 27, 1843: "The compact which exists between the North and the South is 'a covenant with death and an agreement with hell.'" The author readily concedes that this quote has been taken entirely out of context and has nothing whatsoever to do with the topic of these materials, but it made such an engaging title that it seemed obligatory to use it anyway.

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I. INTRODUCTION

No one likes to think about it much, but from all appearances, whether life is approached optimistically[2] or pessimistically,[3] and irrespective of willingness,[4] it appears that death is inevitable.[5] Probably the best we can do as divorce practitioners is to acknowledge that the death of everyone involved in a divorce is certain, but of unpredictable order and timing,[6] and use that knowledge to attempt to structure our orders and decrees in such a way that as little harm as possible will befall the interests we have been employed to create or protect, and (perhaps most of all) fully inform our clients of the financial effects that will flow from the death of one party or the other.

These materials are intended to sketch out the effects upon the benefits flowing from public (military, Civil Service, and Nevada State PERS) and private (ERISA[7]-governed) retirement systems that should be expected upon the death of either the plan member/participant or the non-member/participant spouse, and to show what, if anything, can be done by the practitioner to alter those effects.

As a general rule, the payment of ***retirement*** benefits, *per se*, end with the life of the person in whose name the benefits were earned. For a spouse – or former spouse – to continue receiving money after death of the plan member or participant, there generally must be some specific provision made for payments after the death of the named retiree. Basically, the two

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[2] "Always look on the bright side of life . . . ."
Monty Python, *Life of Brien* (sung during closing credits).

[3] "Life is divided into the miserable and the horrible."
Woody Allen.

[4] "Down, down, down
into the darkness of the grave
Gently they go,
the beautiful, the tender, the kind;
Quietly they go,
the intelligent, the witty, the brave.
I know.
But I do not approve.
And I am not resigned."
Edna St. Vincent Millay, from *Dirge Without Music*

[5] "In this world nothing can be said to be certain, except death and taxes."
Benjamin Franklin, Letter to Jean Baptiste Le Roy, 13 November 1789, in *Works* (1817), ch. 6.

[6] "Eat, Drink, and be merry, for tomorrow we die!"
Common amalgam of Ecclesiastes ch. 8, v. 15, Isaiah, ch. 22, v. 13, and St. Luke, ch. 12, v. 19.

[7] "The Employee Retirement Income Security Act" of 1974, the federal law that created "QDROs," is by its own terms inapplicable to any governmental plans, including civil service, military, or state retirement plans. 29 U.S.C. §§ 1003(b)(1) & 1051. It largely controls by federal preemption the disposition of retirement and survivorship interests of those employed in the private sector.

ways of doing this are to divide the retirement benefits themselves, or to provide a separate, survivorship interest payable to the beneficiary upon the death of the person who earned the retirement.

This is an essential concept, which practitioners ignore at their considerable peril in malpractice.[8] The scope of damages that are at stake is the value of whatever benefit the client lost – which could be the entire retirement benefits otherwise payable to the client.[9] Attorneys practicing divorce law must accept that they may be held responsible for knowing about the existence, value, and methodology of division of whatever actual or potential retirement (and survivor's) benefits might exist. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.[10]

Perhaps most unsettling, from a malpractice perspective, is the length of time such a claim can lay dormant. Several courts have adopted a "discovery rule" for attorney malpractice cases.[11] In other words, divorces involving pensions, but in which no provision was made for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

There is really no question that the omission of providing for survivorship interests could come back to haunt the practitioner in the form of a malpractice action, many years after the divorce in question was concluded. The rest of these materials therefore deal with exactly what benefits are in issue, identifies the ways in which the major retirement systems in the United States might deal with those benefits, and makes some suggestions for dealing with these assets before they become liabilities.

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[8] For some time, courts have held attorneys handling divorces to knowledge of the intricacies of the retirement system involved in their cases. *See Aloy v. Mash*, 696 P.2d 656 (Cal. 1985).

[9] *See Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law; attorney's original advice was correct (the retirement was non-divisible under *McCarty*), but when USFSPA passed just days before the separation agreement was signed, he missed it).

[10] While there is not much appellate authority in this area, and virtually no statutory authority anywhere, I have been hired as an expert witness in several such cases in the past couple of years, in which liability was sought against practitioners who did not properly see to securing survivorship benefits for a spouse. Edwin Schilling, Esq., of Aurora, Colorado, estimates that 90% of his malpractice consultations involve failure to address survivor beneficiary issues. Lawyer's Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956).

[11] *See Petersen v. Bruen*, 106 Nev. 271, 792 P.2d 18 (1990); *Semenza v. Nevada Med. Liability Ins. Co.*, 104 Nev. 666, 765 P.2d 184 (1988).

II. DEATH BENEFITS IN THE MILITARY RETIREMENT SYSTEM

Arguably, the military retirement system provides the most arcane, convoluted, and illogical of the death and survivorship interests explored in these materials, so greater detail is provided for the military system than for the others discussed.

There appear to be five separate possible effects of a death on a couple in which one party is a member of the armed forces, depending upon whether death is before or after retirement, and before or after divorce, and which of the parties has died. Nothing stated below has any effect on service life insurance, which is discussed as the last subsection of this section.

A. Death of Member Before Retirement and Before Divorce

Whether everyone is living happily together or not, if the member dies before a divorce is final,[12] the spouse is the recipient of certain benefits made available for the survivors of active duty military personnel, under 38 U.S.C. § 1311(a), which created a program called Dependency and Indemnity Compensation ("DIC"). DIC payments have been payable to the survivors of any veteran who died after December 31, 1956, from a service-connected or compensable disability.[13] DIC payments are not made to persons divorced from members.

If a person happens to be a recipient of both DIC payments and payments under the Survivor's Benefit Plan ("SBP") explained below, all DIC payments are subtracted from the SBP payments.[14] However, certain supplements to the DIC benefits, for support of a dependent child or because of certain disabilities, do ***not*** get offset against SBP.[15] DIC payments are not taxed, and are therefore more valuable than the (taxable) SBP payments that would otherwise go the survivor.

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[12] This scenario could lead to different results in those states in which separation or the filing for divorce has a greater legal effect.

[13] 38 U.S.C. § 410(a). *See* Pub. L. No. 84-881, 70 Stat. 862, 867 (Aug 1, 1956).

[14] 10 U.S.C. § 1451(c)(2).

[15] *See* 38 U.S.C. § 411(b)-(d).

Previously the rule was that if the survivor remarried, DIC payments were permanently terminated,[16] even if the second marriage ends by death or divorce.[17] However, a rule effective December 16, 2003, permitted former spouses receiving DIC to retain the benefits despite their remarriage – so long as they were at least 57 years old at the time of remarriage. Those that remarried, over 57 years old but prior to December 16, 2003, can have their DIC benefits restored, so long as they apply for it by December 15, 2004.

Further, if the former spouse was receiving both DIC and SBP, and the remarriage occurred when the former spouse was over 55 years, the SBP payment is apparently increased to the full amount (in other words, the DIC offset is replaced by additional SBP dollars, leaving the only effect one of taxation).[18]

B. Death of Member Before Retirement and After Divorce

This is a most dangerous situation for a former spouse. As noted in the section above, spouses lose DIC eligibility upon divorce. And as set out below, there is normally no SBP coverage until after retirement. In other words, the former spouse risks total divestment if the member dies during the period between divorce and the member's actual retirement.

The only practical method of ameliorating this risk would appear to be through private insurance.[19] The problem is that few service members carry significant sums of secondary private insurance.

It is worth pausing for a moment to clarify that any former spouse who will be the recipient of retirement benefit payments if her former spouse lives, but will not get such money if he dies, ***definitionally*** has an "insurable interest" in the life of the member (this is true for military or non-military cases). The matter is one of fact, not a matter of discretion, award, or debate.[20] Anecdotal accounts indicate that some insurers are reluctant to issue private policies of insurance without some court order indicating that the intended beneficiary (the

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[16] Pub. L. No. 101-508, § 8004, 104 Stat. 1388-343 (Nov. 5, 1990).

[17] Remarriage has been defined as "The triumph of hope over experience." Samuel Johnson, *Life of Boswell*, vol. 2, at 128 (1770).

[18] *See*, *generally*, Benjamin Franklin, *In Praise of Older Women*.

[19] ***Not*** through SGLI, as set out in the last subsection of this section, since it is not secure.

[20] "Insurable interest" survivorship provisions are found throughout various federal regulations, as an ***alternative*** to covering a spouse or former spouse (i.e., if no such person exists); it refers to any person who has a valid financial interest in the continued life of the member. *See*, *e.g.*, 10 U.S.C. § 1450(a)(1); 10 U.S.C. § 1450(a)(4).

former spouse) is entitled to insure the life of the other party. Attorneys for former spouses should therefore make a point of reciting the fact of such an interest on the face of the decree.

The survivor of a member who died while still on active duty is not ***necessarily*** excluded from receiving SBP benefits. The Finance Centers will honor a member's election to treat a former spouse as the SBP beneficiary if the member died after: (1) becoming eligible to receive retired pay; (2) qualifying for retired pay but not yet having applied for or been granted that pay; or (3) completing twenty years of service, but not yet completing ten years of active ***commissioned*** service needed for retirement as a commissioned officer.[21] The procedural requirements are the same as in other cases.

Additionally, the 2002 Defense Authorization Act included a provision, retroactive to September 10, 2001, allowing survivors of members who die in the line of duty eligible to receive the full SBP. This has apparently created a pre-retirement survivor annuity, for spouses or former spouses.

C. Death of Member After Retirement and Before Divorce

This was apparently the scenario contemplated when the SBP was created in 1972, to provide a monthly annuity to spouses and dependents of retired members of the Uniformed Services. It largely replaced an earlier survivor's plan known as the RSFPP,[22] which is of little importance here. All members entitled to retired pay are eligible to participate in the SBP,[23] under which a survivor's annuity is payable after a member's death.[24]

Some members retired ***before*** 1972 are nevertheless participants in the SBP, since Congress has provided a number of "open enrollment periods" or "open seasons" during which non-participants could join the program, and those who had selected less than the full amount of benefits could increase their level of participation. Those choosing to begin or increase their participation in the SBP program during an open season are also faced with paying an additional retroactive premium.

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[21] 10 U.S.C. § 1448(d)(1).

[22] The Retired Serviceman's Family Protection Plan (RSFPP) was originally known as the Uniformed Services Contingency Option Plan of 1953, enacted by Pub. L. No. 83-239, 67 Stat. 501 (Aug. 8, 1953). The name was changed by Pub. L. No. 87-381, 75 Stat. 810 (Oct. 4, 1961). The RSFPP is described at 10 U.S.C. § 1431, *et seq*. That program was generally considered a failure due to the very low participation rate of eligible members.

[23] 10 U.S.C. § 1448(a)(1)(A).

[24] 10 U.S.C. § 1447 *et seq*.

The SBP is not divisible. It can be made to cover more than one person in certain circumstances (as in a spouse and dependent child), but it cannot be divided between a spouse and former spouse, or between two former spouses.[25]

The SBP applies automatically to a member who is married or has at least one dependent child at the time the member becomes entitled to retired pay, unless the member affirmatively elects not to participate in the SBP.[26] The member's spouse must consent to any election not to participate in the SBP, to provide an annuity for that spouse at less than the maximum level, or to provide an annuity for a dependent child but not for the spouse.[27]

Where the spouse did not consent to non-coverage, and no "special circumstances" are present, the spouse can petition for "instatement" of the benefits later, even after the member's death.[28] The spouse can be named SBP beneficiary even where he or she has little or no time-rule percentage of the retired pay itself.[29]

A dependent child can only be an SBP beneficiary if the child is also one of the following: (1) the child of the former spouse who is the beneficiary; or (2) the child of a current spouse who is the beneficiary, or who has consented to provide the benefit to the child only; or (3) if the previously-named former spouse beneficiary is no longer still alive.[30]

The SBP is funded by contributions taken out of the member's retired pay. For members entering service before March 1, 1990, premiums are the lesser of the amount computed by two tests. First, 2.5% of the first $572.00[31] of the base amount, plus 10% of the remaining base amount. Second, 6.5% of the base amount. For members entering service on or after March 1, 1990, SBP premiums are 6.5% of the base amount.

