



TO: Members of the Legislative Commission on Pensions and Retirement
FROM: Lawrence A. Martin, Executive Director *LAM*
RE: General Consideration of the Treatment of Public Pension Plan Retirement
Benefit In Marriage Dissolution Marital Property Divisions
DATE: July 23, 2009

Introduction

Periodically, the Legislative Commission on Pensions and Retirement is requested to have proposed legislation that would modify the election of a joint and survivor optional annuity based on a marriage dissolution order.

This Commission staff issue memorandum attempts to provide the Commission with general information on pension benefits as marital property, the role of Minnesota public pension plans in implementing marriage dissolution marital property divisions, and joint and survivor optional annuity forms in the event of a marriage dissolution.

Pension Benefits as Marital Property

Pension benefits or pension rights acquired during the course of a marriage have been recognized as marital property available for division for decades by the Minnesota courts and specifically by state statute since 1978 (see Laws 1978, Ch. 772, Sec. 48).

Laws 1978, Chapter 772, was a general revision of Minnesota law on marriage and divorce. Before 1978, marital property was defined in Minnesota Statutes, Sec. 518.54, Subd. 5, broadly and generally as any real or personal property acquired during the marriage by the married parties or either married party, other than property obtained from a third party as a gift or bequest, property obtained in exchanged for property obtained before the marriage or as a gift, is an increase in value of property acquired before the marriage, property obtained after a legal separation, property transferred between the spouses, or property excluded under a valid ante nuptial contract. In 1978, the reference to real or personal property in the marital property definition was modified to specifically include "nonforfeitable pension benefits or rights." The addition of pension benefits and rights appears on the face of the session law to be an affirmation of prior legislative intent, to be a clarification to avoid common misinterpretations, or to provide emphasis.

Role of Minnesota Public Pension Plans in Marriage Dissolution Marital Property Divisions

For private section plans, federal law (Sec. 206(d)(3) of the Employee Retirement Income Security Act of 1974 (ERISA)) recognized pension interests as marital property subject to division by the court upon a marriage dissolution in an exception to the general prohibition on the assignment or alienation of pension benefits if a "qualified domestic relations order (QDRO)" procedure is utilized. Public pension plans are not included in much ERISA regulation and the QDRO provisions of ERISA do not apply to Minnesota public pension plans.

Before 1987, Minnesota public pension benefits divided in a marriage dissolution award were not enforceable in favor of the second payee against the pension plan because of statutory non-assignment/non-garnishment/non-alienation provisions (see Minnesota Statutes 1986, Sec. 3A.13; 352.15; 352B.071; 353.15; 354.10; 422A.24; 424A.02, Subd. 6; and 490.126), so the division was enforceable by garnishment or attachment by the ex-spouse only upon the receipt of the pension benefit by the public pension plan member or upon the deposit of the benefit in the plan member's bank account.

In 1987 (Laws 1987, Ch. 157), the Minnesota public pension non-assignment/non-garnishment/non-alienation provisions were amended to permit the enforcement of a marriage dissolution judgment dividing public pension interests against the public pension plan if the court judgment met various conditions designed to avoid the imposition of any additional unfunded liability on the pension plan and of any extended administrative burden on the pension plan administrators. The 1987 public pension plan marital property marriage dissolution division conditions were:

- (1) Payment Only If No Liquid Marital Property Exists. The division of marital property is, if possible, to be effected by the sale or disposition of liquid assets (e.g. cash and securities) or of

readily liquidated assets (marketable personal or real property) before pension benefits are divided.

- (2) Payment Only Upon Plan Member Retirement. The division may not occur until the plan member applies for a benefit and the benefit becomes payable.
- (3) Limited to Benefit Plan Terms. The division is payable only to the extent that the benefit plan terms permit.
- (4) Limited to Benefit Duration. The division may not be a benefit payable longer than the recipient's duration of receipt.
- (5) No Lump Sum Payment. The division of a retirement annuity may not be in the form of a lump sum payment.
- (6) Designated Trustee For Payment of Any Residual Amount. Any divided benefit payable to an ex-spouse who predeceases the plan member is payable only to a trustee designated for that purpose.

The 1987 amendments, which were drafted in large part by the staff of the Legislative Commission on Pensions and Retirement and which were reviewed and recommended by the Legislative Commission on Pensions and Retirement, also included an authorization of the division of pension rights as a survivor benefit if the pension plan by law allows the payment of a survivor benefit, included a procedure for the valuation of pension benefits or rights by an actuary, and included the directive for the provision of pension information by public pension plans to the parties of an actual or potential dissolution proceeding.

In 1988 (Laws 1988, Chapter 668, Sections 15, 16, and 20), the 1987 public pension plan marital property division provisions were broadened to include private sector pension plans.

