

MEMORANDUM OF LAW

DATE: September 6, 1995

TO: D. Cruz Gonzalez, Risk Management Director

FROM: City Attorney

SUBJECT: Supplemental Pension Savings Plan Funds for Child Support  
Payments

QUESTION PRESENTED

May an active City employee's Supplemental Pension Savings Plan ("SPSP") funds be attached by the former spouse of the employee's husband for child support payments arising from the marriage of the employee's husband and former spouse?

SHORT ANSWER

No. Earnings (which include the "savings" portion of the SPSP) of the non-obligor spouse are not liable for debts of this type incurred before the marriage. Upon separation from City service, however, the pension portion of SPSP could, in limited circumstances and pursuant to a special hearing, be used to satisfy a judgment for child support.

BACKGROUND

On July 24, 1995, Risk Management received a Notice of Delinquency in the amount of \$534.18 purporting to attach a City employee's SPSP funds for arrearages of child support payments resulting from the marriage of the employee's husband and his former wife. The Obligor's name was blank. The Notice of Delinquency was initiated by the former wife.

This is not the first such notice received by Risk Management. Another Notice of Delinquency in the amount of \$3,200.00 was received by the Risk Management Department on March 28, 1994. On the advice of the City Attorney, the administrator for SPSP informed the former spouse of the employee's husband that no funds would be dispersed pursuant to that Notice. On April 25, 1994, the administrator for the SPSP plan received a letter from the former spouse setting forth her position and erroneous evaluation of the SPSP plan. No action was requested.

On April 27, 1994, the City Attorney sent a letter to the former spouse reiterating the City Attorney's contention that SPSP assets are not assignable or distributable to any creditors or other claimants under the terms of the SPSP plan.

On August 23, 1995, the City Attorney received a letter from the former spouse requesting information about the SPSP plan and "putting

the SPSP plan on notice" that she is "claiming that 100% of any funds disburseable to Kathleen Aceves the employee must be paid over to her under Family Code sections 910 and 915 to satisfy the outstanding child support arrearages in this case."

The City Attorney has reviewed the instant Notice of Delinquency, the SPSP plan document, revenue rulings issued by the Internal Revenue Service ("IRS"), the Family Code sections referenced by the former spouse as well as other relevant statutory and decisional authority and issues this Memorandum of Law.

#### ANALYSIS

##### 1. Introduction

The question in this case, regarding the attachment of SPSP funds for child support payments for children of an employee's spouse from a previous marriage raises, several preliminary issues involving community property and public retirement systems generally. The pivotal issue, however, lies with the nature and scope of the SPSP plan itself. Before addressing the merits of the question presented, we take this opportunity to provide a description of the SPSP plan.

##### 2. The Supplemental Pension and Savings Plan

SPSP is a tax qualified money-purchase plan with a savings component. The fixed employer contributions, and earnings thereon, form the basis for the money-purchase plan. The employee contributions, and the earnings thereon, form the basis for the savings component. This type of pension and savings arrangement is permitted and recognized by the IRS. Rev. Rul. 80-350, 1980-2 C.B. 133. In 1985, the City received a favorable determination from the IRS on the SPSP plan.

SPSP is a money-purchase plan because it provides a benefit based on the total amount of employer contributions in the employee's account. It is a qualified plan because the contributions are fixed and not geared to profits. 26 C.F.R. Section 1.401-1(b)(1)(i); Rev. Rul. 57-312, 1957-2 C.B. 255. It is considered a "pension" plan because the City has an obligation under the terms of the plan to make "fixed or determinable" contributions irrespective of profits. 60A Am. Jur. 2D, Pensions and Retirement Funds Section 19 (1988).

In essence, a money-purchase plan is the opposite of a defined benefit plan such as the San Diego City Employees' Retirement System. Instead of having a benefit formula fixed with contributions to be determined, the money-purchase plan has fixed contributions with benefits to be determined. Having a fixed rate of contributions allows an actuary to determine what the eventual benefits would be. As such, the IRS regards the money-purchase plan as providing "definitely determinable benefits," a qualification requirement for pension benefits generally.

According to Article III, Section 3.02 of the SPSP plan document, the City is required to contribute an amount which equals one hundred percent (100%) of the mandatory and voluntary contributions made by the

employees in the plan. These contributions are paid on a bi-weekly basis to the trustee. Article VI, Section 6.02 of the SPSP plan document provides further that while employed, employees may not, for any reason, withdraw any portion of the employer mandatory or voluntary contributions, including any earnings thereon.

SPSP, however, has a savings component based on the employee contributions to the plan. In this regard, the IRS has ruled that an otherwise qualifying pension plan may also provide for the receipt of voluntary nondeductible employee contributions of up to ten percent (10%) of their compensation. Rev. Rul. 80-350, 1980-2 C.B. 133. The fact that employees are also required to make mandatory contributions will not adversely affect the plan's qualification so long as the voluntary employee contributions are kept to the ten percent (10%) limit. Rev. Rul. 70-658, 1970-2 C.B. 86.

The voluntary employee contributions permitted by the SPSP plan document are well within this ten percent (10%) limit. According to Article III, Section 3.01, of the SPSP plan document, employees are required to contribute an amount equal to three percent (3%) of their compensation. In addition, employees may contribute an additional amount up to four percent (4%) of their compensation. These contributions are deducted from the employee's bi-weekly compensation.