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[25] The military retirement system has no provision for division of a survivorship interest. The absence of such a provision works hardships of unjust enrichment and dispossession. Members' political pressure groups, former spouses' political pressure groups, and the American Bar Association have all stated that this requires correction, and the Department of Defense has recommended that the SBP be made divisible among multiple beneficiaries. *See A Report to Congress Concerning Federal Former Spouse Protection Laws* (Report to the Committee on Armed Services of the United States Senate and the Common Armed Services of the House of Representatives) (Department of Defense, Sept. 4, 2001). Congress has taken no action to date.

[26] 10 U.S.C. § 1448(a)(2).

[27] 10 U.S.C. § 1448(a)(3)(A).

[28] *See McCarthy v. United States*, 10 Cl. Ct. 573 (1986), *aff'd*, 826 F.2d 1049 (1987).

[29] *See Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App. 1994).

[30] 10 U.S.C. § 1448(b)(4). In any event, for "child only" designations, the benefits continue only until the child is 18 years old (or 22, if a full-time student). 10 U.S.C. § 1447(5).

[31] Amount effective as of January 1, 2003. It is adjusted annually.

The maximum amount of the standard SBP annuity for a beneficiary under age 62 or a dependent child is 55 percent of the elected amount of the member's base retired pay[32] as adjusted from time to time for cost of living increases.[33] SBP payments are normally reduced for a beneficiary who is age 62 or older, although there is an expensive supplement available which, if purchased, eliminates the reduction.[34] Since the amount of any particular member's total SBP and SSBP premiums are dependent upon factors of age and total gross pay, they must be individually calculated to be accurately determined.

The bottom line is that it is possible for a military member to provide for survivorship benefits for a spouse after retirement, almost automatically. This was its original purpose.

D. Death of Member After Retirement and After Divorce

This is the classic divorce scenario – whether divorce occurs before or after retirement, it is usually expected that both parties will continue to live until after the member retires from active duty.

Former spouse coverage was not possible before 1983, and has evolved considerably over the years, as it was made no more expensive than current spouse coverage, and then stipulations to provide such coverage were made enforceable.

In 1986, Congress amended the USFSPA so that state courts could order that former spouses be members' beneficiaries.[35] If a member elects, or is "deemed" by a court to have elected, to provide the SBP to a ***former*** spouse, the member's current spouse and children of that spouse cannot be beneficiaries.[36] Generally, an election to make a former spouse an SBP

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[32] As computed under 10 U.S.C. §§ 1401-1401a.

[33] 10 U.S.C. § 1451(a)(1)(A).

[34] Criticism of the lowering of benefits at age 62 led to the development of a "high option" supplement known as the "Supplemental Survivor Benefit Plan," or SSBP. *See* Pub. L. No. 101-189, 103 Stat. 1352 (Nov. 29, 1989). Under the supplement program, payment of additional premiums could increase the survivor's benefits by five percent for each SSBP unit purchased. Unlike the SBP itself, which the government theoretically subsidizes to the extent of 40%, the SSBP was designed to be actuarially neutral – i.e., to neither save nor cost the government any money. Thus, the increased coverage comes at a significantly increased cost.

[35] Pub. Law No. 99-661 (Nov. 15, 1986).

[36] 10 U.S.C. § 1448(b)(2). The Finance Center will notify the member's spouse of the election to make the member's former spouse the SBP beneficiary, but the current spouse's consent is not required. 10 U.S.C. § 1448(b)(3)(D).

beneficiary is not revocable; if the election was pursuant to court order, a superseding court order in necessary to change it.[37]

To initiate a "deemed election," the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order.[38] There are various technical requirements.

It should be noted that the ***amount*** of the survivorship interest is variable, and provides planning opportunities for counsel. The maximum SBP is selected if the entire retired pay is selected as the "base amount." The smaller the base amount selected, the smaller the survivor annuity – and the smaller the lifetime premium paid to supply it. Whatever the base amount selected, cost of living adjustments increase a base amount so as to keep it proportionally the same as the amount initially selected.

No matter what any court orders, the military pay center can ***only*** take the premium "off the top" of the monthly payments of the regular retirement.[39] Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member pays 75% of the SBP premium.

It ***is*** possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives. An explanation of why such shifting might be appropriate, and how to actually do so, is set out in two sections below.

The matter of "deemed elections" and former spouse eligibility for SBP payments presents the single biggest malpractice trap in this area, at least when it is attempted without the member's cooperation.

If the designation of a former spouse as beneficiary is made by a member, it technically is to be written, signed by the member, and received by the Defense Finance and Accounting

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[37] 10 U.S.C. § 1450(f)(1)-(2).

[38] 10 U.S.C. § 1450(f)(3)(B).

[39] The Department of Defense also asked Congress to change ***this*** aspect of the SBP program in the *Report to Congress*, *supra*, requesting that court orders, or stipulations, could specify who was to pay the premium. As noted above, Congress has not acted.

Service within one year after the date of the decree of divorce, dissolution, or annulment.[40] At the time of the election, the member must submit a written statement to the appropriate Service Secretary. The statement must be signed by both the former spouse and the member, and state whether the election is being made pursuant to the requirements of a court order or a written voluntary agreement previously entered into by the member as a part of or incident to a divorce, dissolution, or annulment proceeding. If pursuant to a written agreement, the statement must state whether such a voluntary agreement was incorporated in, ratified or approved by a court order.[41]

As a practical matter, however, the Services have been quite liberal in granting "administrative corrections" upon the requests of members, even years after a divorce, when spouse coverage was in effect rather than "former spouse" coverage, but premiums were paid and the members claimed that they "mistakenly assumed that [the former spouse] remained the covered beneficiary following the divorce since SBP costs continued to be withheld."[42]

The situation is quite different when the former spouse sends in a "deemed election" after a court orders the beneficiary designation, but without the active cooperation of the member. In prior years, it was widely believed that the one-year period in which a former spouse must request a deemed election ran concurrently with the one-year period in which a member must make the election after the divorce. It was therefore thought that the former spouse simply lost the SBP designation entirely if he or she waited until the member's one-year election period ended.

Subsequent developments, however, made this rule slightly more flexible, much more complicated, and a bit illogical in application.

The spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the ***member*** is obliged to make the election "within one year after the date of the decree of divorce, dissolution, or annulment,"[43] whereas the ***former spouse*** must make the request "within one year of the date of the court order or filing involved."

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[40] 10 U.S.C. § 1448(b)(3)(A).

[41] 10 U.S.C. § 1448(b)(5).

[42] *See*, *e.g.*, Memorandum dated February 20, 1997, from Gary F. Smith, Chief, Army Retirement Services, on behalf of the Secretary of the Army, to Director, DFAS, re: "Administrative Correction of SBP Election -- Johnson, Alfred H. III," noting a 1994 divorce decree requiring him to maintain coverage for his former spouse, noting the member's 1997 request for a change in the SBP election from "spouse" to "former spouse," and directing collection of the cost refund that was paid to the member be collected, and that the records be corrected to show former spouse coverage.

[43] 10 U.S.C. § 1448(b)(3)(A).

If there was no previous order giving a valid right to the former spouse to be the SBP beneficiary, the one-year deemed election period runs from the date of a post-divorce order concerning the SBP.[44] This is true for orders that issued prior to the effective date of the SBP deemed beneficiary law, as well as orders that inadequately attempted to provide for the SBP, or omitted all mention of the benefit.[45]

However, once a valid court order is issued requiring coverage, the one year period begins to run, and any subsequent court order that merely reiterates, restates, or confirms the right of coverage as SBP beneficiary cannot be used to start a new one-year election period.[46]

This is where the complications and illogic come in. Presume three identical divorces on the same day. In the first case, the attorney, who knew almost nothing about military retirement benefits law, did not even know there was an SBP to allocate. The second knew that something had to be done, and so put a statement in the Order verifying that the former spouse was to be the beneficiary. The third not only knew to secure the right, but knew about the deemed election procedure, sent the required notice in, etc.

One year and one day after the divorce, the ***third*** former spouse's rights would be secure. The ***first*** former spouse could go back to court at any time (prior to the member's death) to get a valid order for SBP beneficiary status, and then serve the pay center. The ***second*** former spouse, however, whose rights were supposed to be "secured" by the judgment, would be entirely without a remedy (except a malpractice claim against the divorce attorney).

It makes little sense for the law to protect the putative rights of those who do not even try to secure rights upon divorce, while denying any protection to those who believe they have already litigated and received a valid court order protecting those same rights, but that is the bottom line of the law as it now stands.[47] Even the Department of Defense has recognized

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[44] *See*, *e.g.*, Comp. Gen. B-232319 (*In re Minier*, Mar. 23, 1990); Comp. Gen. B-226563 (*In re Early*, Mar. 2, 1990); Comp. Gen. B-247508 (Sept. 2, 1992).

[45] As an aside, this is true even when the divorce court is unsure how to characterize the benefit. In one case, the court made a point of saying that it could not tell if the SBP was a property right, an alimony allocation, or some kind of insurance, but in any event it was valuable, and the benefit was to be secured to the former spouse, even though she did not qualify to receive a portion of the military retirement benefits themselves because the marriage at issue did not overlap the military service. *See Matthews v. Matthews*, 647 A.2d 812 (Md. Ct. App.1994).

[46] Comp. Gen. B-244101 (*In re: Driggers*, Aug. 3, 1992); 71 Comp. Gen. 475, 478 (1992).

[47] "The life of the law has not been logic; it has been experience." Oliver Wendell Holmes, *The Common Law* (1881).

the unnecessarily harsh results that are produced by the current law,[48] but Congress has not yet taken any action to correct the situation.

In addition to the conditions and difficulties mentioned above, practitioners should keep in mind (and advise their clients) when dealing with the SBP, that an annuity payable to a widow, widower, or former spouse is suspended if the beneficiary remarries before age 55.[49] In other words, the client should be advised to ***not*** remarry prior to the relevant age, unless willing to forego continuing payment of the SBP benefits.[50]

E. Death of Spouse

In marked contrast to the multiple line-drawing and subtle distinctions discussed above regarding the death of a member, the death of a spouse has a very simple effect – the member is freed from restrictions, claims, and costs.

If the spouse dies before retirement (whether the parties are married or divorced), no spousal consent is needed to waive the SBP. If the spouse dies during marriage but after retirement, SBP premium deduction stops as soon as the military pay center is informed of the spouse's death.

If the former spouse dies after retirement and divorce, both the spousal share of current military retired pay and any SBP benefits in the spouse's name revert to the member – they may not be left to anyone by will or intestate succession.

And, finally, if the former spouse dies after divorce, retirement, ***and*** after the death of the member, the benefits simply stop.

F. How to Allocate the SBP Premium

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[48] *See A Report to Congress*, *supra* (recommending repeal of the one-year limitation). This is not a new position. A memorandum to Congress in 1991 recommended extending the period in which application could be made from one year to five. *See* "DoD Report on The Survivor Benefit Plan, August, 1991," under cover entitled "A Review of the Uniformed Services Survivor Benefit Plan (SBP) and Report on the Pending Supplemental Plan and Open Enrollment Period, Prepared by Department of Defense, October, 1991," in turn attached to correspondence dated October 1, 1991, from Christopher Jehn, Assistant Secretary of Defense, to Hon. Les Aspin, Chairman, House Armed Services Committee. Congress took no action then, either.

[49] 10 U.S.C. § 1450(b). Before November 14, 1986, benefits were suspended if the former spouse was not yet age 60.

[50] This is strictly a legal analysis, and I take no position herein on the moral or other ramifications of cohabitation, unlike some pundits: "A fate worse than marriage. A sort of eternal engagement." Alan Ayckbourn, *Living Together* (1975).

If the former spouse dies first, then the member automatically gets back the entirety of the spousal share, for the rest of his life. There are nine basic possibilities, however, as to what the ***spouse*** should receive in the event that the member dies first. Each carries with it a different weighing of equities, rights, and responsibilities.

First, there could be no SBP award to the former spouse. The lifetime benefit stream will be divided as the court indicates,[51] but the parties will be left in an unequal position as to ***risk***, because if the member dies, the former spouse gets nothing, but if the former spouse dies, the member gets his share of the benefits, plus hers.

