

Pension Garnishment

Issue

The Governor has asked the Select Committee on Pension Policy (SCPP) to consider whether there should be an additional exception to the general rule that pensions are not subject to garnishment. For example, should pensions be subject to garnishment when the retiree has caused severe bodily injury or death?

Background

Garnishment is a court-ordered process of enforcing payment of an obligation or debt via a third party. Pensions are generally exempt from garnishment, except when ordered by the court for the following circumstances:

- ❖ Divorce.
- ❖ Child support.
- ❖ Federal court order.
- ❖ Restitution (limited).

This issue arose out of the state supreme court ruling in *Anthis v. Copland* (173 Wn.2d 752), and resulting legislation. However, the Governor's question covers different aspects of the issue. In brief, the recent court case and legislation are about the timing of garnishment. The Governor's question is about the underlying policy and exceptions to the rule exempting pensions from garnishment.

Policy Highlights

- ❖ This issue crosses into both pension policy and judicial policy.
 - ◇ Policy makers may wish to coordinate efforts with experts in judicial policy.
- ❖ Policy makers may want to consider balancing public interests such as protecting retirement income for citizens, and ensuring compliance with federal law.
- ❖ Creating a new exception may raise issues under federal tax law, and policy makers may wish to review any proposals with tax counsel.
- ❖ Policymakers may want to consult the Attorney General's Office regarding whether or not retirees or current plan participants have a contractual right in their retirement assets being free from garnishment in situations that are not currently authorized by law.

- ❖ Pension plans will pay the same amount regardless of whether the monthly checks go to one person, or are divided between two people.
- ❖ Washington's peer states do not generally allow garnishment in cases where the retiree has caused serious bodily injury or death.
- ❖ DRS wishes to maintain the clear delineation between the judicial and plan administrator roles.

Committee Activity

The SCPP received an initial briefing on this issue at the May 15, 2012 meeting. The Executive Committee scheduled this issue for a work session.

Next Steps

Possible next steps for the SCPP include the following:

- ❖ No further action.
- ❖ Executive Committee direct may staff to:
 - ◇ Prepare letter to the Governor recommending no changes be made.
 - ◇ Coordinate with Judiciary Committees.
 - ◇ Prepare policy options for next meeting.

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In Brief

Issue

The Governor has asked the Select Committee on Pension Policy (SCPP) to consider whether there should be an additional exception to the general rule that pensions are not subject to garnishment.

Member Impact

Any changes to pension garnishment provisions could affect members of all state retirement systems, including judicial and municipal plans.

Garnishment is the process of enforcing an obligation or debt via a third party.

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Pension Garnishment

Issue

The Governor has asked the Select Committee on Pension Policy (SCPP) to consider whether there should be an additional exception to the general rule that pensions are not subject to garnishment. For example, should pensions be subject to garnishment when the retiree has caused severe bodily injury or death?

If so, the Governor has further inquired to what extent pensions should be subject to garnishment. In other words, should there be limits or caps on the garnished amount of each check?

Background

It is important to note that provisions related to pension garnishment are found in many places throughout the RCW. The following background and analysis was prepared by pension staff in consultation with the Attorney General's Office, and represents staff's best interpretation of the statutes for the purpose analyzing the policy question before the SCPP. Other analysts or attorneys, including judicial staff, may interpret the statutory interaction differently. In addition, case law and administrative interpretation may override any plain reading of the statutes. Readers should consult an attorney before relying on this analysis for any other purpose.

What Is Garnishment?

Garnishment is the process of enforcing payment of an obligation or debt via a third party. For example, if a person has not paid their taxes, the Internal Revenue Service (IRS) can present a court order to the person's employer ordering the employer to divert a set amount of the person's wages to the IRS each month.

Garnishment is limited; typically to a maximum percentage of the person's earnings. However, the actual caps will vary based on the type of garnishment.

Pensions are generally exempt from garnishment, except in limited circumstances.

General Rule For Garnishing Pensions

As a general rule, pensions are exempt from garnishment, and are not subject to state and municipal tax. From an IRS perspective, pensions are intended for the exclusive benefit of the plan participants and their beneficiaries.¹

This exemption applies to state and federal government pensions, federally qualified pensions, and other retirement vehicles such as IRA, 401(k) and 403(b). However, there are exceptions to that general exemption (i.e. circumstances when pensions can be garnished).

At a very high level, current statutes provide four exceptions to the rule that pensions cannot be garnished; three general exceptions, and one limited exception:

- ❖ General exceptions.
 - ◇ Child support enforcement.
 - ◇ Divorce decrees.
 - ◇ Federal court orders.
- ❖ Limited exception.
 - ◇ Restitution, ordered following a criminal conviction.

General Exceptions

The pension statutes for each plan state that pensions are exempt from garnishment, attachment and any other process of law.² Further, pension assets are exempt even after they've been received by the retiree, deposited, or loaned.³

However, these same statutes also provide exceptions to the exemption (i.e. situations where pensions can be garnished):

- ❖ Child support enforcement.
- ❖ Divorce decrees.
- ❖ Federal court orders.

Specifically, the statutes provide that even though pensions are generally exempt from garnishment, this does not prohibit the Department of Retirement Systems (DRS) from complying with court orders issued for the following:⁴

¹ See *Federal Law Analysis*, below

² See e.g. RCW 41.40.052.

