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PENSIONS, DIVORCE, AND MEDICAID

E-mail correspondence among elder law attorneys has addressed the issue of retirement pensions, divorce and Medicaid. In one case, a Medicaid applicant's Civil Service retirement pension was divided in a divorce action, and part of the pension was payable to the applicant's former spouse. The Medicaid eligibility worker said that the part of the pension payable to the former spouse was income to the Medicaid applicant. This may have been an incorrect application of the Medicaid eligibility rules.

In Virginia, Medicaid Manual § S0830.160 addresses broad categories of unearned income, including annuities, pensions, retirement or disability income. Generally, these payments are considered unearned income. There is, however, an exception under S0830.160(B)(2), which pertains to qualified domestic relations orders (QDRO). A QDRO is the result of a divorce proceeding that changes the ownership of a pension and the payment of the pension benefits between husband and wife. Virginia courts address the ownership and division of such assets pursuant to Virginia Code § 20-107.3 (A)(3)(b) and (G)(1). Virginia Code § 20-107.3 (G)(1) permits a court to direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan, or retirement benefits by direct assignment to a party from the employer, trustee, plan administrator or other holder of the benefits.

To be valid for purposes of the Medicaid income exception, a QDRO must be a decree issued by a state court, provide the names and addresses of the participants and the amount or percentage of the benefit, and be approved by the pension plan administrator. The exception states that "[w]hen a QDRO splits the income between a Medicaid applicant/recipient and the spouse, count only the income that is ordered to go to the Medicaid recipient as his income. If the plan administrator has not approved the QDRO or disapproved it, the income should be calculated without regard to the court order."

Private pension and retirement plans are covered under the Employee Retirement Income Security Act of 1974 (ERISA), as amended, and QDROs are to be submitted to the plan administrator for approval. Federal Civil Service plans are covered under the Civil Service Retirement System (CSRS) or Federal Employees Retirement System (FERS). The Federal regulations covering both programs are contained in Title 5, Part 838, of the Code of Federal Regulations. The former spouse must file a certified copy of the QDRO with the Office of Personnel Management (OPM) for approval, and then the QDRO must be classified as a Court Order Acceptable for Processing (COAP) before benefits can be paid. The retiree and the former spouse are both notified that the QDRO has been approved. The QDRO must expressly direct OPM to pay a portion of the monthly CSRS or FERS benefit to the former spouse. The former spouse's share must be stated as a fixed amount, a percentage, or a fraction of the annuity, or by a formula. The amount cannot exceed the amount payable to the retiree after deductions for taxes and insurance.

Military retirement plans in divorce situations are not covered under ERISA, but instead are covered under the Uniformed Services Former Spouse Protection Act. The QDRO must direct the Defense Finance and Accounting Service (DFAS) to apportion the retirement pay when the military member retires, and the order must be submitted to DFAS for approval and payment. Likewise, state and local plans are not covered under ERISA, but are administered pursuant to state and local law and regulations, and QDROs must be submitted to the plan administrators for approval.

Medicaid applicants should provide copies of the final decree of divorce, the QDRO, and the plan administrator's approval with the Medicaid application and cite the exception in Medicaid Manual § S0830.160(B)(2) so that only the portion of the pension actually payable to the applicant is counted as income. It is important that the QDRO makes clear that the pension apportionment is pursuant to a division of property and is not spousal support or alimony.

Useful websites:

<http://www.pensionappraisers.com/pensionstory/ocontents.shtml> - Pension Appraisers Inc. This website offers comprehensive information regarding the issues surrounding pensions and divorce.

http://cpol.army.mil/library/docs_misc/ri84-001.pdf - Department of the Army pamphlet on Court-Ordered Benefits for Former Spouses Under CSRS, FERS, FEHB, and FEGLI.

Correction

The April 27th edition of the *Elder Law News* incorrectly states that House Bill 3205 applies to all documents and writings of decedents dying on or after July 1, 1998, regardless of when such documents or writings came into existence. It should state that this House Bill applies to all documents and writings of decedents dying on or after July 1, 2007. The *Elder Law News* thanks Richmond, Virginia, lawyer Frank Brown for bringing this error to its attention.

Speakers

If you are interested in having an elder law attorney from Oast & Hook speak at an event, then please call Jennifer Lantz at 757-399-7506.

Oast & Hook

Oast & Hook is an elder law firm. We represent older persons, disabled persons, their families, and their advocates. The practice of elder law includes estate planning, investment and insurance advice, estate and trust administration, powers of attorney, advance medical directives, titling of assets and designations of - beneficiaries, guardianships, conservatorships, and public entitlements such as Medicaid, Medicare, Social Security, and SSI, disability planning, income tax planning and preparation, bill paying, account management and reporting, care management, and fiduciary services. We also handle litigation involving these issues, such as will contests and estate administration disputes. For more information about Oast & Hook, please visit our website at www.oasthook.com.

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