Second, there is the "default" – what would happen if the court deemed the former spouse to be the SBP beneficiary, at the full base amount, but took no steps to alter the ramifications of that election. The spouse would be "over-secured," to a greater or lesser extent.[52] The smaller the lifetime interest of the former spouse happened to be, the larger the share of the premium that the member would pay.[53] If the member died first, payments to the spouse would increase from $233.75 to $550.00. If the spouse died first, payments to the member would increase from $701.25 to $1,000.00.

The third scenario would have the former spouse pay the entire SBP premium. Using the same hypothetical facts, reducing the spousal share from 25% to 19.7861% would free the member from paying any portion of the premium, directly or indirectly.[54] The former spouse is still over-secured, as in the prior scenario, and the parties are still left in an unequal position regarding risks and burdens, since the member still has an entirely free survivorship

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[51] For example, in a state following the "time rule," and presuming a ten-year marriage during service, out of a 20-year military career, then the presumptive spousal share would be 25%.

[52] Since the SBP program pays 55% of the base amount, and the maximum spousal share is 50%, the spouse would receive at least ***some*** more money in SBP than her lifetime share. If the marriage did not completely overlap the service time, then under any "time rule" formula, the spousal interest would be ***less*** than 50%. In the hypothetical 10 year marriage out of a 20-year military career, if the SBP was in place at the maximum base amount, then the death of the member would cause a jump in payments to the former spouse from 25% to 55%.

[53] In the hypothetical case where the marriage exactly overlapped the last 10 years of a 20-year career, and the gross retirement was exactly $1,000.00, the 6.5% SBP premium would be $65.00. After taking it "off the top," the military pay center would divide the remaining $935.00 in "disposable retired pay" 75% ($701.25) to the member, and 25% ($233.75) to the spouse. The member would effectively pay $48.75 of the premium, and the spouse would effectively pay $16.25.

[54] The 6.5% SBP premium would still be $65.00. After taking it "off the top," the military pay center would divide the remaining $935.00 in "disposable retired pay" 80.2139% ($750.00) to the member, and 19.7861% ($185.00) to the spouse. The member would effectively pay nothing, and the spouse would effectively pay $65.00.

interest on the spouse's life, and she is paying the entire premium for the survivorship interest on the member's life.

The fourth scenario imposes the SBP premium payment entirely on the member, by increasing the spousal share to 26.7380%.[55] The former spouse remains over-secured, as above. The entire premium falls to the member, who still has the free survivorship on the spouse's life. Shifting the premium in this way is analogous to a spousal support award.

The fifth scenario presumes that the court wants to "equally divide" the premium, which would be accomplished by decreasing the spousal share to 23.2620%.[56] This requires decreasing the spousal share somewhat from the default, and increasing the member's share somewhat, to cause a sufficient dollar adjustment so that each pays exactly the same amount toward the premium cost that the military will take "off the top." There is some equitable logic in this idea, although it still leaves the former spouse over-secured, in that the possible survivorship that each party might receive is maximized, and they equally share the cost of the survivorship benefit that the member has on the spouse's life (i.e., none), and the cost of the survivorship benefit that the spouse has on the member (the only survivorship that has a cost associated with it).

As discussed above, it ***is*** possible to restrict the SBP to ***only*** secure the former spouse's lifetime interest – i.e., to arrange things so that she would get the same amount if the member died that she received while he remained alive. Notably, it is ***not*** possible to similarly restrict the ***member's*** interest; no matter what the court does, the member will retain an automatic reversion of all the money paid to the former spouse, if she dies first.[57] In the next four scenarios, then, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits.

Scenario six therefore is the same "default" as set out in scenario two, the only difference being that the base amount is lowered, from the entire retirement benefits, to only that portion of which 55% would equal the former spouse's lifetime interest, in this hypothetical

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[55] Again, the 6.5% SBP premium would be $65.00. After taking it "off the top," the military pay center would divide the remaining $935.00 in "disposable retired pay" 73.2620% ($685.00) to the member, and 26.7380% ($250.00) to the spouse. The member would effectively pay $65.00, and the spouse would effectively pay nothing.

[56] The 6.5% SBP premium is, of course, still $65.00. After taking it "off the top," the military pay center would divide the remaining $935.00 in "disposable retired pay" 76.7380% ($717.50) to the member, and 23.2620% ($217.50) to the spouse. The member would effectively pay $32.50, and the spouse would effectively pay $32.50.

[57] There have been several cases of members taking action to accelerate that reversion by trying to kill former spouses.

case, $454.55.[58] Since the 6.5% premium is reduced to only $29.55, the member's 75% of the $970.45 of remaining "disposable retired pay" yields $727.84, and the spouse's 25% yields $242.61. The member effectively pays $22.16 toward the premium cost, and the spouse pays $7.39.

Scenario seven shifts that reduced SBP premium to the spouse by reducing her percentage of the lifetime benefit.[59]

Scenario eight shifts the reduced the other way, to the member, for the same reasons, and to the same effect, as set out in scenario four, but with smaller totals, since the spousal survivorship interest has been reduced.[60]

And in scenario nine, the reduced burden is equally divided between the parties, for the same reasons as set out in scenario five, but without over-securing the former spouse.[61]

Again, if the spouse dies first, the member gets the full gross military retirement benefits, but if the member dies first, the spouse continues to get only her share of the benefits. Note that under 10 U.S.C. § 1408(e)(1), it is not permissible to pay the former spouse more than 50% of the military retired pay. Thus, if it is intended that the former spouse receive more than about 46 percent, and that the member is to pay the SBP premium, some mechanism other than the shifting set forth above will be needed to effect that end.

G. Why it Might Be Appropriate to Re-allocate the SBP Premium

As explained elsewhere in these materials, the military system does not permit the creation of a divided interest to the spouse, but only a divided payment stream. As detailed in the section immediately above, there is an automatic reversion of the spousal share of those payments to the member, should the spouse die first.

In other words, the member essentially has an automatic, cost-free, survivorship benefit built into the law that automatically restores to him the ***full amount of the spouse's share*** of the

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[58] This is because 55% of $454.55 would be $250.00 – the sum awarded to the spouse.

[59] To 22.7163%, so that she receives $220.45. The member's share, increased to 77.2837%, yields the full $750 that he would have received if there had been no SBP, and the spouse thus effectively pays the entire $29.55 SBP premium.

[60] To 5.7613%, in this scenario, so that she continues to receive $250.00. The member's share, decreased to 74.2387%, yields $720.45, so that he effectively pays the entire $29.55 SBP premium.

[61] Making the spousal interest 24.2382% yields $235.22; increasing the member's share to 75.7618% increases his share to $735.23. Both parties pay $14.77 (actually, there is an odd penny, which for no good reason I allocated to the former spouse, who pays $14.78).

lifetime benefit if she should die before him. No matter what any court might order, if the former spouse dies first, the member not only continues to get ***his*** share of the benefits, but he will ***also*** get ***her*** share, for as long as he lives.

There is little case law guidance as to what would be an appropriate weighing of risks and burdens, or why. Several courts have ruled that the SBP be kept in effect for protection of the former spouse's interest, using one theory or another, but their reasoning has often been sketchy, or faulty.

One court that did explain why it was ruling as it did was the Colorado Court of Appeals, in *In re Marriage of Payne*.[62] The court held that ordering husband to pay for the wife's SBP gave the wife a right already enjoyed by husband, that is "the right to receive her share of the marital property awarded to her." The court adopted the "default" position for distribution of the premiums (discussed in the next section), observing that:

> The cost of the Survivor Benefit Plan is deducted from the husband-retiree's gross pension income of $2200 per month before the net remainder is divided between the parties pursuant to the permanent orders. Thus, the expense is shared equally by both parties.[63]

The military member had appealed in *Payne*, claiming that the SBP should be funded solely by the former spouse because it is "a court-created asset for her benefit alone." The appellate court rejected that argument, holding instead that the SBP is "an equitable mechanism selected by the trial court to preserve an existing asset – the wife's interest in the military pension."[64] Several other courts have reached the same conclusion, but most of the decisions so holding did not fully discuss the math involved in the text of their decisions, or explain the policy choices for who should bear what expense.[65]

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[62] 897 P.2d 888, 889 (Colo. App. 1995).

[63] *Id*.

[64] *Id*.

[65] *Harris v. Harris*, 621 N.W.2d 491 (Neb. 2001); *Kramer v. Kramer*, 510 N.W.2d 351, 356 (Neb. Ct. App. 1993) (affirming award of SBP, reasoning that requiring the purchase of an SBP "gives the division of a nondisability military pension more of the attributes of a true property division"); *Smith v. Smith*, 438 S.E.2d 582 (W. Va. 1993) (ordering husband in dissolution action to purchase and pay for SBP for wife to avoid unfairness of wife's receiving nothing if husband predeceases her); *Haydu v. Haydu*, 591 So. 2d 655 (Fla. App. 1991) (trial courts have discretion to order spouse to maintain annuity for former spouse under SBP); *In re Marriage of Bowman*, 734 P.2d 197, 203 (Mont. 1987) (court recognized that "to terminate [wife's] survivor's benefits jeopardizes her 29 year investment in the marital estate"); *Matthews v. Matthews*, 647 A.2d 812 (Md. 1994) (court order requiring party to designate a former spouse as a plan beneficiary does not constitute a transfer of property); *In re Marriage of Lipkin*, 566 N.E.2d 972 (Dist. Ct. App. 1991) (survivor's benefit is a separate and distinct property interest).

The courts holding that the SBP should be maintained seem to impliedly realize, but not explicitly state, that the members' survivorship interest in the former spouse's benefits is automatic and free, while the spousal survivorship in the member's benefits requires payment of a premium. None of the decisions goes into detail, comparing what the member or the spouse would actually receive in the event of the death of the other, or whether the results fit into the theory of equitable or community property and debt division.

Mathematically, the "default" position discussed below distributes the premium debt proportionally to the parties' respective shares of the benefits taken – not equally.

Having the member bear the entire premium would only appear to be a correct result if the court determined, based on the entirety of the parties' economic positions, that the result was mandated as a matter of disparity of income. Similarly, it would be improper to have the former spouse bear the entirety of the SBP premiums, at least in those states in which the courts are required to equally distribute marital property and debts, because the benefit being accorded to the member in the event of the spouse's death is ***greater***, and there is no cost to that survivorship interest.

As a matter of logic and math, where the member has a ***free*** survivorship interest in the spouse's life, in addition to his own benefits, it seems most appropriate to either have the parties equally divide the premium, or adopt the default position for proportional payments toward that premium.

H. Reserve-Component SBP

The Reserve Component Survivor Benefit Plan (RC-SBP) was established to provide annuities to beneficiaries of reservists who completed the requirements for eligibility for retired pay at age sixty but died before reaching that age.[66]

Before 1978, reservists could not elect participation in their SBP program until they were eligible to draw retired pay (that is, at age sixty). That year, legislation granted them the power to elect participation upon notification of eligibility for retirement, which generally is before they reach age sixty.[67]

There are three options available to reservists upon notification for eligibility. Option A declines coverage until age sixty; if the member dies before that age, there is no benefit. Presuming survival to that time, this option has the same costs and benefits as the active-duty SBP program.

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[66]*See* Pub. L. No. 95-397, 92 Stat. 843 (1978).

[67]*See Id.*

Option B provides coverage so that payments begin on the later of (1) the date of the retiree's death, or (2) the date the retiree would have turned sixty. Benefits are actuarially reduced from the sum provided in Option A.

Option C provides coverage so that payments begin immediately after the retiree dies, regardless of age. Benefits are actuarially reduced from the sum provided in Option A.

The premiums for Option A work like normal SBP premiums, in that they come "off the top" of benefits payable. Premiums for Options B and C are paid by way of that reduction, ***plus*** an actuarial reduction in the benefits paid. This is how the system accounts for coverage being in existence years before eligibility for retirement benefits is reached.