³ This provision was added by SHB 1552 (2012).

⁴ The exception provisions (i.e. stating when pensions can be garnished) are largely identical in each of the pension plan chapters. However, some, but not all, contain an additional provision that allows DRS to comply with an order for a mandatory benefits assignment issued by DRS. Compare e.g. RCW 41.40.052(3) and RCW 43.43.310((2)). Both are nearly identical, except the former includes "a

1. Wage assignment orders, issued pursuant to chapter 26.18 RCW (Child Support Enforcement).
2. Orders to withhold and deliver, issued pursuant to chapter 74.20A RCW (Support of Dependent Children).
3. Notices of payroll deduction, issued pursuant to RCW 26.23.060 (Child Support).
4. Court orders for mandatory benefits assignments, as defined in RCW 41.50.500(3) (Mandatory assignment of retirement benefits).
5. Any administrative or court order expressly authorized by federal law.

Limited Exception

Current statutes state that pensions can be garnished when ordered by the court for restitution following a criminal conviction. Specifically, it may only be awarded for easily ascertainable damages.

Pension garnishment to pay restitution is authorized by current statutes, but is limited to criminal cases, and easily-ascertainable damages.

Under RCW 9.94A.753(5), restitution shall be ordered whenever the offender is convicted of an offense which results in an injury to any person, or damage or loss of property, or when pleading guilty to a lesser offense as part of a plea deal.

To enforce payment of restitution, a court may order a mandatory payroll deduction from the defendant's earnings.⁵

"Earnings" is defined, for the purpose of restitution, to explicitly include "periodic payments pursuant to pension or retirement programs."⁶ Further, this ability to garnish pensions is "notwithstanding any other provision of law making such payments exempt from garnishment, attachment, or other process."⁷

However, restitution is limited to easily ascertainable damages⁸, which includes the following:

- ❖ Injury to, or loss of property.
- ❖ Actual expenses incurred for treatment.
- ❖ Lost wages resulting from injury.

mandatory benefits assignment order issued by the department" [emphasis added], while the latter includes a "mandatory benefits assignment order issued pursuant to chapter 41.50 RCW" [emphasis added.]

⁵ RCW 9.94A.7602. Technically, the court can order payroll deduction for legal financial obligations (LFOs), which includes restitution along with other court-ordered costs. See RCW 9.94A.760.

⁶ RCW 9.94A.7601

⁷ RCW 9.94A.7601

⁸ RCW 9.94A.753(3)

This definition does not include pain and suffering, or other intangible losses.

DRS Procedures And Data

Once a court has issued an order to garnish a retiree's pension, the petitioner provides that order to DRS.

Upon receipt, DRS reviews the order to ensure it is a genuine, final court order, and that it clearly states how the pension should be apportioned.

DRS will then divide the assets as they are paid out, by issuing two checks: one to the retiree, and one to the petitioner.⁹

If for any reason DRS is unable to enforce the order, DRS will return the order to the petitioner, and notify the petitioner of the relevant RCWs and WACs that apply to garnishment. The petitioner may then pursue a modification of the order, and submit that modified order to DRS.

Over the past three years, DRS reports it has enforced 1002 new court orders for garnishment, broken down as follows:

- ❖ IRS levies: 21.
- ❖ Child support orders: 14.
- ❖ Bankruptcy orders: 6.
- ❖ Divorce orders: 961.

