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The Retirement Asset Minefield

By Darya Klammer

How many of us start the attorney-client relationship by sending a client questionnaire or information sheet along with our fee agreement to the new client? Sometimes that questionnaire is returned 100 percent completed, but often it is not. While it is important to have a client provide you with accurate and complete information, sometimes you may need to investigate further in order to determine if a client truly understands the questions they are being asked, especially when it comes to the assets of a marriage. Remember, that section in the client questionnaire might be blank, not because it’s not applicable to the client, but rather because the client does not understand the question or the asset. Retirement assets can be a real minefield as many clients may not understand their nature or value.

Unfortunately, one of the easiest ways to lose money for your client is to fail to address retirement assets properly. This can happen by omitting a retirement asset, by misidentifying a retirement asset or failing to recognize that a client might have retirement assets with both marital and separate property components. A client might not understand that he or she has an interest in the marital portion of the spouse’s retirement because the account is only in the name of the spouse. Educating the client and ensuring that they understand their interests is important so we can arrive at a plan for distributing the retirement assets, memorializing the division of assets in a separation agreement or preparing for trial. A few important steps can ensure you can navigate this minefield and protect both you and your client in the long run.

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Step One: Identify all retirement plans. Always request that the client provide copies of plan statements. Often, the client does not know what type of retirement plan they have. Many clients do not know the difference between a pension and a 401(k). By requesting copies of plan statements, you are not relying on the client's potentially inaccurate assertion.

Step Two: Conduct discovery. Whether you are working towards a dissolution of marriage and request an informal exchange of information or if a divorce is pending and you propound formal discovery requests, make sure you are requesting the identification of retirement accounts and the production of account statements. If the information is not forthcoming, be sure to issue subpoenas to an employer or prior employer to determine the existence of plans and to financial institutions to determine balance information and potential loans, if applicable.

Step Three: Value retirement if necessary. If the retirement asset is a defined contribution plan with a premarital component, you should consider obtaining a passive growth analysis on the "separate asset." If the client is the participant in a state pension with a spouse who has paid into social security, you should consider obtaining a present value report and a hypothetical social security report.

Step Four: Choose your separation agreement language carefully. If you reach a resolution on the distribution of retirement assets, use clear and unambiguous language when addressing the distribution. Make sure that if you are addressing a defined benefit plan, you select language which reflects the appropriate coverture fraction, typically the traditional coverture fraction. If conflict arises and trial or appellate courts must interpret the intended meaning, the use of "generic" language might not result in the greatest benefit to your client. Do not neglect the impact of pre-retirement and post-retirement survivor annuities. When addressing defined contribution plans, remember to address loans taken against the plan and "gains and losses" after the assignment date.

The separation agreement provisions on retirement should not be brief unless there are no retirement assets to distribute. If accounts are being divided, less is not more. Be specific and include language which is sufficient to demonstrate intent. Remember a court will always look to the language of the separation agreement to determine intent. In doing so, you protect your client and yourself.

About the Author

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