As of 1983, it was possible for reservists to designate former spouses as their SBP recipients,[68] and the 1986 amendments presumably gave courts the same power to deem beneficiary designations in Reservist cases as in any others. SBP benefits based on reserve-component service have a reduction similar to that for regular retirement SBP benefits after a beneficiary turns age sixty-two.

The RC-SBP was amended as of January 1, 2001, to require written spouse concurrence for taking any benefit less than Option C. Thus, the order of events for retirement and divorce make a difference as to whether the former spouse will have any input into the option selected.

I. Service Member's Life Insurance

A mistake frequently made in the course of negotiation or litigation is the effort to compel (or trade assets in order to receive) beneficiary status for a former spouse in a member's National Service Life Insurance (NSLI), or its active-duty counterpart, Serviceman's Group Life Insurance, or SGLI.

This is a mistake because any such stipulation or court order is simply unenforceable – a court order compelling beneficiary status ***cannot be enforced***. Under the laws setting up these insurance plans,[69] the former spouse cannot be made the owner of the policy, and the insured has complete freedom to designate or re-designate the intended beneficiary of the program. The federal courts, early and forcefully, held that the programs were "the congressional mode of affording a uniform and comprehensive system of life insurance for members and veterans of the armed forces of the United States," and the resulting benefits were therefore immune from state court division, even when community property was the

[68] *See* Pub. L. No. 98-94, 97 Stat. 614 (1983).

[69] *See* 38 U.S.C. § 1917, Pub. L. No. 85-857, 72 Stat. 1152, § 717 (Sept. 2, 1958), as amended.

source of the premiums paying for the policy.[70] A host of similar programs have been established, and expired, since 1919.

A former spouse who negotiated beneficiary status for SGLI in exchange for giving up other rights, or even obtained an order to receive beneficiary status under that plan, thus has no direct remedy if the member dies having named someone else anyway; a member is free to change beneficiaries, and such a named beneficiary is free from suits from the former spouse for a portion of the proceeds.[71]

There is apparently no prohibition, however, of a former spouse who has been thus deceived proceeding against the member (at least while everyone is still alive). Such a suit would not be interfering with the protected insurance policy, but punishing the contemptuous act of duplicity by the member. As with other matters involved in these cases, the key is adequate vigilance, especially by the former spouse, to be sure that what was negotiated or ordered was actually put into place, and no one attempts to fraudulently evade the orders, ***before*** anyone dies.[72]

Far better than trying to fix such problems would be to avoid them altogether, of course. Preferable mechanisms by which payments after the member's death could be accomplished include private life insurance (with the intended beneficiary as owner),[73] or beneficiary status under the Survivor's Benefit Plan, discussed above.

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[70] *See Wissner v. Wissner*, 338 U.S. 657, 658 (1949); *see also Estate of Allie*, 50 Cal. 2d 794, 329 P.2d 903 (CA 1958); C.J.S. *Armed Services* § 226.

[71] The key case is *Ridgway v. Ridgway*, 454 U.S. 48 (1981). Cases since then have cited it for the proposition that there is simply nothing they can do for defrauded former spouses. *See*, *e.g.*, *Kaminski v. Kaminski*, 1995 WL 106497 (Del. Chanc. Ct. 1995). In that case, the member had promised in his stipulated divorce decree to name his daughter from his first marriage as his irrevocable beneficiary. When he died leaving his second wife as sole beneficiary, the first wife's action seeking a constructive trust for the daughter was dismissed. The court said that the "narrow exception" for fraud was restricted to "extreme factual situation" unlike simple breach of contract.

[72] "Mendacity is a system that we live in.
Liquor is one way out an' death's the other."
Tennessee Williams, *Cat on a Hot Tin Roof* (1955), act 2.

[73] "I detest life-insurance agents; they always argue that I shall some day die, which is not so."
Stephen Leacock, *Literary Lapses* (1910).

III. DEATH BENEFITS IN THE CSRS/FERS (FEDERAL CIVIL SERVICE) SYSTEM

By way of background, it should be noted that there is an "old" system (Civil Service Retirement System, or CSRS, for those who began service before January 1, 1984) and the "new" system (Federal Employees' Retirement System, or FERS, for those who began service on or after January 1, 1984).[74] The most obvious difference between them is that participants in CSRS do not participate in the social security program, while those in FERS do participate. Under both systems, the survivor annuity election is automatic for current spouses at retirement unless both spouses "opt out."

The two statutory schemes have independent code sections, but generally what is provided by one is provided by the other. The marriage must have lasted at least nine months for benefits to be paid to a former spouse. The former spouse's payments of a portion of the retirement benefits end when the retiree dies.

A. FERS and CSRS Survivorship Provisions

There is at least some limited form of pre-retirement survivor annuity available for a former spouse in the Civil Service System. If an employee dies while still in service, a court-ordered survivor benefit is payable to a former spouse if the employee completed at least 18 months of creditable civilian service, and dies while under the CSRS or FERS retirement coverage.

Under CSRS, a survivor annuity is payable. Under FERS, a lump sum death benefit is payable, and a survivor annuity is also payable if the employee has 10 years of creditable service.

If a separated former employee dies before retirement under CSRS, no survivor annuity can be paid to a former spouse, despite the terms of the court order. In certain limited circumstances, under FERS, a survivor annuity for a former spouse may be payable if a separated former employee dies before retirement.

5 U.S.C. § 8341(h)(1) provides that a former spouse of a deceased member of CSRS is entitled to a survivor's annuity if provided in the terms of a decree of divorce or annulment or court-approved property settlement agreement incident to such a decree. Similar language is repeated for the former spouses of FERS members in 5 U.S.C. § 8445.

[74] *See* 5 U.S.C. §§ 8331, 8401.

After divorce, to remain eligible for survivorship benefits while the retiree is still living, the former spouse must not remarry before age 55.[75] There does not appear to be any such remarriage limitation "if the employee dies before the former spouse remarries before age 55."[76] The former spouse is required to promise, in applying for survivorship benefits, to be personally liable for any overpayments resulting from the spouse's remarriage before age 55.[77]

It should be noted that cost of living adjustments are applied to survivor annuities, which makes it slightly more complicated to determine present values.[78] Court orders which concern marriages ending on or after May 7, 1985, are acceptable for processing under the regulations.[79] Also acceptable for processing are orders awarding survivor annuities in divorces prior to that date, if the retiree was receiving a reduced annuity to benefit that spouse on May 7, 1985.[80]

The OPM considers it bad form to state that the annuity "continues after the death of the retiree" (since the benefits terminate at the death of the employee, and only ***survivor's*** benefits would be available after that date). Use of such a phrase makes the order "not a court order acceptable for processing."[81] Practitioners are advised to refrain from so stating, instead making lifetime benefit payments and survivor annuities quite distinct. Which retirement system is at issue ***must*** appear in the COAP.

If the order uses a formula, then all data necessary for applying the formula must either appear on the face of the court order, or be contained in "normal OPM files."[82] In other words, OPM will look up some data – such as the total number of months of creditable service performed by a retiree – to fill in the denominator of a time rule formulation. Note that references to statutes, or case law, are unacceptable in formulas.[83]

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[75] 5 C.F.R. § 838.732(a).

[76] 5 C.F.R. § 838.732(b).

[77] 5 U.S.C. § 838.721(b)(1)(vi)(C).

[78] *See* 5 C.F.R. § 838.735.

[79] 5 C.F.R. § 838.802(a).

[80] 5 C.F.R. § 838.802(b).

[81] 5 C.F.R. § 838.803(b).

[82] 5 C.F.R. § 838.805.

[83] 5 C.F.R. § 838.805(c).

Amendments to orders are possible, but ***not*** if they are issued after the date of retirement or death of the employee and they modify or replace first order dividing the marital property of the employee or retiree and the former spouse.[84]

In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, ***must*** be: (1) issued prior to retirement or death; ***or*** (2) the first order dividing the marital property.[85]

How about if there was a first order, but it has been vacated or set aside? Well, it is OK, but ***not*** if: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity that was vacated, etc., and (3) ***either*** it is effective prior to its date of issuance, ***or*** the retiree and former spouse do not compensate OPM for any uncollected costs relating to the vacated, etc., order.

The regulations clearly require that the cost of a survivor annuity be paid by way of reduction in the monthly retirement payments.[86] Unlike the military system, however, it is relatively easy to have the beneficiary pay the cost of the survivorship premiums if that result is intended. If the intent is to have the parties both pay part of the premium, the OPM should be directed to divide the "gross" annuity,[87] and if the intent is to have the former spouse only pay the premium, then the OPM should be directed to divide the "self only" annuity,[88] and deduct the entire premium from the former spouse's share.

There are two types of survivor annuities, under sections 8341(h) and 8445 of title 5, United States Code.[89] The former is the default "former spouse" survivor annuity, but is subject to the remarriage-before-age-55 termination discussed above. The latter is an "insurable interest" survivor annuity, and it is not so restricted, but it costs more.

Further, the latter type has various restrictions: it may only be taken by a retiree at the time of retirement, who is in good health and not retiring for disability. Also, it is not enforceable through OPM – the face of the regulations state that such an annuity can be canceled at a later date to provide a survivor annuity for a "spouse acquired after retirement."[90] The same

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[84] 5 C.F.R. § 838.806(a).

[85] 5 C.F.R. § 838.806(b).

[86] 5 C.F.R. § 838.807.

[87] Defined as the total monthly benefit after deduction of any survivorship premium.

[88] Defined as the total monthly benefit before deduction of any survivorship premium.

[89] 5 C.F.R. § 838.912.

[90] 5 C.F.R. § 838.912(c)(2).

regulation goes on to state those situations in which it might be used: if the spouse expects to remarry before age 55, if the employee expects to remarry a younger second spouse before retirement, or if another former spouse already has a normal former spouse survivor annuity. The regulation adds, however, that "the court will have to provide its own remedy if the retiree is not eligible for or does not make the election" since "OPM cannot enforce the court order."

If no amount of the survivor annuity is stated, then the maximum possible sum (55% of the employee annuity under CSRS; 50% under FERS) is selected. However, if the employee is a FERS participant with at least 18 months of creditable service, but less than 10 years, the only death benefit payable to the former spouse is the "basic death benefit as defined in § 843.602" and no other survivor annuity.[91]

One very important distinction from the military survivorship system is that a participant can have ***multiple*** beneficiaries (although, of course, no more than the maximum survivor's benefit can be paid out among however many beneficiaries are named). The survivor annuity can be divided "pro rata," in which case each former spouse receiving a "pro rata" share will receive a portion of the survivor annuity in accordance with the time rule.[92] Unless cost of living adjustments are expressly ordered to ***not*** apply to a survivor annuity, they will apply.[93]

The regulations specifically contemplate an award of the maximum possible survivor annuity, award of the same survivor annuity that had been in effect for a spouse before a divorce, to be continued at that level post-divorce, a prorata share, a fixed monthly amount (with or without cost of living adjustments), a percentage or fraction, an award based on a stated formula, and an award of a percentage, fraction, or formula applied to the maximum survivor annuity.[94] These should be sufficient to take care of most possibilities.

It is also possible to specify that a survivor benefit payable to a former spouse be maintained at one level (for example, the maximum benefit), but can be reduced (for example, to a pro

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[91] 5 C.F.R. § 838.921.

[92] 5 C.F.R. § 838.922(a).

[93] 5 C.F.R. § 838.923.

[94] *See* Model Paragraphs 701-12, 721-22 set out in *A Handbook for Attorneys on Court-ordered Retirement, Health Benefits, and Life Insurance Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program, and Federal Employees Group Life Insurance Program* (United States Office of Personnel Management, Retirement and Insurance Group, rev. ed. July, 1997) (hereafter, *Handbook*). The *Handbook* can be obtained from the Government Printing Office, Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954; its current printing is identified as "RI 83-116," and it includes all clauses on computer disk. The text and clauses can also be accessed, printed, or downloaded from the Internet, from http://www.opm.gov/retire/html/library/other.html.

rata share) in the event that the employee remarries either before retirement, or after retirement, but the language required is different for the two possibilities.[95]

One fascinating attribute of the civil service system is what happens if the ***former spouse*** predeceases the member: the former spouse's share of the retirement benefits revert automatically to the retiree, ***unless*** the court order provides otherwise. Instead of that automatic reversion, the court ***can*** provide that the money is paid: (1) into court (presumably for further distribution upon further court order); (2) to "an officer of the court acting as a fiduciary"; (3) to the estate of the former spouse; or (4) to one or more of the retiree's children.[96] Thus, it is possible to create a heritable asset for the former spouse.