Court Case And Legislative Action

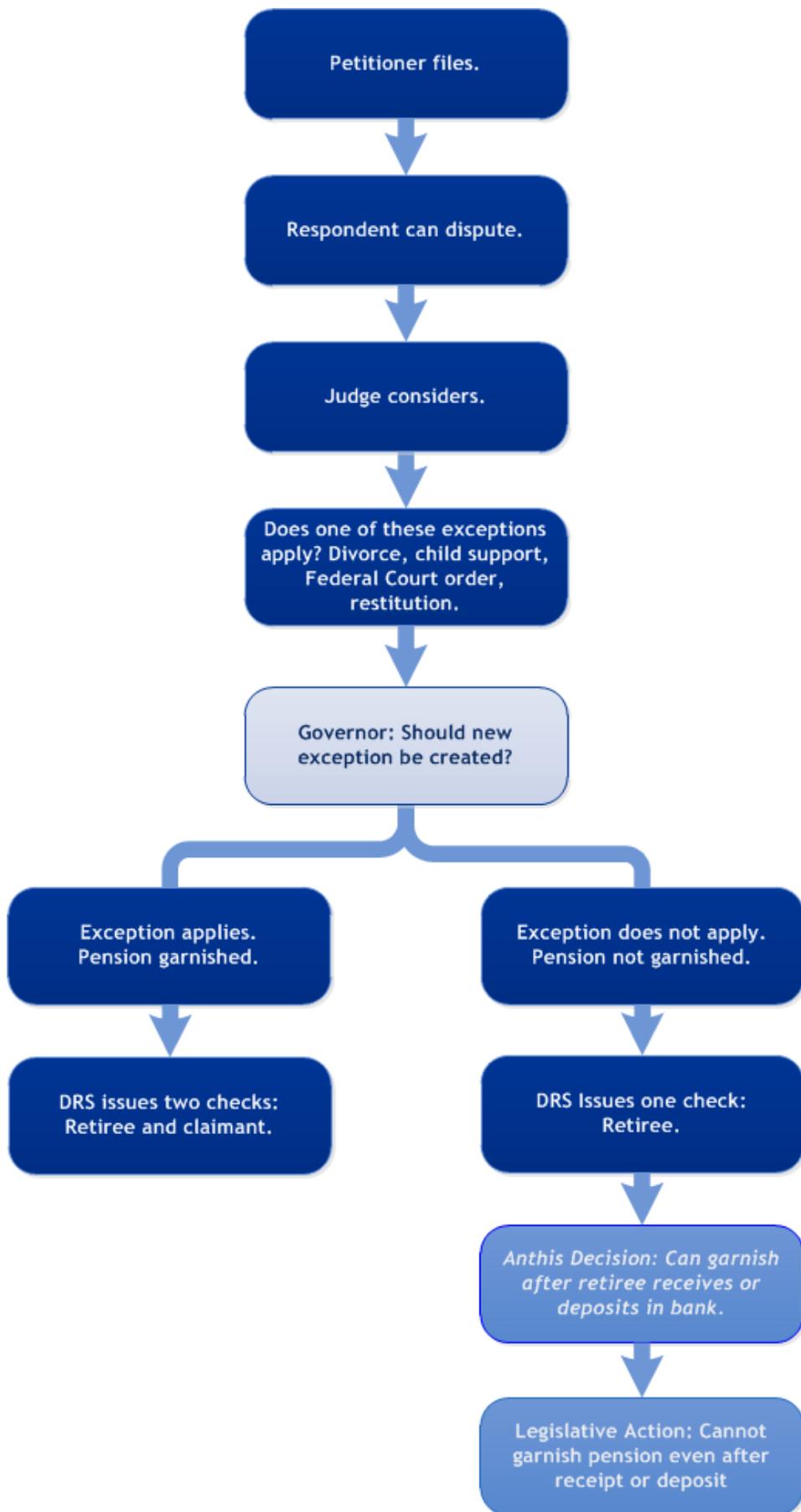
An understanding of the recent court case and the resulting legislation will help provide context, and assist readers in understanding the background of the garnishment issue.

The case and legislation have more to do with timing of garnishing pension assets. That is, can pension assets be garnished once the retiree receives the check or deposits it in a bank?

In contrast, the Governor has asked the SCPP to consider the underlying policy for why pensions should or should not be exempt from garnishment in the first place.

The recent court case and legislation concern the timing of pension garnishment. The Governor has asked the SCPP to consider the underlying policy.

⁹ Retirement accounts can also be split in some circumstances. Please see WAC 415-02-500 for more information.



Washington State Supreme Court Case

Anthis decision: Pension assets can be garnished after receipt or deposit by the retiree.

Anthis v. Copland,¹⁰ concerned a wrongful death claim against a retiree. Specifically, the retiree had been convicted of first degree manslaughter. The victim's spouse filed a civil claim for wrongful death, and was awarded damages.

The retiree's Law Enforcement Officers' and Fire Fighters' (LEOFF) pension was his only asset, and the victim's spouse sought to garnish that pension to enforce payment of the damages.

The court looked at the precise wording of the pension statutes, and used a constructive analysis to determine that LEOFF pensions are only exempt from garnishment up to the point that they are paid to the retiree. From that point on, those assets can be garnished.

Since the court's decision was based on precise technical language in the LEOFF statutes, the court mentioned that the Legislature could change this by adding certain language to the statute.

The court has denied a petition to review the case.

Legislative Action

Legislative action: Pension assets are exempt from garnishment even after receipt or deposit.

After the *Anthis* case was decided, the Legislature amended an existing bill on garnishment provisions. Prior to amendment, the bill included largely procedural changes, such as new forms and attorneys' fees.

This bill was amended to state that pensions are not subject to garnishment even after the assets have been paid to the retiree or placed in a bank account, etc. This change was applied to pension statutes for all state pension plans, including the judicial and municipal plans.

The resulting legislation was enacted as SHB 1552, or Chapter 159, Laws of 2012, 1st Sp. Session.

The Governor's Letter To The SCPP

Governor's letter: Should there be an additional exception allowing pensions to be garnished when the retiree has caused serious bodily injury or death?

After signing the bill, the Governor wrote to the SCPP. The full text of the letter is included below as an attachment to this issue paper. In brief, the Governor asked the SCPP to make a recommendation regarding the following:

- ❖ Should there be an additional exception to the general rule exempting pensions from garnishment?
- ◇ In addition to divorce, child support, federal order, or restitution.

¹⁰ 173 Wn.2d 752, 270 P.3d 574 (2012)

- ◇ For example, where the retiree caused serious bodily injury or death.
- ❖ If so, to what extent should pensions be subject to garnishment?

Analysis

In addition to the underlying issue of balancing public interests, policymakers may want to consider aspects of pension policy, judicial policy, and administration.

