

DISCOVER RETIREMENT ASSETS EARLY/COMPLETELY: LEARN FROM OTHER PEOPLES' MISTAKES, NOT YOURS

Over the years we have witnessed too many retirement assets that could not be divided as intended, or at all, because the asset was either not timely discovered or fully understood. Pensions are often the single largest asset a couple has, so you should take full advantage of the discovery process to ensure your client receives what you and your client intended.

Early Discovery: Absent special circumstances, a court will typically not amend or revise a final divorce decree or settlement agreement. Even if such circumstances exist, most courts won't disturb a final decree if the issue is not raised within one year after the decree. However, many attorneys wait until after the final decree to conduct thorough discovery of retirement assets. You have more leverage before the final decree to force the opposing party (or a plan sponsor) to comply with discovery requests.

Also, don't rely on or wait for your QDRO preparer to conduct discovery, especially since far too many parties delay having the QDRO prepared till well after the divorce is finalized. For example, the Wife in *Semmelhaack v. Semmelhaack*, 2013-Ohio-3568, did not request a QDRO till two years after the final decree. The QDRO preparer discovered that Husband had a second pension plan (with the same employer as the first plan) that was not addressed in the separation agreement, and that had a much larger marital benefit than the first plan. The Court mentioned it was suspicious of Husband's failure to disclose the second plan, but still refused to modify the "unambiguous" separation agreement that did not include the second plan. Interestingly, Husband mentioned in his brief that if Wife had timely requested a QDRO she might have been able to file a Rule 60(B) motion. To avoid making this same mistake, we recommend sending discovery requests to all the opposing party's present and past employers early in the proceedings, and to begin the QDRO process promptly.

Complete Discovery: Not all retirement assets are the same. Many retirement assets have unique and complicated provisions regarding benefit accrual, vesting, distribution, division, etc. You need more than a plan name and account balance to fully understand the amount and nature of a retirement asset.

For instance, we are aware of a major manufacturer's union pension plan that won't pay any portion of a special benefit to a former spouse unless the QDRO specifically directs the plan administrator to do so. Furthermore, the model QDRO for this plan makes no mention of the special benefit. An attorney (who had used the plan's model QDRO) recently asked us to help him understand why his client was receiving so much less per month than the participant. Not completely discovering how the plan works cost his client hundreds of dollars per month.

Conclusion: Make sure you discover and understand all the couple's retirement assets before the property division is finalized. It very well may save your client (and you) a lot of time, money, and heartache down the road.