B. An Aside Regarding the Thrift Savings Plan

A "Thrift Savings Plan" was also created by the FERS statute (but is also available to CSRS participants). It is payable in a number of ways, but requires spousal consent if taken in any form other than a joint and survivor annuity. Loans can be taken out by the retiree against the Plan account, unless a court order prohibits it.

The Thrift Savings Plan ("TSP") is expressly excluded by the regulations governing the CSRS and FERS retirement benefits.[97] It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board), which has its own rules for distributions.[98] There are no "survivorship" benefits, *per se*, for TSP accounts, as it is a cash plan like an IRA.

Withdrawal of TSP funds is limited to those separating from service, but practitioners should note that there are lump-sum distribution options from the plan (if $3,500.00 or less, the full fund balance is ***automatically*** distributed at the time of separation). More importantly, hardship loans up to $50,000.00 are available against the plan balance, and a specific category of hardship for loan purposes is "unpaid legal costs associated with a separation or divorce." The Federal Retirement Thrift Investment Board will, however, honor "most" court orders restricting distribution or safeguarding funds for other purposes (such as child

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[95] They are set out at Model Paragraphs 751 and 752 in the Handbook.

[96] 5 C.F.R. § 838.237.

[97] 5 C.F.R. § 838.101(d).

[98] The Thrift Savings Plan is *not* addressed in the clause set provided by Office of Personnel Management. The practitioner must find out whether a Civil Service employee is or has been a participant in the Thrift Savings Plan, and if so whether any funds have been withdrawn or borrowed from the plan. Those wishing further information on the Thrift Savings Plan can call the administering agency (Federal Retirement Thrift Investment Board) in Washington, D.C., at (202) 942-1600.

support or alimony awards). Obviously, if the employee spouse has emptied out the TSP prior to the divorce, that fact should be brought up in the litigation.

IV. DEATH BENEFITS IN THE NEVADA PERS RETIREMENT SYSTEM

A. Background and Basic Statutory Structure

Survivor's benefits for PERS participants vest upon the member's eligibility for retirement, completion of ten years of service, or the member's death, whichever occurs first.[99]

Since 1987, PERS has required spousal consent to the form of retirement chosen.[100] However, the absence of spousal consent only prevents the member from choosing any desired retirement option for 90 days.[101] While this makes it look as if the burden is on the spouse to get a court order prohibiting the member from choosing a different retirement option within the 90 day period, it is not really that onerous a burden, since PERS is willing, in practice, to alter beneficiary designations after retirement upon service of a court order requiring it.

Still, there is a risk to the spouse, since the member's death at any time before a corrective court order is entered could result in elimination of the survivorship interest. Further, PERS is statutorily immune from suit for benefits paid because of a member's falsification of marital status on a retirement option selection form.[102]

Under PERS, it is possible to both provide a survivor annuity and to modify its amount to reflect only the share of the pension awarded to the former spouse. Option 6 permits the specification of the sum that is guaranteed to the spouse irrespective of the member's death.[103]

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[99] NRS 286.6793.

[100] *See* NRS 286.541.

[101] *See* NRS 286.545.

[102] NRS 286.541.

[103] Note in negotiating any such sum that the amount of the survivor annuity will have a *direct* impact on the amount of the monthly benefit available for division between the parties during the life of the member. PERS will, upon request, analyze how much would be paid under each option, but since the survivorship interest lowers the monthly sum payable (which is usually the amount that PERS uses to calculate the survivor's interest), the calculation can be a bit complicated.

PERS provides for post-retirement cost of living adjustments, based upon the lesser of the CPI average or at 2% per year after three full years, 3% per year after six years, 3.5% per year after nine years, 4% per year after 12 years, and 5% per year after 14 years.[104] Under the statutes, survivor beneficiaries only receive COLAs under options 2, 3, 4, and 5.[105] PERS has also, however, permitted COLA adjustments to fixed survivorship sums under Option 6, despite the absence of clear statutory authority to do so.

PERS provides that the option selection will be "automatically adjusted" to option one (the unmodified allowance) if a spouse or former spouse with a survivorship option predeceases the member.[106]

Unfortunately, the system has no corresponding benefit to protect a former spouse – it has no pre-retirement survivorship provision. In other words, if a former spouse is awarded a portion of the retirement benefits, but the member dies prior to retirement, the spouse will not receive any benefits, since the PERS statutes allow only a shared-payment type of benefit, not a "separate interest" type of benefit that sets up an entirely separate lifetime annuity based on the spouse's life. Prior to the member's retirement, PERS leaves the former spouse absolutely unprotected from being divested in the event of the member's death.

The only apparent means by which counsel for the non-employee spouse can deal with this risk is by insisting on securing the spousal interest with a policy of private insurance.[107] As is the case with survivorship interests in many retirement plans, this is a hidden malpractice danger, since the failure of counsel to suggest the obtaining of insurance could lead to an allegation of malpractice if the former spouse is ultimately divested of her interest by way of the member's death prior to retirement.

The state system also shares the unfortunate characteristic of having a ***non-divisible*** survivorship interest. In other words, if a former spouse is awarded 25% of the retirement, and Option 2 is selected, the former spouse would actually gain an ***increase*** in payments after the member's death. What cannot easily be done is to ***divide*** the survivorship interests (between a current and former spouse, for example), as is simply done for ERISA-governed retirement benefits, or even Civil Service survivorships (which can be easily awarded in *pro rata* shares).

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[104] *See* NRS 286.575; 286.5756. The CPI alternative test is based on lifetime experience, so it is only recently, during the past few years' run of record low inflation, that some members have bumped up against the cap and received COLA adjustments of less than the sums set out in the fixed-percentage schedule.

[105] *See* NRS 286.5775(3).

[106] NRS 286.592(1).

[107] *But see* discussion in the Introduction, and below, of the *Wolff* opinion.

Anecdotal accounts suggest that some creative counsel have accomplished a divided survivorship benefit anyway, by having the relevant court order call for such a division, and having PERS pay the survivorship interest (in one of the beneficiary's names) to a trustee who then divides the benefit between them.

It is very unfortunate that such Rube Goldberg constructs are still necessary. Given the large and increasing proportion of divorces involving multiple families, a change in PERS to explicitly allow division of the survivorship interest would be a beneficial change.[108]

B. NRS 125.155

In 1995, legislation was quietly introduced that, in its original form, would have enormously altered the application of Nevada's community property laws as it applies to PERS benefits.[109] It was discovered by officers of the Family Law Section on nearly the last day of the legislative session, and was quickly and radically altered just as the session ended.

Enacted as NRS 125.155, the statute still contains several very questionable provisions. The only parts of the legislation directly relevant in this section of the materials, however, are the subsections to NRS 125.155(2), the main section of which states that in dividing PERS retirement, a court "may . . . order that the benefit not be paid before the date on which the participating party retires."[110]

The subsections to that provision provide that a court: (a) may require a "performance or surety bond" to be "conditioned upon payment of the pension or retirement benefits . . . equal to the amount of the determined interest of the nonparticipating party in the pension or retirement benefits"; (b) may require the purchase of life insurance to secure the determined value of the spousal share "until the participating party retires"; (c) may increase the value of the determined interest of the spouse "as compensation for the delay in payment of the benefit to that party" upon agreement of the parties to do so; or could "allow the participating party to provide any other form of security which ensures the payment of the determined interest" of the spouse.

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[108] The American Bar Association is on record as encouraging all pension plans to provide for such interests.

[109] *See* extended discussion in the PERS section of these materials.

[110] This, of course, is contrary to *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995); and *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996). It appears to nearly define an equal protection violation, since it states that spouses of participants in the Nevada PERS system are entitled to lesser protection of their community property rights than spouses of all participants in all other private and public retirement systems on which a divorce court might rule.

Some of this, such as the provision permitting a court order "upon agreement of the parties" is merely useless, but most of it seems derivative of the constitutional flaws referenced above. Still, to the degree that it appears to contemplate a codification of the courts' common-law power to secure their judgments (by providing a private insurance policy in a sum that approximates the present value of the spousal share of the retirement), it is at least benign surplusage.[111]

Apparently, no portion of the statute has yet been challenged in any case that has resulted in a published appellate decision.

C. Planning Opportunities in Police and Fire-Fighter Survivorship Benefit Cases

Police and fire-fighters survivor's benefits are somewhat different than those of other PERS participants. Most employees, to get the full, unreduced amount of monthly benefits at retirement, must give up all survivor's interests. Put another way, the monthly lifetime benefit is reduced in order to pay for the survivorship benefits; the larger the benefit option selected for the former spouse, the greater the reduction in the lifetime benefits.

Police and fire-fighters, however, get both the full monthly retirement ***and*** a 50% survivorship interest, ***if*** the same spouse is married to the member at both retirement and the member's death.[112] In other words, as long as those conditions are satisfied, there is ***no*** reduction in the monthly lifetime retirement benefit, and the survivor gets half the monthly sum for her life if the member dies first.

This statutory bonus of a "free" survivorship interest presents a substantial strategic planning opportunity. The usual situation is that the member divorced one spouse and married another while still employed. If the former spouse was awarded a survivorship interest (i.e., the order required an option other than option one to be selected upon retirement), it is possible to create a "win/win" situation, as long as the parties cooperate, or a court is willing to order a modification of the option selection.

Specifically, altering the option selection to option one will eliminate the premium that would otherwise be charged to fund the survivorship benefit for the former spouse. In return, the monthly benefit to be divided between the member and the former spouse will ***increase***.

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[111] *See Kennedy v. Kennedy*, 98 Nev. 319, 646 P.2d 1226 (1982) (where interest is accruing on a judgment, the payment schedule must "allow the liquidation of arrearages on a reasonable basis," including the accruing interest); *Reed v. Reed*, 88 Nev. 329, 497 P.2d 896 (1972) (courts have discretion to determine the method of paying a judgment).

[112] NRS 286.667.

While the precise dollar figure will vary from case to case, depending on the retirement payable to the member, the increased sum payable to the former spouse by elimination of the premium might be enough to fund a private insurance policy in favor of the former spouse equal or greater than the actuarial value of the survivorship benefit.[113] If it does not cover that cost, the member could always stipulate to increase the precise time-rule fraction payable to the former spouse by an amount sufficient to cover that premium.[114] Either way, the cost to the member will be less than the cost of providing full insurance coverage for his later spouse.

D. Direct Conflict Between PERS Policy and Nevada Supreme Court Directive

Wolff v. Wolff[115] contained a number of holdings directly bearing on the practice of division of PERS retirement benefits, and the allocation of survivorship interests. In that case, 11.71 years of husband's 21.65 years of service with PERS (highway patrol) had accrued during the marriage, creating a 54% community interest. Husband became eligible to retire three months after divorce, but elected to keep working.

The Court reversed the lower court's requirement that the husband purchase a life insurance policy to cover a loss of benefits to the wife if the husband died prior to retirement, since there was no existing insurance policy, and there was no corresponding liability to the wife, and the order therefore constituted an "unequal distribution of debt." The Court found that if the husband died before he retired, the wife still "may be" entitled to a portion of the retirement, citing NRS 286.6703. This would appear to be a judicial commentary that there ***may*** be some kind of implied pre-retirement survivor annuity within PERS, but since the statutes do not provide for any such, it will apparently take a case directly on point to see if the Court meant to create one.

Just as amazing, however, the Court made the interests in PERS ***heritable***, specifically affirming the lower court's order that the wife's share would ***not*** revert to the husband if she predeceased him, but would instead continue being paid to her estate. The Court held that

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[113] There are two ways to calculate the amount that should be secured. Looked at one way, the only necessary amount is the difference in life expectancies between the member and former spouse, multiplied by the monthly sum payable to the former spouse, since that is the only period in which the survivorship benefits would ***probably*** be paid to the former spouse. On the other hand, it is ***possible*** that the member could die the day after the order is entered, so an argument could be made that the sum to be secured is the present value of the entire lifetime payment stream to the former spouse, since the lack of a survivorship benefit through the plan puts that entire amount at risk (albeit a risk that diminishes every month that both parties remain alive).