Balancing Public Interests

In considering whether a new exception should be created, policy makers may want to consider balancing public interests such as the following:

- ❖ Protecting retirement income for citizens.
 - ◇ This is supported by the general exemption of pensions from garnishment. Thus, retirees' income cannot be garnished, for example, to enforce payment of a utility bill or consumer loan.
- ❖ Ensuring that separated spouses support each other.
 - ◇ This is supported by the ability to garnish pensions as part of a dissolution.
- ❖ Ensuring parents provide financial support for their children.
 - ◇ This is supported by the ability to garnish pensions for child support.
- ❖ Complying with federal law
 - ◇ This is supported by the ability of DRS to enforce federal court orders, for example when filed by the IRS for nonpayment of taxes.
- ❖ Requiring convicted criminals to compensate their victims.
 - ◇ This is supported by the ability of a judge to order garnishment of pensions following a criminal conviction.

Creating a new exception may involve a balancing of several public interests.

Pension Policy

When analyzing the pension policy implications of an issue, the SCPP typically reviews and considers at least the following aspects:

- ❖ Impact on pension liabilities.
- ❖ Contractual rights.

- ❖ Federal Law
- ❖ Other states.

A retirement plan will pay the same amount regardless of how each check is divided.

Impact on Pension Liabilities

Creating a new exception (i.e. allowing pensions to be garnished under more circumstances) would not impact pension liabilities. The plan will pay the same amount regardless of whether the monthly checks go to one person, or are divided between two people.

Contractual Rights

Several RCW provisions explicitly state that retirement assets are exempt from garnishment, except under the limited circumstances detailed above. Policymakers may want to consider whether or not retirees or current plan participants have a contractual right in their retirement assets being free from garnishment in situations that are not currently authorized by law.

Policymakers may wish to consult the Attorney General's Office for advice before pursuing a particular option.

Federal Law Analysis

In order to determine if there were any federal tax implications to expanding garnishment provisions staff requested the assistance of Ice Miller, LLP. The full report from Ice Miller is reprinted as an attachment to this issue paper.

In brief, expanding garnishment provisions to include situations where a retiree has caused serious bodily injury or death may raise issues under the exclusive benefit rule if the garnishment is not voluntary on the part of the retiree.¹¹

As noted above, the exclusive benefit rule requires that plans be established for the exclusive benefit of members and their beneficiaries.¹²

However, the IRS has allowed involuntary garnishment of pensions in circumstances largely related to enforcement of federal laws.¹³ This includes, for example, payment of federal income tax, federal fines, criminal restitution under the Federal Debt Collection Procedures Act, or garnishment under the Mandatory Victims Restitution Act.

In prior rulings and regulations, the IRS has also allowed garnishment in circumstances where the garnishment was voluntary on the part of the retiree, reasoning that payment of a debt or obligation is a benefit

Creating a new exception may raise issues under the exclusive benefits rule. Policy makers may wish to solicit analysis of any proposal for a new exception.

¹¹ See Ice Miller analysis, page 4

¹² See Ice Miller analysis, page 1

¹³ See Ice Miller analysis, page 2

to the plan member.¹⁴ In other words, while the debt itself may be mandatory, the garnishment of the retiree's pension to enforce payment of that debt may need to be optional.

Thus, to be consistent with prior IRS rulings, any new exception may need to be voluntary on behalf of the retiree.

This does not mean that involuntary garnishment is necessarily prohibited. The analysis prepared by Ice Miller largely relies on Private Letter Rulings (PLRs) issued by the IRS. While PLRs only bind the IRS with respect to the recipient of the ruling, they may provide useful guidance for future rulings.

If policy makers wish to pursue a proposal for creating a new exception to pension garnishment provisions, they may wish to review that proposal with tax counsel before proceeding.

Other States

All of Washington's peer states allow pension garnishment for support of a child or ex-spouse. At least six peer states allow garnishment for federal taxes. Only one state (CO) allows garnishment for state taxes. Only two (CO and OH) allow garnishment for restitution in limited criminal cases.

The two states that allow pensions to be garnished for restitution only allow such garnishment for specific crimes (e.g. theft while in public office.)¹⁵

Washington's peer states do not generally allow pensions to be garnished when the retiree has caused serious bodily injury or death.

Judicial Policy

The issue of pension garnishment crosses into not just pension policy, but judicial policy as well. Judicial policy is typically outside the purview of the SCPP and staff, and policymakers may wish to coordinate any efforts on this issue with judicial policy experts.

If policymakers decide that a new exception should be created, the practical application would raise many questions of judicial policy, and involve analysis of non-pension statutes.

¹⁴ See Ice Miller analysis, page 2

¹⁵ The preceding analysis relies largely on plan handbooks issued by the state retirement systems. Please note that the handbooks may not have anticipated this precise issue, and there may be additional statutes, case law, and administrative interpretation that guide or trump the general rules presented.

Sample Judicial Policy Questions

An exhaustive discussion of judicial policy questions is beyond the scope of this issue paper. However, the following sample questions are provided for illustration.

Policy makers may wish to coordinate efforts with experts in judicial policy.

- ❖ What types of judgments are included?
- ❖ What types of injuries should qualify?
- ❖ Who should qualify?
- ❖ Should the exception be retroactive?
- ❖ Should pensions be a last resort?
- ❖ What should the limits be?
- ❖ At what point is it available?

Please see the Appendix for more discussion of these questions, as well as potential sub-questions.