Many practicing lawyers in Minnesota will be familiar with ERISA requirements and QDRO procedures, but will generally not be knowledgeable about public pension plan marital property division provisions.

Joint and Survivor Optional Annuity Forms

Most complaints brought to the Legislature relating to public pension benefits and marriage dissolutions relate to joint and survivor optional annuity forms.

Most statewide and major local Minnesota public pension plans determine a retirement annuity initially in the form of a single life annuity, although, since 2008 (Laws 2008, Ch. 349, Art. 4, Sec. 7), virtually all Minnesota public pension plan annuities and benefits are payable in the form of an automatic 50 percent joint and survivor annuity form unless the spouse of the public pension plan member waives the automatic joint and survivor annuity coverage on a notarized form. A single life annuity form means that the retirement annuity is payable solely for the duration of the retired lifetime of the annuitant. To accommodate the needs and desires of prospective annuitants to have survivorship insurance coverage, most major and statewide Minnesota public pension plans have established optional annuity forms.

An optional annuity form allows the annuitant to potentially extend the time period over which an annuity will be paid and to potentially include other recipients. The recipients must be natural persons, rather than legal persons (trusts or corporations), so that there is an actual lifetime for which the actuarial value can be determined. The optional annuity form is typically provided on an actuarial equivalent basis, so the longer period of potential payment or the inclusion of additional recipients is accounted for by a reduced annuity amount. The most typical optional annuity forms are joint and survivor optional annuities or term-certain optional annuities. A joint and survivor optional annuity pays a reduced annuity amount to the annuitant, but upon the death of the primary annuitant, all or a portion of the prior monthly benefit continues to be paid for the remaining life of the designated survivor. Joint and survivor annuities are often elected by married couples to ensure continued income for the surviving spouse. The amount of the reduction is a function of the actuarial life expectancy of the annuitant, the actuarial life expectancy of the potential survivor, and the extent of increased benefit payment duration caused by the differences in the ages. A term-certain optional annuity pays a reduced annuity amount to the annuitant, and if the annuitant dies before a designated period of time of receipt has elapsed, an equal annuity amount to the annuitant's survivors or estate for the remaining un-elapsed period of time. The amount of the reduction is a function of the actuarial life expectancy of the annuitant and the length of the period of guaranteed annuity payments. An accelerated annuity (or Social Security leveling optional annuity) provides a benefit in a greater amount during the initial years of retirement, followed by a lower benefit amount for the remainder of the retired lifetime, typically intended to assist public employees who retire at ages earlier than when Social Security benefits are payable (earliest is age 62) or when full Social Security benefits are payable (age 65 if born earlier than 1938, increasing to age 67 if born later than 1959).

Optional annuity forms are likely to be elected by retirees or disabilitants for a number of potential motivations. The most clear motivation is a concern about the financial situation of a potential survivor (spouse, child, or other survivor) following the death of the primary recipient that underlies the selection of joint and survivor optional annuity forms. The motivation for the pre-age 62 accelerated optional annuity form is presumed to be an equalization of total benefit payouts to account for the delay in eligibility for Social Security benefits until age 62. The primary motivations for selecting term certain or period certain optional annuity forms are less clear. Because of its time limitations, the term certain optional annuity forms are not generally considered to be survivor benefits, although some term certain optional annuity forms may be utilized for specialized survivor coverage concerns. The motivation for selecting accelerated annuity forms is the accommodation of retirement ages earlier than the earliest Social Security benefit age of age 62.

The "bounce back" in a joint and survivor annuity means that the annuity amount returns from the joint and survivor actuarially reduced amount back to the single life annuity amount if the intended survivor predeceases the annuitant. The bounce back is subsidized because no additional actuarial reduction in the retiree's retirement annuity amount is required for the feature beyond the joint and survivor optional annuity form actuarial equivalence reduction. The bounce-back feature has not been included as part of term-certain or other optional annuity forms.

The various statewide and major local retirement plans are permitted to establish whatever optional annuity forms that the plan membership desire, by retirement board action, so long as the optional annuity form is actuarially equivalent to the single life annuity. The following summarizes the optional annuity establishment authority and the current optional annuity forms for the various statewide and major local retirement plans:

Retirement Plan	Optional Annuity Form Authority	Current Optional Annuity Forms
General State Employees Retirement Plan of the Minnesota State Retirement System (MSRS-General)	M.S., Se. 52.116, Subd. 3, 31, 3b, 3c, and 4	<ul style="list-style-type: none"> • 50% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • 15-year term certain and life thereafter • Accelerated pre-age 62 annuity
General Employees Retirement Plan of the Public Employees Retirement Association (PERA-General)	M.S., Sec. 53.30, Subd. 3, 3a, 3b, 3c, and 5	<ul style="list-style-type: none"> • 50% joint and survivor (with subsidized bounce back feature) • 75% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • Accelerated post-age 55 annuity
Teachers Retirement Association (TRA)	M.S., Sec. 354.35 and 354.45, Subd. 1 and 1a	<ul style="list-style-type: none"> • Guaranteed refund • 50% joint and survivor (with subsidized bounce back feature) • 75% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • 15-year term certain and life thereafter • Accelerated pre-age 65 annuity
Correctional State Employees Retirement Plan of the Minnesota State Retirement System (MSRS-Correctional)	M.S., Sec. 352.116, Subd. 3, 3a, 3b, 3c, and 4; and 352.93, Subd. 3a	<ul style="list-style-type: none"> • 50% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • 15-year term certain and life thereafter • Accelerated pre-age 62 annuity • Social Security leveling annuity
State Patrol Retirement Plan	M.S., Sec. 352B.08, Subd. 3	<ul style="list-style-type: none"> • 50% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature)
Public Employees Police and Fire Retirement Plan	M.S., Sec. 353.30, Subd. 3, 3a, 3b, 3c, and 5	<ul style="list-style-type: none"> • 25% joint and survivor (with subsidized bounce back feature) • 50% joint and survivor (with subsidized bounce back feature) • 75% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature)
Local Government Correctional Employees Retirement Plan of the Public Employees Retirement Association (PERA-Correctional)	M.S., Sec. 353.30, Subd. 3, 3a, 3b, 3c and 5; and 353E.04, Subd. 5	<ul style="list-style-type: none"> • 25% joint and survivor (with subsidized bounce back feature) • 50% joint and survivor (with subsidized bounce back feature) • 75% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • Social Security leveling annuity
Legislators Retirement Plan	M.S., Sec. 3A.02, Subd. 5	<ul style="list-style-type: none"> • 100% joint and survivor with bounce back feature • Term certain and life thereafter
Elected State Officers Retirement Plan	Not applicable	Not applicable

<u>Retirement Plan</u>	<u>Optional Annuity Form Authority</u>	<u>Current Optional Annuity Forms</u>
Judges Retirement Plan	M.S., Sec. 490.124, Subd. 11	<ul style="list-style-type: none"> • 50% joint and survivor • 50% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor • 100% joint and survivor (with subsidized bounce back feature) • 10-year term certain and life thereafter • 15-year term certain and life thereafter
Minneapolis Employees Retirement Fund (MERF)	M.S., Sec. 422A.17	<ul style="list-style-type: none"> • Guaranteed refund • 50% joint and survivor • 100% joint and survivor
Duluth Teachers Retirement Fund Association (DTRFA)	M.S., Sec. 354A.32	<ul style="list-style-type: none"> • 5-year term certain and life thereafter • 10-year term certain and life thereafter • 15-year term certain and life thereafter • 20-year term certain and life thereafter • 50-% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • Accelerated pre-age 62 annuity
St. Paul Teachers Retirement Fund Association (SPTRFA)	M.S., Sec. 354A.32	<ul style="list-style-type: none"> • Guaranteed refund • 50% joint and survivor (with subsidized bounce back feature) • 100% joint and survivor (with subsidized bounce back feature) • 15-year term certain and life thereafter

Minnesota Public Pension Plan Joint and Survivor Optional Annuity Forms and Marriage Dissolution Judgments and Orders

No provision of Minnesota Statutes, Sec. 518.581, indicates that a Minnesota District Court can void a retirement annuity form election at the time of a marriage dissolution, although occasionally there are dissolution settlements that specify that the second half of a joint and survivor annuity is not to be paid. These cases suggest poor work on the part of the lawyers involved in the process leading up to the marriage dissolution settlement. Benefit waivers in divorce decrees appear to conflict with the due process property protections provided by the Fifth Amendment to the U.S. Constitution, with Minnesota pension law, and the Minnesota division of marital property statute.

If the optional annuity form is not appropriately handled in the dissolution property settlement deliberations and avoiding of an optional annuity form election provided for in the dissolution decree, a legislative remedy is not possible because of due process concerns and because the decreed election change would impose an actuarial cost on the applicable retirement plan. Since optional annuity forms are established to be the actuarial equivalent of a single life annuity at the time of retirement, any reopening of an optional election form will threaten to disrupt the actuarial situation under which the option was calculated. Also, since the optional annuity form election frequently establishes rights to a potential eventual retirement benefit in other people, any reopening of or any modifications in the optional annuity form will affect their rights and, consequently, would be inappropriate.

Conclusion

A number of bills remain pending before the Legislative Commission on Pensions and Retirement from the 2009 Legislative Session that would permit some optional annuity form elections to be voided or modified if a marriage dissolution decree so orders. This issue memorandum is intended to provide the Commission with general information on the broad topic in anticipation of the Commission hearing these items of proposed legislation later this year.