[114] The member will have a few more dollars to allocate, of course, since his share of the monthly lifetime benefit will have also increased by the switch to option one.

[115] 112 Nev. 1355, 929 P.2d 916 (1996).

the community interest was divided upon divorce to two sole and separate interests, citing 15A Am. Jur. 2d Community Property Sec. 101 (1976), so that even if the estate was not listed as an alternate payee in NRS 286.6703(4), her estate was entitled to the payments that she would have received if she was still alive.

PERS will ***not*** enforce the Court's holding that an Alternate Payee's portion of the retirement benefit is permanently transferred to the Alternate Payee, creating an interest that should be paid to his or her estate if the Alternate Payee predeceases the Member – even if directly recited in a PERS QDRO. Instead, PERS will reject any proposed order reciting the Court's holding in *Wolff*.[116]

This creates a terrible dilemma for counsel, since the Nevada Supreme Court has required counsel to do what PERS says they cannot do.[117] This creates an obvious danger for counsel. If counsel complies with the directive of PERS to remove the language that the Nevada Supreme Court has told us should be in the QDRO, the attorney runs the risk of being sued by the alternate payee's survivor, or estate, should the alternate payee predecease the member and the flow of benefits not go to those survivors.

It is not appropriate for counsel to be caught in the middle of PERS' dispute with the Nevada Supreme Court, but that is the current situation. Apparently, it will take a case in which counsel for an alternate payee is willing to seek a writ of mandamus to resolve this conflict.[118]

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[116] One such rejection read: "In the event the Alternate Payee predeceases the Participant Retired Employee, the entire benefit is then paid to the retired employee. The Alternate Payee cannot designate a beneficiary or the estate to receive his portion of the benefit."

[117] For some years, we have noted PERS' rejection of orders complying with the mandate in *Wolff*. We have attempted, unsuccessfully, to bring it to the attention of PERS.

[118] The writ is to issue to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, and where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160. A writ of mandamus is available when the respondent has a clear, present legal duty to act, or to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). One function of a writ of mandate is to compel the performance of any act. *See Clark County Liquor & Gaming Licensing Bd. v. Clark*, 102 Nev. 654, 730 P.2d 443 (1986).

V. DEATH BENEFITS IN PRIVATE (ERISA-GOVERNED) RETIREMENT PLANS

Many attorneys find the various forms of benefits available from private employers to be confusing. Generally, private plans come in two varieties – defined benefit plans[119] and defined contribution plans.[120]

Private pensions, after the Employee Retirement Income Security Act of 1974 (ERISA) and the Retirement Equity Act of 1984 (REA), may only be divided by means of a Qualified Domestic Relations Order (QDRO). ***Any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a "domestic relations order" under federal law.[121] It becomes a "qualified" order, or QDRO, when it creates or recognizes one of the listed classes of persons as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in a pension plan that is a "qualified plan."

An order is ***not*** "qualified" if it requires a plan to provide a type or form of benefit not otherwise available under the plan, or requires the plan to provide a greater (actuarially computed) sum of benefits, or requires payment of benefits to an Alternate Payee that are required to be paid to ***another*** Alternate Payee under a prior QDRO.[122]

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[119] A defined ***benefit*** plan (often called a pension plan) is usually funded by employer contributions (although in some plans employees can contribute) and is intended to provide certain specified benefits to the employee after retirement, usually for life. Often, the benefit is determined by a formula taking into account the highest salary received and the total number of years worked for the employer (such as a "high-three" or "high five" plan). For example, a plan might pay one-tenth of an employee's average monthly salary over the three years before retirement, multiplied by one-fourth the number of years that the employee worked. A twenty-year employee earning an average of $2,000.00 per month during his last years would get $1,000.00 per month (i.e., $2,000.00 x .1 x 20 x .25). Generally, no lump-sum distributions (other than certain nominal amounts in some plans) can be distributed from defined benefit plans. The IRS apparently considers $3,500.00 the measure of "nominal" for this purpose.

[120] Defined ***contribution*** plans (including profit sharing and 401(k) plans) are those in which the employee has an individual account made up of contributions made by the employee (and, if any, by the employer), plus investment gains. Employers are not required by law to contribute, although many such plans contractually bind the employer to add some formula percentage of the amount the employee puts into the plan. *See* 29 U.S.C. § 1002(34). These plans come in many varieties, including profit-sharing plans (employer contributions vary according to company performance), stock bonus plans (the plan invests in the securities of the company itself), "401k" plans (employee chooses either taxable salary or nontaxable contribution to plan), and money purchase plans (like profit-sharing, but with a fixed employer contribution). The key concept for such plans is that they have a specific balance of funds belonging to each particular employee.

[121] *See* 29 U.S.C. § 414(p)(1)(B).

[122] *See* 29 U.S.C. § 414(p)(3), 29 U.S.C. § 1056(d)(3)(D).

QDROs need not necessarily be long or complex; the question is what is sought to be accomplished, and what safeguards are reasonably necessary given the parties, the background factual situation, the kind of plan involved, and the desired distributions.[123] These materials will address only those portions of proposed QDROs going to survivorship benefits.

A. Defined Contribution Plans

Typically, such plans incorporate a specific benefit payable to a beneficiary in the event the participant dies while in active service. The usual pre-retirement survivorship award is the entire account balance in the participant's name.

The death benefit can be made payable (in whole or part) to a former spouse by means of a QDRO; application of the rules controlling this possibility give rise to several possibilities for dispossession or unjust enrichment.

If the now-former spouse was awarded a portion of the account balance (usually by roll-over to the spouse's IRA), but the participant does not change the beneficiary designation forms provided by the plan, the former spouse might be able to "double dip" by receiving both the spousal share of the balance at divorce ***and*** a survivorship interest in the remainder. This could be true even if the participant remarries, and believes that the later spouse is the beneficiary, and even if the decree contains a general residuary, waiver or release clause.[124]

In *McMillan*, the court noted federal preemption of state laws that relate to ERISA plans, and pointed out that ERISA requires that a plan administrator discharge his duties in accordance with the documents and instruments governing the plan. In that case, the plan documents named the woman as beneficiary, and her ex-husband did not change this designation after the divorce. The court found that the "clear statutory mandate," together with the plan documents, dictated that despite the divorce settlement waiver the woman was still the beneficiary.

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[123] These materials, however, will join the near-universal chorus of those who write or lecture in this field, and stress that practitioners should ***not*** simply copy the "form" or "sample" QDROs provided by companies, especially if the intent is to adequately serve the interest of the Alternate Payee (former spouse). It is relatively easy to come with an order sufficient to pass muster under ERISA, but practitioners should not believe that the plan has any special interest in protecting the rights of a former spouse under state law or a decree of divorce. For example, the entire ***subject*** of survivor's benefits may not be in a plan's sample order; that in no way excuses the practitioner from considering survivor's benefits, addressing them in the QDRO, and ensuring they are in place for the former spouse, where appropriate under the decree.

[124] *See McMillan v. Parrott*, 913 F.2d 310 (6th Cir. 1990) (woman did not give up her right to the proceeds of her now deceased former husband's vested ERISA plans, of which she was designated as beneficiary, when she signed a divorce settlement in which both spouses relinquished 'any and all' claims against the other and in which the husband was designated to receive all property not otherwise disposed of).

The case does not stand alone; some federal courts have been quite strict about enforcing the beneficiary designation on the face of plan documents and requiring that any waivers, to be effective, must specifically refer to the spouse's rights as a beneficiary in an ERISA plan.[125] Even where the intentions of both parties appear to be clear, failing to do an adequate hoop-jump through the technical requirements of the plan's beneficiary designations can give rise to a holding that the waivers were inadequate and the former spouse is entitled to the proceeds.[126]

The level of technicality given "preemptive" importance can border on the ridiculous. In *Lasche*, the district court held that a former wife was entitled to the proceeds of a Merrill Lynch retirement plan in the name of her deceased husband, where she signed page five rather than page four of the plan documents for waiver of those survivor's benefits. The court found that the waiver requirements of ERISA would be "hollow protection" if not conformed to precisely, and thus that she did not "effectively" waive her rights in the plan. This conclusion was in ***spite of*** the wife's admitted signature on the waiver documents, and despite the fact that the waiver forms had been signed in accordance with a prenuptial agreement that called for that waiver to be signed. In other words, the court readily acknowledged that its result flew in the face of the parties' clear and mutual intent, and the reviewing appellate court also thought that form was more important than intent.

The key to such cases appears to be that of specificity and formality; if a participant seeks to have a former spouse waive an interest in a plan, it is necessary to be very specific about what is being waived; it is much more certain to hold water if the proper procedures are followed exactly.[127]

This is not to say that the federal courts are all aligned on the subject; imperfectly executed waivers are sometimes given effect, and the outcome may well depend on the federal circuit in which the litigants happen to live.[128] The court in *Altobelli* noted that ERISA does not directly address this issue and there is a split of authority among other circuits; it chose to reject the approach of the Second and Sixth Circuits that holds that a divorce settlement cannot effectively waive pension benefits because the plan administrator may consider only the beneficiary designation on file, and instead agree with the Seventh Circuit that ERISA's anti-alienation provision does not apply to a beneficiary's waiver of benefits.

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[125] *See Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown,* 897 F.2d 275 (7th Cir.), *cert. den.*, 498 U.S. 820 (1990); *Lyman Lumber Co. v. Hill*, 877 F.2d 692 (8th Cir. 1989).

[126] *See Lasche v. George W. Lasche Basic Retirement Plan*, 870 F. Supp. 336 (D. S. Fla. 1994), *aff'd*, 111 F.3d 863 (11th Cir. 1997).

[127] *See Hurwitz v. Sher*, 982 F.2d 778 (2nd Cir. 1992), *cert. den.*, 508 U.S. 911 (1993).

[128] *See*, *e.g.*, *Estate of Altobelli v. IBM*, 77 F.3d 78 (4th Cir. 1996) (finding that a woman, who was the default beneficiary of her now deceased ex-husband's employer-provided pension plans, "effectively surrendered her rights" in the pensions in their decree-incorporated marital settlement agreement).

The Ninth Circuit weighed in on the side of a narrower preemption analysis, permitting state courts to entertain actions such as constructive trusts intended to allow the intentions of parties to govern the payment of ERISA-governed survivor designations. *See Emard v. Hughes Aircraft Co.*[129]

When *Emard* was issued, the opinion was promptly "disagreed with" by the Fourth Circuit in *Metropolitan Life Ins. Co. v. Pettit*.[130] This is not unusual; Shepardizing virtually any of the above federal cases yields a host of "criticized" and "distinguished" cites from the other circuits.

State courts have appeared somewhat more concerned with the resulting equities, and more willing to give effect to the perceived intentions of the parties. *See*, *e.g.*, *Wennett v. Cappone*, 4 Mass. L. Rep. 706 (Mass. Super. 1996), 22 FLR 1320 (BNA May 21, 1996) (woman's waiver of any interest in her husband's employer-provided retirement plan, which was incorporated into their divorce decree, was controlling over her designation as the plan beneficiary).

B. Defined Benefit Plans

ERISA requires defined benefit plans to provide a default pre-retirement survivor benefit payable to a spouse; it may be awarded, in whole or part, to a former spouse. Ever eager for acronyms, those working in the field tend to refer to the standard death benefit payable while an employee continues to work as a "qualified pre-retirement survivor annuity," or "QPSA"; the same folks refer to the standard death benefit payable after retirement and after the death of the employee as a "qualified joint and survivor annuity," or (unpronounceably) "QJSA." Basically, the amount of the benefit is either all, or half of the accrued benefit as of the last day the participant was alive and in service.

The same "double-dipping" possibilities exist here as with defined contribution plans, since an independent benefit can be carved out for a former spouse through a QDRO; if the former spouse is nevertheless retained as the survivor beneficiary, the former spouse would effectively get a double recovery. Many of the same considerations, and much the same results, have been seen in litigation concerning beneficiary designations in defined benefit plans.[131]

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[129] 153 F.3d 949 (9th Cir. 1998), *cert. denied*, ___ U.S. ___ (1999).