Non-Pension Statutes

As noted above, garnishment statutes appear in many places throughout the state code. Specifically, the RCWs contain at least five more-or-less self-contained chapters on garnishment and similar enforcement mechanisms.¹⁶

Each of the following code chapters concerns the court-ordered diversion of assets from one person to another for payment of an obligation or debt. To some degree, they each describe notice and response procedures, present boilerplate forms, and state what types of assets are included. More than one explicitly includes pensions as a garnishable asset.

- ❖ Garnishment in chapter 6.27.
- ❖ Payroll deduction in chapter 9.94A. (Sentencing Reform Act).
- ❖ Wage assignment order in chapter 26.18. (Child Support Enforcement).
- ❖ Mandatory assignment of benefits in chapter 41.50. (Department of Retirement Systems).
- ❖ Lien against personal property for non-payment of child support in chapter 74.20A. (Support of dependent children -- Alternative method).

In addition to these chapters, there are others that overlap to some degree. For example the personal property exemptions in chapter 6.15 RCW impact the general garnishment provisions noted above.

¹⁶ These are in addition to the general exemption provisions in pension statutes. See General Exceptions, above.

Administration

As noted above, DRS enforces court orders presented to it, and defers to the courts to determine whether or not garnishment is appropriate for a given case.

The department has stated that whatever changes or new exceptions may be made, they wish to maintain the clear delineation between the judicial and plan administrator roles, and continue to defer to the courts to determine when garnishment is appropriate.

Conclusion

Pensions are generally exempt from garnishment. There are currently four exceptions to the general rule: divorce, child support, restitution, and federal court orders.

The Governor has asked whether an additional exception should be created, for example when a retiree has caused serious bodily injury or harm. In deciding, the committee may want to consider the balancing of several public interests.

Creating a new exception would cross into aspects of pension policy, and judicial policy. As such, policy makers may wish to coordinate any efforts with experts in judicial policy.

Expanding garnishment may raise issues under the exclusive benefits rule, and policymakers may want to consider additional legal analysis of any proposal for a new exception to ensure consistency with IRS requirements.

Attachments

Letter from Governor Gregoire, dated March 29, 2012.

Email from Bonnie Anthis, dated May 10, 2012.

Letter from Ice Miller, LLP, dated September 7, 2012.

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APPENDIX

If a new exception is created (i.e. if pensions can be garnished under more circumstances), the practical application of that exception would raise many judicial policy questions.

As noted in the issue paper, a full discussion of all the potential judicial policy questions is outside the scope of this paper. However, the following questions are provided here for the purpose of illustration.

What Types Of Judgments Are Included?

Following an injury, there may be both criminal and civil actions. For example, following the killing of a person, the state may file criminal charges, and the victim's family may file a civil suit.

This presents the first sub-question: Should pensions be garnishable in both criminal and civil cases?

Second, if civil cases should be included, must those civil cases be connected to a criminal case? In other words, should garnishment be available to pay common debts, or must the civil case be related to a criminal case?

Third, if it is assumed that the civil case should be related to a criminal case, would any type of criminal case qualify, or must the civil case be tied to specific types of crimes, as is the case with wrongful death?

Fourth, must there be a conviction in the related criminal case as a prerequisite to garnishing the retiree's pension in a civil suit?

What Types Of Injuries Should Qualify?

The Governor's letter suggests an exception where the retiree has caused serious bodily harm or death. In determining what types of injuries constitute "serious bodily injury", current statutes contain provisions that might be utilized. For example, RCW 9A.04.110 contains three separate definitions for "bodily harm," "substantial bodily harm," and "great bodily harm." Alternatively, policymakers might choose to determine the requisite injuries based on the classification of the crime, such as murder, manslaughter, battery, etc.

Who Can Petition For Garnishment?

Should people other than the victim be allowed to qualify for the new exception? If so, should it be limited to immediate family, such as the victim's spouse and dependent children?

Should The Change Be Retroactive?

Retroactivity is a common issue in pension policy, and is usually discussed in terms of unfunded costs. However, retroactivity may have different implications in this context. Specifically, policymakers may want to give some thought as to whether or not there are constitutional issues with retroactively creating a remedy for an otherwise settled criminal sentencing or related civil suit.

Should Pensions Be A Last Resort?

In some cases, the retiree's only source of income is his or her pension. That will not always be the case. Should a person be required to pursue collection from any other assets the retiree has before attempting to garnish the pension, or should the garnishment option always be available?

What Should The Limits Be?

As noted above, the caps for garnishment differ based on the underlying claim. Should pension garnishment be capped, should those caps be aligned with existing caps, and if so, which ones?

At What Point Is It Available?

Pre-judgment garnishment is available in limited circumstances.¹⁷ Should pre-judgment garnishment be available under the new exception?

¹⁷ See RCW 6.26.010

CHRISTINE O. GREGOIRE
Governor



STATE OF WASHINGTON
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March 29, 2012

The Honorable Barbara Bailey
Chair, Select Committee on Pension Policy
Post Office Box 40600
Olympia, WA 98504-0600

Dear Representative Bailey:

I am writing to ask the Select Committee on Pension Policy to review and to make recommendations to the Legislature as to whether additional exceptions to the general exemption of pensions from garnishment would be appropriate, and if so, what level of garnishment would be appropriate.