While employed, and with certain restrictions, employees may withdraw all or a part of their employee contributions, including earnings thereon. The right of withdrawal is limited to the employee. Spouses of employees have no withdrawal rights. The fact that the employee is permitted to withdraw all or a portion of the employee contributions, including earnings thereon, will not alter the overall characterization of the plan or jeopardize its tax qualified status. Rev. Rul. 69-277, 1969-1 C.B. 116; Rev. Rul. 60-323, 1960-2 C.B. 148.

Finally, Article XIV, Section 14.02 of the SPSP plan document provides for the non-alienation of benefits. Pursuant to this provision, the benefits are not "assignable or distributable to any creditor or other claimant of such participant."

3. The savings portion of the SPSP is not liable for a child support debt arising from the marriage of an employee's husband and his former wife.

Generally speaking, a child or spousal support obligation of a married person that does not arise out of the marriage shall be treated as a debt incurred before the marriage. California Family Code section 915. In addition, it is also well settled that the community estate is liable for a debt incurred by either spouse before or during marriage unless there is an express statutory exception. California Family Code section 910.

The "earnings" of a married person are an express exception to this general rule. In this regard, California Family Code section 911

expressly provides:

(a) The earnings of a married person during marriage are not liable for a debt incurred by the person's spouse before marriage. After the earnings of the married person are paid, they remain not liable so long as they are held in a deposit account in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate, except property insignificant in amount.

(b) As used in this section:

(1) "Deposit account" has the meaning prescribed in Section 9105 of the Commercial Code.

(2) "Earnings" means compensation for personal services performed, whether as an employee or otherwise.

In the present case, the employee contributions in the savings component of SPSP plan are clearly "earnings," and therefore not liable for the child support debt incurred by the employee's husband as the result of his former marriage. In support of this conclusion we note that the employee contributions to SPSP are deducted from the employee's biweekly compensation, thus satisfying the definition of "earnings" referenced in Family Code section 911 (b)(2).

In addition, we note that the employer and employee contributions to SPSP are held in trust in separate accounts to which the employee's spouse has no independent right of access, or withdrawal. As such, the employee contributions remain protected as long as they remain in SPSP. The protection is available upon withdrawal as well, however, so long as the employee places the withdrawn employee contributions in another "'deposit account' in which the person's spouse has no right of withdrawal and are uncommingled with other property in the community estate." California Family Code section 911.

4. The pension portion of SPSP, upon severance of the employment relationship, may be available to satisfy a child support debt arising from the marriage of an employee's husband and his former wife.

Generally speaking, public retirement benefits are exempt from attachment or execution of money judgments. California Code of Civil Procedure section 704.110. This rule is not absolute. Judgments for child or spousal support, however, are accorded special treatment. California Code of Civil Procedure section 703.070.

According to section 703.070, a court, upon noticed motion of the judgment creditor, may determine the extent to which the exempt property may nevertheless be applied to the satisfaction of the judgment. This

section provides further:

In making this determination, the court shall take into account the needs of the judgment creditor, the needs of the judgment debtor and all of the persons the judgment debtor is required to support, and all other relevant circumstances. The court shall effectuate its determination by an order specifying the extent to which the otherwise exempt property is to be applied to the satisfaction of the judgment.

The timing of this motion, however, appears to be conditioned upon the availability of the exempt asset. According to California Code of Civil Procedure section 704.110(c), where an exempt asset becomes payable to a person and is sought to be applied to the satisfaction of a judgment, the amount is exempt only to the extent determined by the court pursuant to the hearing procedure described in section 703.070 above.

In the present case, the employer contributions to the SPSP are the pension portion of plan. These funds are not available to the employee, for any purpose, until the employee severs the employment relationship. This is an absolute prohibition. The tax qualified status of the plan is dependent upon the continued maintenance of this requirement. Thus, even though there is a community interest in these monies, they are not available for distribution until the employee retires from or terminates City service.

As such, any hearing on the use of this exempt asset prior to the time in which these monies could become payable to the employee is premature. Only upon termination or severance of the employment relationship could the court consider this exempt community asset by conducting the hearing envisioned by section 703.070. Until then, the employer contributions, including any earnings thereon, are not subject to attachment for the child support arrearages set forth in the instant Notice of Delinquency.

5. The joinder is unnecessary and should be removed.

Before closing, we turn briefly to the issue of the joinder placed on the SPSP in 1993 pursuant to Family Code section 2060. In our view the joinder is unnecessary and should be removed. According to Family Code section 5103, "an order for the payment of child, family, or spousal support may be enforced against an employee benefit plan regardless of whether the plan has been joined as a party to the proceeding in which the support order was obtained."

If the joinder remains on the SPSP account, however, we find that it impacts the distribution of the pension portion (employer contributions and earnings thereon) only. To the extent that employee funds are available for withdrawal, any request by the employee for

their withdrawal should be processed in the normal course.

CONCLUSION

Under California law, a child support obligation of a married person that does not arise from the marriage shall be treated as a debt incurred before the marriage. Importantly, a non-obligor spouse's earnings are exempt from liability for debts incurred before the marriage.

Thus, while SPSP funds may be community property for some purposes, the employee contributions for active employees, constituting the savings component for the SPSP, are considered earnings and therefore not subject to attachment for child support obligations arising outside the marriage.

The same is true for the pension portion of the SPSP. Until the employment relationship is severed, the employer contributions constituting the money purchase pension plan are not due and payable to the employee. They cannot be the subject of an attachment now. Any hearing required by law to consider this otherwise exempt asset must wait until these monies become available to the employee.

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