[130] 164 F. 3d 857 (4th Cir. 1998).

[131] *See. e.g.*, *Trustees of Iron Workers Local 451 Annuity Fund v. O'Brien*, 937 F. Supp. 346 (D. Del. 1996) (waiver provision in a divorce stipulation purporting to release each party from present and future claims by the other did not operate to waive the wife's interest as the designated beneficiary of the husband's ERISA governed pension plan).

As with defined contribution plans, the results in these cases are not always predictable, and not always what might be expected from an examination of the probable intent and expectations of the parties.[132]

There is a lesson to be learned from these cases. The only thing likely to result from relying upon the terms of the decree alone to effect beneficiary changes is litigation, and one or more displeased litigants looking for someone to blame. It is incumbent upon divorce practitioners to advise their clients to change the beneficiary designation forms (on defined benefit ***and*** defined contribution plans) as part of the file closing procedure.

Additionally, practitioners should be aware that, no matter what one or both parties wants to happen, it may not be ***possible*** to create an award for a former spouse, and it may prove impossible to remove a beneficiary designation from a now-former spouse where ***that*** is intended.

Specifically, if the divorce occurs after retirement, then the practitioner must find out what benefits were elected at the time of retirement. If, for example, the participant had selected a "single life annuity," then the monthly benefit would be all that was before the court, and there would ***be*** no death benefits to allocate to a former spouse, even if the parties (or a court) wished to do so. Thus, no survivorship benefit would be at issue.

Some courts have taken the position that if the divorce occurs after retirement, and the spouses had selected a benefit form creating a survivor's benefit in the spouse, both parties had necessarily shared the burden of reduced monthly payments during life because of the premium therefor, and it was too late for the participant to request a change in benefit structure.[133]

Of course, it is easy to construct a situation where a different result would be warranted, such as when a short-term marriage overlaps the end of a career, and a worker makes his or her spouse the beneficiary upon retirement (since failing to name ***someone*** usually requires permanently giving up any survivorship interest).

ERISA does not speak directly to the question of waiver; there is no legal requirement in such circumstances, either way. Where a plan does not permit post-retirement beneficiary re-designation, it may be impossible to remove a spouse from beneficiary status, or to

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[132] *See*, *e.g.*, *In re Estate of Lanken*, 676 A.2d 190 (N.J. Super. 1996). There, the court held that the anti-alienation provision of ERISA applies to beneficiaries as well as plan participants, so that a woman did ***not*** waive her interest as named beneficiary of her husband's pension plan when in their divorce judgment she withdrew her "demand for support, equitable distribution, and attorneys fees," and the husband died 14 years after the divorce without having changed the beneficiary designation.

[133] *See*, *e.g.*, *Carlson v. Carlson*, 108 Nev. 358, 832 P.2d 380 (1992) (now-former spouse entitled to remain the survivor beneficiary).

nominate a later spouse, directly, as a substitute survivor beneficiary. This state of affairs leaves the parties involved to the vagaries of lawsuits regarding waivers and seeking constructive trusts, where there has been a great deal of activity.

A trio of federal cases illustrate the concept. Most recently, in *Egelhoff v. Egelhoff*,[134] the Court found that a Washington State statute[135] "related to" pension benefits and was thus preempted by ERISA. The statute provided that the designation of a spouse as the beneficiary of any non-probate asset (including a life insurance policy or employee benefit plan) was revoked automatically upon divorce. The decedent had not yet retired when he divorced, remarried, and then died. His heirs attempted to use the Washington statute to effect an "automatic" change of beneficiary designation, which the Supreme Court held had an impermissible relation to ERISA plans and was therefore preempted.

The primary thrust of *Egelhoff* concerned the burden to be put on plan administrators if they were required to turn to the statutory law of the various states in determining to whom to pay benefits, and how a state law that would require that result would be "related to" ERISA and therefore pre-empted as conflicting with that statute. The opinion acknowledged the dissent's complaint – that such a broad of an interpretation of ERISA would appear to be contrary to even such ancient common law doctrines as "slayer" statutes – but decided that since those statutes were not before the Court in that case, it need not be addressed.[136]

In *Boggs v. Boggs*,[137] the Court held that ERISA preempts a state community property law permitting the testamentary transfer of an interest in a spouse's pension plan. *Boggs* dealt with a situation where the sons of a predeceased spouse tried to prevent the ***new*** spouse from collecting the survivor benefits, based upon a purported testamentary transfer of the deceased former spouse's survivorship interest to the sons.

The Court held that ERISA preempted state law allowing a nonparticipant spouse to transfer by testamentary instrument an interest in undistributed pension plan benefits.

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[134] 532 U.S. 141, 121 S. Ct. 1322, 149 L. Ed. 2d 264 (2001).

[135] Wash. Rev. Code § 11.07.010(2)(a) (1994).

[136] Confusingly, the Court majority further remarked that since such "slayer" statutes had "been adopted by nearly every State" and had "a long historical pedigree predating ERISA, . . . their interference with the aims of ERISA is at least debatable." From a family law perspective, that gives some concern that the Court will view ERISA preemption as a "majority rules" matter, which does not bode well for the validity of ***any*** community property question that might pass anywhere near ERISA's orbit.

[137] 520 U.S. 833, 117 S. Ct. 1754, 138 L. Ed. 2d 45 (1997).

The modern case most commonly cited for an expansive view of ERISA preemption is *Hopkins v. AT&T Global Info. Solutions Co.*,[138] which dealt with a former spouse trying to collect unpaid alimony from an obligor's subsequent spouse by means of attaching that subsequent spouse's survivorship benefits. Technically, the question presented was the qualification of the order sought by the former spouse as a QDRO. The former spouse, who happened to be owed money by the decedent, sued the pension plan arguing that the plan should not pay survivor's benefits to the final spouse and widow, as the plan intended to do.

The court affirmed the dismissal of the former spouse's case, due primarily to the priority provided under ERISA to protection of surviving spouses, reasoning that ERISA vested the survivorship benefits in the surviving spouse upon the decedent's death, so that the benefits were not his, but those of the surviving spouse. The *Hopkins* court stated that it "need not consider the interests of a subsequent spouse" because of the applicability in that case of § 1055(f).[139] The provision cited is an optional one, which states that a plan ***may*** provide that survivorship benefits are conditioned upon the marriage of the participant and named beneficiary for a year prior to the date of death or the annuity starting date.

This is not to say that the conclusion will always be reached that ERISA preempts the application of state law, or thwarts the conclusions that would be reached under state law. In *Lewis v. Atlantic Research Corp.*,[140] the worker had named his children as beneficiaries of an ERISA-governed plan; he retired four years later, remarried after another three years, and then died two years after his last marriage. The children claimed that under 29 U.S.C. § 1055(f) and the holding of *Hopkins* that their father's final spouse and widow was not his "surviving spouse," based on their claim that the survivorship benefits had "vested" in them upon his retirement.

The court rejected the argument, finding that the fact of naming others could not defeat the primacy given protection of surviving spouses, even where it appears that it was the decedent's intention to do so. The *Lewis* court noted that the code section at issue in *Hopkins*, Section 1055(f) is "an optional provision, providing that a plan 'may,' not 'shall' or 'must,' incorporate certain requirements governing whether a spouse can receive spousal benefits."[141] *Lewis* instructs that there are no mandates to the code section at issue in *Hopkins* at ***all***. The court held that the widow, who had married the plan participant after his retirement, was entitled to the benefits. *Id*.

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[138] 105 F.3d 153 (4th Cir. 1997).

[139] *See* 105 F.3d at 157 n.6.

[140] 1999 U.S. Dist. LEXIS 13569 (W.D. Virginia, Aug. 30, 1999).

[141] *Id*. at 10.

The impact of equitable doctrines where § 1055(f) is implicated was faced by the court in *Croskey v. Ford Motor Company*,[142] in a case involving a bigamist whose two "wives" both made claims to the same stream of survivorship benefits. After a lengthy analysis, the court eventually remanded for a trial court determination of whether the equitable doctrine of laches should bar the earlier wife from denying the legitimacy of the second wife's marriage, thus placing the latter wife in the position of "surviving spouse" under the statute; the trial court was directed to ***state*** law in making its determination of entitlement.

ERISA does not explicitly address the possibility that a retiree could divorce, his spouse could relinquish her status as beneficiary, the retiree could then remarry, and then seek to have those benefits paid to the intended later spouse (and widow). Some courts hearing such cases have stated that they should be settled in accordance with "federal common law," a body of case law developed where ERISA itself does not expressly address the issue before the court and courts are called upon to construct a common law that effectuates the policies underlying ERISA.[143] In so doing, courts may use ***state*** common law as a basis for federal common law, to the extent that state law is not inconsistent with congressional policy concerns.[144]

There are those who reference the internal intricacies of ERISA in attempting to separate the legal doctrines applicable to ERISA-governed ***welfare*** plans from those applicable to ERISA-governed ***pension*** plans. Specifically, the opinion was sometimes expressed that while equity is important in cases concerning ERISA-governed ***welfare*** plans, courts must ***ignore*** equity when deciding cases that addressed ERISA-governed ***pension*** plans. This does not appear to be true, however.

In *Silber v. Silber*,[145] the Court of Appeals of New York addressed the issue of federal common law, under which a court may recognize the waiver/relinquishment of survivor beneficiary status of ***pension plan*** benefits upon divorce. The *Silber* court noted that its view was the far majority view, and explicitly rejected any contrary reading of *Hopkins*, while following a constructive trust case, *Estate of Altobelli v. IBM*.[146]

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[142] 2002 U.S. Dist. LEXIS 8824 (SDNY, May 6, 2002).

[143] *See Thomason v. Aetna Life Ins. Co.*, 9 F.3d 645 (7th Cir. 1993).

[144] *Id.*; *see also Phoenix Mutual Life Ins. Co. v. Adams*, 30 F.3d 554 (4th Cir. 1994) (facts showed sufficient performance of acts indicating intention to name successor beneficiary, despite technical absence of formal change of beneficiary; such substantial compliance with technical requirements was sufficient).

[145] 99 N.Y.2d 395, 786 N.E.2d 1263, 757 N.Y.S.2d 227 (2003).

[146] 77 F.3d 78 (4th Cir. 1996).

In *Walsh v. Woods*,[147] the South Carolina Court of Appeals held that the trial court erred in granting judgment for an ex-wife based on ERISA provisions governing vesting and non-alienability, and should have examined the settlement agreement to determine if the ex-wife had relinquished "all of her interests" in the pension. The husband had named his then-current wife as beneficiary upon retirement, and upon divorce she relinquished the benefits. The husband later remarried and wanted the benefits to go to his new spouse.

In *Neal v. General Motors Corporation*,[148] the United States Federal District Court for the Western District of North Carolina stated that where a domestic relations order upon divorce calls for waiver/relinquishment, that intent can be placed in a QDRO, is exempt from ERISA's preemption, and has "full force and effect over an ERISA benefit plan," citing 29 U.S.C. § 1056(d)(3)(A).

The Supreme Court of Texas joined all of these cases in finding that federal common law (found to be represented by and identical to the Texas law governing waivers and constructive trusts) permitted the beneficiary of an ERISA-governed pension plan to waive or relinquish those benefits, and that such a waiver is to be enforced by way of a QDRO designating a new survivor beneficiary. *Keen v. Weaver*.[149] That decision stated that the rule it adopted was by far the majority rule, in both federal and state courts, and that only one federal circuit (the Sixth) seemed to have a contrary view. Further, the court noted that many such decisions were issued after *Egelhoff*, and that *Hopkins* should not be read to lead to any contrary result, citing *Altobelli* and *Fox Valley and Vicinity Constr. Wkrs. Pension Fund v. Brown*.[150]

All of these seemingly-contradictory opinions about the scope of ERISA preemption do not yield much easily-understood rules of construction. One of the clearer expositions on what courts should be trying to accomplish was set out by the Ninth Circuit in a case decided shortly before the *Egelhoff* decision was issued – *Emard v. Hughes Aircraft Company*.[151] In

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[147] 2003 S.C. App. LEXIS 80, filed June 2, 2003.