Today I signed into law SHB 1552, an act concerning garnishment. The initial purpose of the bill was to streamline the garnishment procedures and allow garnishees to retain a larger portion of their wages. In the legislative process, the bill was expanded to also amend several pension statutes in response to the ruling in the recent State Supreme Court case *Anthis v. Copland*, 270 P.3d 574 (2012). These amendments restore state pension policy to the pre-*Anthis* state policy that pensions are generally exempt from garnishment. Restoration of long-standing pension policy does, however, limit avenues available to victims of serious crimes for collecting on civil judgment awards.

The *Anthis* case involves the garnishment of a LEOFF 1 pension following a successful wrongful death lawsuit against the beneficiary. The Court held that although the LEOFF garnishment exemption language protects the funds while in the control of the trust, once the funds are disbursed to the beneficiary, they are subject to potential garnishment. Prior to *Anthis*, the legal practice was that state law exempted pensions from garnishment, even after deposit in a bank account. The Court used a statutory construction analysis, and invited the Legislature to clarify the language if necessary, which the Legislature did by amending 12 public employee pension exemption statutes in SHB 1552 to exempt pensions from garnishment after deposit reflecting the long standing policy and practice.

While there are public policy reasons to support the general exemption of pensions from garnishment, I recognize the concern about exemptions in situations such as presented in *Anthis*. State law already allows for garnishment of pensions in limited circumstances such as divorce decrees, child support enforcement orders, and federal court orders. It may also be appropriate to allow for garnishment in instances in which a beneficiary causes serious injury to or the death of another person, leaving individuals without means of basic support. If, however, garnishment were to be extended in these types of circumstances, it would be important to determine to what extent the pension could be garnished.



The Honorable Barbara Bailey
Chair, Select Committee on Pension Policy
March 29, 2012
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The Select Committee on Pension Policy is uniquely qualified to study these issues and to make recommendations to the Legislature. I have spoken with the proponents of SHB 1552 and they share my concerns that the issue of garnishment to collect on judgments where the beneficiary has caused the death of another person or other serious circumstances must be addressed.

I hope that the Select Committee on Pension Policy will take up consideration of these important pension policy matters.

Sincerely,

A handwritten signature in blue ink that reads "Christine".

Christine O. Gregoire
Governor

cc: Representative Roger Goodman
Other members of the Select Committee

Wallis, Keri

Subject: FW: Bonnie Anthis

From: Bonnie [<mailto:bonnieanthis@yahoo.com>]
Sent: Tuesday, May 01, 2012 7:13 PM
To: McCrow, Adam
Subject: Bonnie Anthis

Chairperson Rep. Barbara Bailey
Committee on Pension Policy

My name is Bonnie Anthis, I am the widow of Harvey "Al" Anthis who was shot and killed by Walt Copland, a retired police captain from Tacoma, in September of 2005. I feel it is important for me to illustrate how this bill (1552, section 21) directly effects me and my family and has now created an avenue for convicted killers such as Mr. Copland to avert paying restitution to victims of violent crimes. First I think it is relevant to point out that collecting an award from a civil lawsuit is challenging at best. It is common for convicted felons to not have many or any assets, and what assets they possess are typically liquidated to pay for their legal representation throughout the many years of appeals, thus leaving the victims' family nothing. So my fight has little to do with financial gain-it has everything to do with justice and protecting the rights of the victims families post Anthis v. Copland.

In my case, after Mr. Copland exhausted his appeals and the conviction was upheld, the next tactic for him to shelter his only known asset was to seek bankruptcy protection naming me as his only debtor. A trial was held in Tacoma and after hearing testimony from our witnesses that had testified at the murder trial, the bankruptcy Judge determined that the civil lawsuit was NOT discharged, therefore I could continue with the pursuit of garnishment once Mr. Copland received his monthly distribution from his pension into his personal bank account. It has been nearly 7 stressful, time and money consuming years of standing up in court for justice, and I have prevailed on every level-all the way through the State's Supreme Court.

My understanding is that almost immediately after the ruling by the State's Supreme Court, Rep. Goodman felt that it left the pensions of state employees, specifically those of firefighters and police vulnerable to garnishments, so as a direct response to the ruling an emergency amendment was added to the bill. What I find hard to digest was unlike the original bill which went through the normal process allowing for public hearings and scrutiny, the emergency amendment (section 21) was slipped in without and public discussion, without any legislators knowing how this one little addition would adversely effect "Bonnie Anthis" and potentially other Washington citizens. I was never contacted and my attorney was never contacted for our comments or concerns. While I understand Rep. Goodman's passion to move his bill into law, he has worked on Bill 1552 for years and the bill was just at the end of being signed into law and then.... the Supreme Courts ruling threw a proverbial wrench in his plan-I feel it was rushed in recklessly rather than giving it the attention and scrutiny it deserved, it was signed into law by the Governor with the recommendation that your committee now look at possible exceptions of pensions from garnishments.

You can certainly understand the emotions I now feel nearing the end of this 7 year battle to finally have the Supreme Court interpret the law and rule in my favor to then immediately have the Legislature and Governor come in and squash the victory for victims rights.

