Judicial Impact Statement

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Prepared By Louis Tobin, Esq., Legislative Liaison

PUBLIC PENSION SURVIVORSHIP RIGHTS

Sponsors:
Representatives Bob Cupp and Tim Brown

Status:
Awaiting Introduction

What is a Judicial Impact Statement?

A Judicial Impact Statement describes as objectively and accurately as possible the probable, practical effects on Ohio's court system of the adoption of the particular bill. The court system includes people who use the courts (parties to suits, witnesses, attorneys and other deputies, probation officials, judges and others). The Ohio Judicial Conference prepares these statements pursuant to R.C. 105.911.

TITLE INFORMATION

To make changes to the Ohio Revised Code to give Ohio judges with domestic relations jurisdiction statutory authority to divide marital property that exists in public pension form through a "separate interest" Division of Property Order (DOPO).

IMPACT SUMMARY

This proposal is a joint effort of the Ohio Judicial Conference Domestic Relations Law & Procedure Committee and the Ohio Association of Domestic Relations Judges. It is part of the Ohio Judicial Conference 2013 – 2014 Legislative Platform. The proposal will promote public confidence in the law, improve the administration of justice, and bring clarity to the law.

BACKGROUND

The Ohio Revised Code requires a court in divorce proceedings and authorizes a court, upon the request of either spouse, in legal separation proceedings, to equitably divide "marital property."[1] Marital property includes, among other things, "All interest that either or both of the spouses currently has in…the retirement benefits of the spouses…that was acquired by either or both of the spouses during the marriage."[2] The theory behind this is that each spouse contributes equally to the production and acquisition of this property through their joint efforts during the marriage and is thus entitled to a share of that property when the marriage ends.[3]

The assignment of pension benefits is, with several exceptions, prohibited under a federal law commonly known as ERISA (the Employee

[1] R.C. 3105.171(C)
[2] R.C. 3105.171 (A)
[3] R.C. 3105.171(C)

Retirement Income Security Act). One exception authorizes the assignment of these benefits to a former spouse pursuant to a Qualified Domestic Relations Order (QDRO) that is issued as part of a divorce decree or decree of dissolution of marriage. ERISA, however, is only applicable to the federal government and to private pensions. States must, therefore, enact separate legislation authorizing their public pension system or systems to assign public pension benefits.[4] Because of this, the 123rd General Assembly enacted House Bill 535 in 2000 to, among other things, authorize Ohio's public pension systems[5] to make payments to a retirant's former spouse pursuant to a DOPO, the public pension fund equivalent of the QDRO.

Survivorship Rights

Soon after the enactment of House Bill 535, courts and litigants were faced with an additional question about the division of pension benefits. Specifically, the issue was whether a former spouse of a public pension fund member had a right to continue to receive pension benefits after the member's death. This issue is perhaps best illustrated by a case that was decided by the Supreme Court of Ohio in 2002.

In *Cosby v. Cosby*, Carel Cosby, a public school teacher, divorced Faye Cosby, his wife of 37 years. As part of the divorce settlement agreement, Carel agreed to grant Faye 40% of his STRS retirement fund upon retirement and the court entered a DOPO recognizing this agreement. Subsequently, Carel continued to work, eventually remarried and then died eight years after divorcing Faye. Carel, although eligible to retire, never retired. Upon Carel's death, STRS awarded 100% of the survivor benefits, to his second wife, Bonnie. "Survivor benefits" are benefits awarded to a designated beneficiary or in the absence of a designated beneficiary to a statutory beneficiary, when a member dies before retirement. Because Bonnie, his wife of only a few years, was the statutory beneficiary, the Court determined that she alone was entitled to the survivor benefits and that the DOPO was not enforceable under the circumstances. Ultimately, the fact that most of the STRS benefits were acquired during the 37 years that Carel was married to Faye, and were thus acquired through the joint efforts of Carel and Faye, was irrelevant. The Court felt "bound by the statutory mandates of the STRS" and suggested that "a different solution lies only with the General Assembly."

In part because of the Cosby decision, the 125th General Assembly enacted House Bill 98 in 2005. Among other things, House Bill 98 created statutory authority for Ohio public pension funds to pay death benefits to former spouses of public pension fund members pursuant to DOPOs. "Death benefits," which must be distinguished from survivor benefits, are benefits awarded to a designated beneficiary or in the absence of a designated beneficiary to a statutory beneficiary, when a member dies after having retired. While this was a necessary change that improved the administration of justice in Ohio, it did not resolve the issue presented in Cosby where the pension fund member died before retiring and the conditions of the DOPO were thus unenforceable.

The "Separate Interest" QDRO/DOPO

There are two common approaches to the division of pension benefits, the "shared payment" approach and the "separate interest" approach. Under the shared payment approach, pension

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[4] *Erb v. Erb* (1996), 75 Ohio St. 3d 18, 22

[5] PERS; OP&FPF; STRS; SERS; SHPRS

benefits are split as payments are made. The alternate payee's right to receive his or her portion of the benefits vests only when the benefits reach pay status. The shared payment approach is the approach used most commonly in Ohio and is the only approach currently recognized in the Ohio Revised Code for dividing public pension benefits. Importantly, even the shared payment approach in Ohio is not recognized for all types of public pension benefits. Specifically, the Code does not authorize the division of pre-retirement survivorship benefits, thus the outcome in Cosby.

