THE NEED FOR A LEGAL EXPERT IN DIVIDING AND DISTRIBUTING YOUR PENSION UPON DEATH OR DIVORCE

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With record returns being made in the stock market for your pension plan investments, your pension may very well be your most valuable asset, more valuable than your home, car, savings or all of these put together. Certainly, you would consult a real estate broker and pay this broker enormous commissions so you have proper representation with either the purchase or sale of your home. Why, then, do so few people consult legal experts when dividing and distributing their more valuable asset, their pension?

Let's look at some examples of published cases where people have experienced nightmares in dividing and distributing their pensions. In the U.S. Supreme Court case of Boggs vs. Boggs (1997) 520 U.S. 833, Isaac Boggs worked for South Central Bell Telephone Company and participated in its pension plan during his marriage to Dorothy. Isaac and Dorothy had drafted a Will and a Trust whereby when one died, one-third of the pension plan would go to the survivor and the remaining two-thirds would be equally divided among their three sons.

Dorothy died in 1979 while Isaac still worked for South Central Bell accumulating his pension. One year later, in 1980, Isaac married Sandra. Isaac retired five years later and Isaac received, in addition to his retirement, a lump sum distribution from the Bell Systems Savings Plan plus accumulated shares of AT&T stock. Isaac died in 1989 and since Isaac's new wife, Sandra, was the survivor, the company began paying benefits to Sandra. The three children who were supposed to receive the pension plans in equal shares under their parents' estate plan, filed an action with the court asking the court to direct the pension benefits to them instead of Sandra. Then, Sandra filed her own under ERISA. Hundreds of thousands of attorney's fees later, the case went to the Supreme Court, which ruled in favor of the new wife, Sandra, to the exclusion of the three sons. Certainly, Isaac and Dorothy would be rolling over in their graves if they knew that Isaac's valuable pension which he worked on for years and years as an employee for South Central Bell, went to the person Isaac was married to for only four years to the exclusion of this three sons. Had Isaac simply paid an attorney no more than $15,000 to enact his estate plan in such a way as to make sure his three sons received the majority of the pension benefits (rather than Dorothy who does not have the right to make a testamentary transfer of such benefits to the sons), the three sons would have enjoyed the pension benefits rather than the new wife, Sandra. Isaac also would not have paid the six figures Isaac's estate no doubt paid to the attorneys who were forced to bring the case before the U.S. Supreme Court.

Another case, *In Re The Marriage of Shelstead* (1998) 66 Cal. App. 4th, 893; Cal. Rptr. 2d 365, Gene and Janet Shelstead were getting divorced. During their twenty year marriage, Gene acquired a pension as a carpenter in the Carpenter's Pension Trust for Southern California ("the Pension"). At the time of their dissolution, the

parties divided their Pension whereby Janet had the right to obtain her share of the Pension benefits when Gene retired or was eligible to retire. The agreement the couple prepared stated that if Janet predeceased Gene Janet's share of the Pension was to go to her "designated successor." The agreement was signed by the parties and then signed by the judge and filed with the court. Luckily, Janet didn't predecease Gene based upon what occurred thereafter. When the agreement was presented to the Pension Plan Administrator of the Carpenter's Union, the agreement was rejected since Janet, as a non-employee of the union, could not name a "designated successor." The plan said that if Janet predeceases Gene, Janet's heirs are out of luck. The case went back and forth to the Court of Appeal and after expending an exorbitant amount of attorney's fees, the Court of Appeal agreed with the Pension Plan and said that it must be revised since Janet could not name a designated successor as to her share of the Pension Plan because she was not an employee and therefore not a participant in the Plan. Under ERISA, only the Plan Participant can designate a beneficiary who must be a spouse, former spouse, child or other dependent. It is important for your representative to know about the non-assignability requirements under ERISA for non-participants, so that the intent of the parties can be properly carried out, particularly, with regards to the heirs of the parties such as their children.

In a recently decided case filed on July 8, 1999, *Rich vs. Southern California IBEW-NECA Pension Plan*, (1999) Daily Journal D.A.R. 6965, Walter Rich was a union member of the Electricians Union for twenty five years and accordingly became a vested participant in the very valuable IBEW Pension Plan.

After twenty years of marriage, Walter decided to divorce his wife, Patricia, and the parties entered into an agreement dividing the pension benefits. The order that was calculated provided that Patricia would receive $448 per month as her share and Walter would receive $509 per month as his share. Walter and Patricia must have had some dummy preparing their agreement for them since their language in the divorce decree said:

> "Such payments will continue until the earlier of the participant Respondent's death or by alternate payee Petitioner's death."

Patricia died in 1997, survived by Walter and Walter contacted the plan administrator to have Patricia's share now paid directly to him so that Walter's payments would increase to $962 per month, based upon the non-assignability" feature of ERISA which this particular plan was governed by. The plan refused based upon the above-language and Walter had to hire another attorney and expend thousands to get the pension to pay him Patricia's share after she died.

Walter lost in the Trial Court so he then had to pay more money to have his attorney appeal. After shelling out thousands, after the dust was settled, Walter won.

The damage was done, however. It will take many, many months of Walter's $962 pension payments to pay off his attorney. Had the divorce decree been prepared correctly in the first place, all of this could have been avoided. All Walter would have need to add to the agreement is the following language:

> "Upon the death of the participant or the alternate payee, the payments shall continue in the full amount to the survivor until the death of the survivor."

In summation, members of pension plans who contribute over long periods of time can acquire an extremely lucrative asset. Clearly, it was never the intent of the member to work ten, twenty, thirty, or more years in acquiring this asset only to have it go to the courts, attorneys, ex-wives, new wives, or pensions other than the intended beneficiaries. When you are dividing this very valuable asset in a divorce or in the preparation of a trust, it is imperative you have highly skilled counsel who is specialized in this area to prepare the documents correctly so that it conforms with the owners' intent. This is not the job for a paralegal or an inexperienced attorney who, after the screw up, are no longer able to be found and, even if they are found, do not have the financial wherewithal to pay your considerable damages suffered as a consequence to the incorrectly prepared document.