[148] 2003 U.S. Dist. LEXIS 9944, decided June 11, 2003.

[149] 2003 Tex. LEXIS 82 (Tex., June 19, 2003). The Texas courts have gone further than most others in directly applying the applicable state law ***as*** the applicable federal common law. *See also Emmens v. Johnson*, 923 S.W.2d 705 (Tex. Ct. App. 1996).

[150] 684 F. Supp. 185, 188 (N.D. Ill. 1988), *aff'd*, 897 F.2d 275 (7th Cir. 1990). *See also Keeton v. Cherry*, 728 S.W.2d 694, 697 (Mo. Ct. App. 1987); *Brandon v. Travelers Ins. Co.*, 18 F.3d 1321 (5th Cir. 1994); *Mohamed v. Kerr*, 53 F.3d 911 (8th Cir. 1995); *Manning v. Hayes*, 212 F.3d 866 (5th Cir. 2000).

[151] 153 F.3d 949 (9th Cir. 1998), *cert. denied*, ___ U.S. ___ (1999).

Emard, the court approved a constructive trust in favor of a widower against a decedent's former husband, who remained the designated beneficiary on the plan documents.[152]

The court began with the acknowledgment that any state court order or law would be pre-empted by ERISA if it "related to" or was "connected with" an ERISA plan.[153] However, the court found no prohibition of the trial court's power to establish the constructive trust, funded by the proceeds from a life insurance policy provided as part of an ERISA benefits package, over the former husband's claim that the constructive trust was barred by ERISA preemption.[154] The court noted that a preemption inquiry requires the reviewing court to figure out exactly what action is sought to be "pre-empted":

> The use of a federal statute to forbid state regulation in "areas where ERISA has nothing to say" would unjustly restrain the legitimate exercise of the states' historic police powers without achieving the objectives sought by Congress.

The court concluded that the establishment of a constructive trust altering who ultimately received the proceeds affected only the parties to the state case, not the pension plan itself, so ERISA does not preclude a court from entering an order directing the establishment of a constructive trust to be funded by the proceeds from the plans after they have been distributed to the beneficiary.[155]

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[152] As recited by the *Emard* court at 954: "'A constructive trust is an equitable remedy imposed where the defendant holds title or some interest in certain property which it is inequitable for him to enjoy as against the plaintiff.' *Kraus v. Willow Park Public Golf Course, 73 Cal. App. 3d 354, 140 Cal. Rptr. 744, 756 (Ct. App. 1977); see also* Cal. Civ. Code § 2224." The California courts have used resulting trusts in disputes between surviving spouses and former spouses, where only one of the two was eligible to actually be the beneficiary of survivorship benefits, but both had an equitable claim to a share of the proceeds. *See In re Marriage of Becker*, 161 Cal. App. 3d 65, 207 Cal. Rptr. 392 (Ct. App. 1984).

[153] "By its terms, ERISA 'supersede[s] any and all State laws insofar as they may now or hereafter relate to any employee benefit plan' covered by the statute. *29 U.S.C. § 1144*(a). 'The term "State law" includes all laws, decisions, rules, regulations, or other State action having the effect of law . . . .' Id. § 1144(c)(1)." *Emard*, *supra*, 153 F.3d at 953.

[154] Life insurance policies qualify as welfare plans, and "thus an employee benefit plan" under ERISA. An employee benefit plan is defined as a "welfare or pension benefit plan." *Metropolitan Life Ins. v. Pettit*, 164 F.3d 857, 860-861 (4th Cir. 1998); 29 U.S.C. § 1002. Between the cases and the statutory provisions, the definitions are largely circular.

[155] *Id*. at 954-955. The majority found no barriers in ERISA to interception of the benefits and payment to the intended beneficiary either before ***or*** after they had been distributed to the beneficiary. The dissenting justice in *Emard* concurred that a constructive trust could be imposed on any benefits payable to a beneficiary who would be a wrongful recipient under state law, but disagreed as to whether state community property law generally would be pre-empted.

The Court analyzed the intent of Congress in enacting ERISA,[156] concluding that it is "designed to ensure that benefits are paid out," and "lacks any provision prohibiting garnishment or attachment of benefits after they have been received by the beneficiary. . . . The absence of such language from ERISA indicates that Congress did not intend such a prohibition."[157]

Because ERISA "is silent as to the disposition of those funds after their receipt by the beneficiary" the Court found that ERISA simply does not preempt California law permitting the imposition of a constructive trust on insurance proceeds after their distribution to the designated beneficiary." *Id*. The court acknowledged that a plan administrator, having been informed of such a constructive trust, would have to:

> take certain steps to answer the complaint and either disburse the disputed funds to the prevailing claimant or deposit the funds with the court. But this burden on the administrator is too slight to overcome the presumption against preemption of state family and family property law. See *Boggs, 117 S. Ct. at 1760; Hisquierdo v. Hisquierdo, 439 U.S. 572, 581, 59 L. Ed. 2d 1, 99 S. Ct. 802 (1979);* see also *De Buono v. NYSA-ILA Medical and Clinical Svcs. Fund, 520 U.S. 806, 117 S. Ct. 1747, 1752, 138 L. Ed. 2d 21 (1997)* (ERISA does not preempt generally applicable state laws "that impose some burdens on the administration of ERISA plans but nevertheless do not 'relate to' them within the meaning of the governing statute") (citing *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668, 131 L. Ed. 2d 695, 115 S. Ct. 1671 (1995),* and *Dillingham, 117 S. Ct. at 841-42); District of Columbia v. Greater Washington Board of Trade, 506 U.S. 125, 130 n.1, 121 L. Ed. 2d 513, 113 S. Ct. 580 (1992)* (state law is not preempted if it "has only a 'tenuous, remote, or peripheral' connection with covered plans") (citations omitted).[158]

Emard placed the burden on the party arguing for preemption to show, as a matter of law, that it was the clear and manifest purpose of Congress to supersede the type of claim before the Court.

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[156] "In enacting ERISA, Congress intended to occupy the field of regulation of employee welfare and pension benefit plans. See *Metropolitan Life Ins. Co. v. Taylor, 481 U.S. 58, 64, 95 L. Ed. 2d 55, 107 S. Ct. 1542 (1987).* This occupation is complete, however, only as to regulation of ERISA plans as plans. See *Fort Halifax, 482 U.S. at 11* (noting that 'Congress pre-empted state laws relating to *plans*, rather than simply to benefits') (emphasis in original). As applied in this case, California's law of community property has no effect on the Hughes plan as such: it does not affect the duties of the employer or the plan entity, nor does it alter the rights of participants and beneficiaries as against the other plan entities. Because California's community property law does not regulate ERISA plans as such, its application is not barred by field preemption." 153 F.3d at 961.

[157] *Id*. at 955.

[158] 153 F.3d at 959.

It is unclear whether that direction and general sentiment survived the United States Supreme Court's decision in *Egelhoff*, which may explain why the California Court of Appeals elected to leave unpublished its later decision in *Araiza-Klier v. Teachers Insurance and Annuity Association*,[159] which imposed an equitable constructive trust on pension plan benefits. The *Araiza* court acknowledged the expansive reading often given to ERISA, but found that as a matter of both logic and law, "the term 'relate to' cannot be taken 'to extend to the furthest stretch of its indeterminancy,' or else 'for all practical purposes preemption would never run its course.'"[160]

The results in such cases can be governed by little more than the vagaries of chance and timing. In *Anderson v. Marshal*,[161] the Boeing Company Employee Retirement Plan had refused the request of a retiree who had elected the joint and surviving spouse pension option to remove his now-former wife as beneficiary. The court upheld the plan's decision, pointing to the broad preemption provisions of ERISA, and blocked the retiree's efforts to proceed with a state court contempt action against the plan.

Pointing out how happenstance can control the outcome, the court distinguished *Fox Valley*, *supra*, since in the earlier case the employee had not yet retired and was free to change his beneficiary designation, whereas in *Anderson* the retiree attempted to remove his ex-wife as beneficiary after his retirement. Reminding the retiree that the election of benefit form he signed during his employment stated that his election "shall be revocable and reelectable . . . prior to the effective retirement date," the court in *Anderson* concluded that the employee "cannot now avoid this clear prohibition by asserting that his ex-wife 'waived' her entitlement to benefits in a divorce decree which was filed long after any . . . applicable election period."

In other words, who gets the money might have less to do with the intent of the parties, or even the orders of the divorce court, than with the order in which retirement and divorce happen to occur.

C. A Brief Aside on Prenuptial Agreements

Practitioners must be at ***least*** as cautious when drafting prenuptial agreements as when negotiating divorce decrees. Counsel must be aware of the case law indicating that only

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[159] 2001 Cal. App. LEXIS 2794 (Ct. App. No. D034967, Nov. 29, 2001) (designated as unpublished).

[160] *Id*. at 15 [citations omitted].

[161] 856 F. Supp. 604 (D. Kan. 1994).

"spouses" can legitimately waive survivorship interests.[162] Of course, there is contrary authority.[163]

As a matter of defensive legal practice, it would be good practice to ensure that the employee/client is told to not ***only*** have a prenuptial agreement providing that the soon-to-be-spouse ***will*** sign such a waiver, but also told to ensure that the spouse ***does*** sign such a waiver after the wedding.

VI. CONCLUSION

There is no really short way of explaining, or understanding, the various plans, and all of the substantive and procedural tricks, traps, and intricacies inherent in them. The good news is that all of these plans are essentially statutory in nature, such that the information that must be known to master them is obtainable, if time-consuming to absorb.[164]

These plans are everywhere – they appear in a large percentage of cases, on one side or the other (or both), and a practitioner can ignore them only at his or her peril. It is a poor coping mechanism for the hazards in this field to insure against malpractice liability by hoping to die before one's clients.

The bottom line for litigators is that they must either have, learn, or hire sufficient expertise to deal competently with not only the monthly flow of benefits to be expected from public and private retirement plans, but particularly the survivorship interests that might be created under those plans. A lawyer who does not do so, and continues to handle these cases, will sooner or later make an error which cannot be corrected.

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[162] *See*, *e.g.*, *Nat'l Automobile Dealers and Assocs. Retirement. Trust v. Arbeitman*, 89 F.3d 496 (8th Cir. 1996).

[163] *See*, *e.g.*, Linda Ravdin, MARITAL AGREEMENTS 354 (Tax Management Inc., 2002; pre-publication copy) (discussing *Critchell v. Critchell*, 746 A.2d 282 (D.C. Cir. 2000), and *Marriage of Rahn*, 914 P.2d 463 (Colo. App. 1995), while criticizing other decisions for "misreading the statute" relating to waivers by prospective spouses in prenuptial agreements.

[164] "But there, everything has its drawbacks, as the man said when his mother-in-law died, and they came down upon him for the funeral expenses."
Jerome K. Jerome, *Three Men in a Boat* (1889).

APPENDIX

MISCELLANEOUS ADDITIONAL OBSERVATIONS ON LIFE AND DEATH

"Death is nature's way of telling you to slow down."
Anon., American Life Insurance Proverb, *Newsweek*, April 25, 1960, at 70.

"No arts; no letters; no society; and which is worst of all, continual fear and danger of violent death; and the life of man, solitary, poor, nasty, brutish, and short."
Thomas Hobbs, *Leviathan*, pt. 1, ch. 11 (1651).

"Death is like sex, except you don't get sick afterwards."
Woody Allen (attrib.)

"Life's but a walking shadow, a poor player,
That struts and frets his hour upon the stage,
And then is heard no more; it is a tale
Told by an idiot, full of sound and fury,
Signifying nothing."
William Shakespeare, *Macbeth*, act 5, sc. 5 (c. 1600)

"Be happy while y'er leevin,
For y'er a lang time deid."
Scottish motto for a house.

"He'd make a lovely corpse."
Charles Dickens, *Martin Chuzzlewit* (1844).

"Death and taxes and childbirth! There's never any convenient time for any of them."
Margaret Mitchell, *Gone With the Wind* (1936).

"I refuse to attend his funeral, but I wrote a very nice letter explaining that I approved of it."
Mark Twain (on hearing of the death of a corrupt politician), J. Munson, *The Sayings of Mark Twain* (1992).

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