Alternatively, under the separate interest approach, the entire pension is divided into two separate portions with each party maintaining a right to his or her own portion. The alternate payee's right to his or her portion of the pension vests when the order is issued even if the pension benefits are not in pay status. The alternate payee can then begin receiving his or her portion of the pension when the pension fund member reaches retirement eligibility. The alternate payee's right to the benefits under this approach is not dependent on the fund member's retirement status. While this approach is recognized under ERISA for the purposes of dividing private pensions and by several states for the purposes of dividing state public pensions, it is not recognized in the Ohio Revised Code as a viable approach to dividing Ohio public pensions.

Had the separate interest DOPO been available when Carel and Faye Cosby agreed to divide his retirement benefits pursuant to their divorce, the judge could have awarded Faye her 40% portion of the pension, the portion of the pension that accumulated due to her joint efforts during their 37 year marriage, without regard to the fact that Carel would continue to work and eventually remarry. Unfortunately, the only option for the judge was to establish a shared payment DOPO that was entirely dependent on Carel retiring and the retirement benefits reaching pay status. Because this never happened, Faye was deprived of this portion of what was once her marital property. Instead, Carel's second wife, Bonnie, received a windfall.

JUDICIAL IMPACT

Under current law, judges have no legal authority to recognize the existence of an ex-spouse's right to receive his or her portion of marital property in the form of public pension fund benefits when the public pension fund participant dies before retiring. By adopting the separate interest approach and giving judges legal authority to recognize this right, the change will promote public confidence in the law, improve the administration of justice, and bring clarity to the law.

Promotes Public Confidence in the Law

Carel Cosby's second wife, Bonnie, to whom he had been married no more than eight years, received a windfall of over forty years worth of survivor benefits from STRS, thirty-seven years of which were due to the joint efforts of Carel and Faye Cosby. This inequitable result diminishes public confidence in the law.

Public pension fund benefits, like any other form of marital property, are the product of the joint efforts of a marital couple during their marriage. The current legal distinction that allows an ex-spouse to receive "death benefits" (i.e. alternate payee benefits that arise when a retiree dies) but prevents an ex-spouse from receiving "survivor benefits" (i.e. alternate payee benefits that arise when a participant dies before retiring) is an arbitrary legal distinction that is incomprehensible to the average litigant. Perhaps more importantly, the inclusion of these benefits in the definition of marital property creates an expectation that rights to that property exist. When the law creates expectations that cannot be realized, litigants come to view the law as unfair and public confidence in the law suffers.

Adoption of the separate interest approach to DOPOs will enable Ohio courts with domestic relations jurisdiction to more equitably divide public pension benefits at the end of long-term marriages. The proposal will enable judges to reinforce the expectations of the parties and thereby bring more fairness to divorce and dissolution proceedings. Overall, the proposal will promote public confidence in the law.

Improves the Administration of Justice

This proposal will improve the administration of justice in Ohio in several important ways. First, the proposal will help prevent abuse of the law. The current distinction that prevents an ex-spouse of a public pension fund member from receiving survivor benefits amounts to a legal loophole that allows the fund participant to avoid the implications of a court order and deprive his or her ex-spouse of marital property by continuing to work after becoming eligible for retirement. While this may often be because of a legitimate desire to continue working, it also creates the potential for abuse. Either way, adoption of the separate interest DOPO will close this loophole. The proposal will enable courts to appropriately divide pension benefits based on the objective status of retirement eligibility rather than on the subjective status of actual retirement.

Second, current ERISA law enables judges to issue separate interest QDROs for private pensions while state law prevents the same for public pensions. The basis for this legal distinction is tenuous given the fact that any division of a pension, regardless of whether it is public or private, must be actuarially neutral. In this way, current law creates issues of justness and fairness and may even create a constitutional equal protection problem. The ex-spouse of a public pension fund member, after all, contributes just as much to the public pension fund through his or her joint efforts as the ex-spouse of a private pension fund member does. Nevertheless, the ex-spouse of the public pension fund member is treated differently in the eyes of the law. What's more, the state of the current law often leads the judge to require the parties, as part of settlement negotiations, to split the cost of life insurance to insure against the risk of the public pension fund member dying prior to retirement. The cost of this can be expensive depending on factors such as the age and health of the purchaser. This additional cost sometimes leads to a breakdown in settlement negotiations and raises legitimate questions from the litigants about why they must incur such a cost. Public confidence in the law and the administration of justice suffer. The separate interest DOPO would resolve this problem.

Finally, the proposal will help to encourage settlement. Pensions, particularly in long term marriages, are typically the largest marital assets and are therefore a large bargaining chip in any divorce settlement negotiations. Because current law creates uncertainty for an ex-spouse surrounding the right to receive pension benefits, he or she will often be unwilling or even unable to bargain and reach a settlement agreement. The separate interest DOPO will make the right of an ex-spouse to receive pension fund benefits more certain by taking the status of the pension fund member out of the equation. By bringing more certainty to the process, many couples will be more likely to reach a settlement agreement.

Brings Clarity to the Law
As noted above, the Ohio Revised Code currently includes pension fund benefits within the definition of marital property. The Code does not, however, give courts the authority to divide this type of marital property pursuant to a divorce decree or decree of dissolution of marriage when the property happens to exist in public pension fund form and when the public pension fund member has not yet retired. The definition of marital property is, in this way, inconsistent with court authority to divide that property.

Adoption of the separate interest approach to DOPOs will clarify that courts have the authority to divide this type of marital property outright pursuant to divorce or dissolution.

RECOMMENDATION
Ohio judges recommend the adoption of the separate interest approach to qualified domestic relations orders as applicable to Ohio's public pensions systems. The separate interest DOPO will promote public confidence in the law, improve the administration of justice, and bring clarity to the law.