So now I urge you and your Committee to advise the lawmakers to adding, amending, creating or doing whatever is necessary to restore the rights of the victims families, to close up this loophole and to consider including language consistent with the Ninth Circuit of U.S. Bankruptcy Appeals which concluded (section 523 (a) provides in relevant part that (a) discharge under section 727...does not discharge an individual debtor from and debt...for willful and malicious injury by the debtor to another entity)

Without such language in State pension law, as the law stands, those convicted felons such as Mr. Copland, would essentially receive an automatic discharge for their debt for willful and malicious injury leaving the victims family no recourse to collect on a civil lawsuit.

I appreciate your time,

Bonnie Anthis

PENSION GARNISHMENT – FEDERAL LAW CONSIDERATIONS

By Mary Beth Braitman and Terry A.M. Mumford, Ice Miller LLP

QUESTIONS ADDRESSED BY THIS ANALYSIS

This analysis has been prepared to be included in a report by the Office of the State Actuary ("OSA") to the Washington Select Committee on Pension Policy ("Select Committee"). The Select Committee was asked by Governor Gregoire to review and make recommendations to the legislature as to whether additional exceptions to the general exemption of pensions would be appropriate. OSA has asked Ice Miller LLP to address the following scenarios and specific questions.

Under state law, pensions are exempt from garnishment and attachment, subject to certain exceptions. General exceptions include divorce, child support, or as needed to enforce a federal court order. If the state were to add one or more new exceptions:

1. *Are there general ground rules in tax code, ERISA, or case law, for garnishing public pensions?*

2. *Are there tax and legal implications at the federal level for expanding garnishment provisions? Specifically, would there be implications if the state were to garnish pensions when the retiree has caused serious bodily injury or death?*

a. *Is there guidance in federal law regarding the reasons pensions can be garnished?*

b. *Are there red flags or other options lawmakers should consider?*

c. *Are there potential impacts to plan qualification?*

In responding to these questions, OSA is only concerned with pension garnishment at the point where the Department of Retirement Systems is issuing a monthly check. The issue the Washington Supreme Court looked at – whether one can garnish after the retiree receives the money -- is not an issue at this time.

GENERAL GROUND RULES

Federal Status of Washington State Pension Plans

The Washington State defined benefit plans have been established and maintained as qualified governmental plans under Internal Revenue Code ("IRC") Sections 401(a) and 414(d). The benefits of qualified status flow directly to the members, retirees, and beneficiaries of those plans. Therefore, it is important that the qualified status of those plans be maintained.

Exclusive Benefit Rule (IRC Section 401(a)(2))

The IRC requires that qualified plans, such as the Washington State pension plans, must be established for the exclusive benefit of members and their beneficiaries. See IRC Section 401(a)(2). This would generally mean that a qualified plan cannot make payments except to members and their beneficiaries.

However, the Internal Revenue Service ("IRS") ruled in Private Letter Ruling ("PLR") 8426124 that payments made from a governmental plan, discharging a debt owed (in the bankruptcy context) by a member, satisfied the exclusive benefit rule. See GCM 39267. In this PLR, the IRS noted that the participants had voluntarily entered into debt repayment plans under Chapter 13 and that the payments were supervised by a bankruptcy court trustee. The IRS further stated the following:

For a plan to fail to qualify under section 401(a) of the Code, the diversion of funds of the trust must be for other than the exclusive benefit of the participants. If the funds of the trust are used for the exclusive benefit of the employees or their beneficiaries, there is no prohibited diversion. The repayment of debts for an employee is for the economic benefit of an employee since it relieves him of a liability. In such a case, the benefit to the creditor is incidental. Therefore, the payment by the Systems [governmental plans] to the Chapter 13 trustees is not a violation of the exclusive benefit rule of section 401(a)(2).

In summary, the key elements of the PLR were that the plans involved were governmental plans, the debt repayment plans were voluntary, the member had a liability that was being satisfied, and there was a judicial process and supervision for the payments.

By its terms a PLR only binds the IRS with respect to the recipient of the ruling. The IRS can "change its mind" when presented with a subsequent ruling request. However, it is reasonable to review PLRs to determine how the IRS might analyze a similar situation.

Assignment and Alienation of Benefits (IRC Section 401(a)(13) and Treas. Reg. Section 1.401(a)-13)

With respect to non-governmental plans, the IRC also provides that benefits under a qualified plan cannot be assigned or alienated, except in limited circumstances. See IRC Section 401(a)(13). Even though IRC Section 401(a)(13) does not apply to governmental plans, we believe that it is reasonable for governmental plans, such as the Washington State plans, to allow for assignment and alienation under the provisions of IRC Section 401(a)(13).

Assignment and alienation of benefits from a qualified plan are specifically allowed by IRC Section 401(a)(13) in the following circumstances:

1. Voluntary and revocable assignments by the benefit recipient not to exceed 10% of the benefit payment.
2. Plan loan repayments.

3. Qualified domestic relations orders (discussed below)
4. A benefit offset payable to the plan if the offset is the result of a conviction of a crime involving the plan.
5. A benefit offset payable to the plan if the offset is the result of civil judgment for certain violations of ERISA.

Treasury Regulation Section 1.401(a)-13 provides additional exceptions for:

1. The enforcement of a Federal tax levy under IRC Section 6331.
2. The collection by the United States on a judgment resulting from an unpaid tax assessment.
3. Any arrangement for the withholding of Federal, State or local tax from plan benefits.
4. Any arrangement for the recovery by the plan of overpayments of benefits previously made to a participant.
5. Any arrangement for the transfer of benefit rights from the plan to another plan.
6. Any arrangement for the direct deposit of benefit payments to an account in a bank, savings and loan association or credit union, provided such arrangement is not part of an arrangement constituting an assignment or alienation.
7. Voluntary arrangements where the third party recipient files an acknowledgement that the party has no enforceable right to the funds.

In interpreting IRC Section 401(a)(13), the IRS issued PLR 200426027 to specifically approve payment of a fine or criminal restitution to the United States government when ordered to do so pursuant to an order of garnishment obtained pursuant to 18 U.S.C. Section 3613, the Federal Debt Collection Procedures Act of 1990, 28 U.S.C. Sections 3001-3008 ("FDCPA") and the Mandatory Victims Restitution Act, 18 U.S.C. Section 3613(c). The PLR primarily addressed the treatment of court orders for U.S. fines and criminal restitution for the U.S. government, private parties and non-federal governments (*i.e.*, states, municipalities, counties, *etc.*) The IRS specifically stated that, if the garnishment occurred due to a federal court order based on the FDCPA, then it did not matter who was the ultimate recipient of the benefit dollars. The ruling of the PLR covered IRC Section 401(a)(2) as well as IRC Section 401(a)(13) because the IRS reasoned that the payment satisfies a participant's debt.

Although the PLR is only directly applicable to the entity who requested the ruling, it provides us insight as to how the IRS would react to a plan provision which included restitution-type exceptions to the anti-alienation provision of a retirement plan. Although the PLR dealt with a non-governmental plan, we believe that it is reasonable for a governmental plan to follow the approach that was approved.

Timing of the Garnishment

With regard to a garnishment pursuant to a federal tax levy or criminal restitution, the IRS takes the position that the IRS (or government agency) "steps into the shoes" of the "taxpayer" (in this case the member). This means that the garnishment will not apply until the participant has a right to a distribution under the terms of the plan.

Domestic Relations Orders (IRC Section 414(p))

The IRS recognizes that the payment of qualified domestic relations orders ("QDROs") is a valid exception to the prohibition against assignments and the exclusive benefit rule for a qualified plans. Under IRC Section 414(p)(11), if a governmental plan recognizes domestic relations orders, those are treated as QDROs for these purposes.

Forfeiture

In addition, for purposes of completeness, we note that the IRS has long approved plans that provide for forfeiture of pensions by employees who commit certain crimes, so called "bad-boy" provisions. Rev. Rul. 82. In these situations, the participant forfeits their benefit and nobody else (beneficiary, victim, U.S. government, *etc.*) has any right to any benefit.

Plan Provision

Plan fiduciaries must administer their plan in accordance with its terms. Therefore, even if a garnishment would be permissible as a matter of federal law, the plan must allow the garnishment in order for it to be allowed. In addition, any expansion of garnishment should be evaluated under state law and constitutional provisions. For purposes of this report, we have assumed that the analysis of state law and constitutional provisions will be handled by the Washington Office of the Attorney General.

TAX AND LEGAL IMPLICATIONS FOR EXPANDING GARNISHMENT PROVISIONS

Expansion of Garnishment Provisions Generally

If Washington State garnishment provisions were expanded to include any item listed above, which has been previously approved by the IRS and/or is specifically listed in IRC Section 401(a)(13) or the related Treasury Regulations, that should not adversely affect plan qualification.

Expansion of Garnishment Provisions Specifically When Retiree Has Caused Serious Bodily Injury or Death

This expansion would raise issues under the exclusive benefit rule (IRC Section 401(a)(2)) unless the garnishment were consistent with PLR 842614 – it was voluntary, it was in payment of a retiree's liability, and it was determined in accordance with a judicial-type procedure and was supervised.

However, if the garnishment were the result of a federal action and if it fell within the parameters of PLR 200426027, then we would also believe that the garnishment would not affect plan qualification.

IRS Approval of Garnishment

In the case of a proposed garnishment that did not fit within the IRC, Treasury Regulations, or the PLRs described above, the implementation of the garnishment change should be made contingent on receipt of IRS approval.

IMPLEMENTATION OF A GARNISHMENT

Timing and Prerequisites

As noted above, the IRS takes the position that a garnishment can only be applied when the participant is eligible for a distribution. This means that the garnishment cannot effectuate a distribution election on behalf to the participant but is subject to the terms of the plan, *e.g.*, pertaining to spousal consent, to the same extent as the participant.

Taxation

IRC Section 72(t) imposes a 10% premature distribution penalty on certain distributions that occur before a participant is 59 ½. That penalty will not apply to a periodic payment (after a separation from service), to a lump sum distribution if the member separated during the calendar year in which he/she turns 55 (age 50 for public safety), to a QDRO, or to a tax levy, criminal restitution, or a fine.

If the garnishment were made against a distribution that would otherwise be an eligible rollover distribution, the 20% mandatory withholding under IRC Section 3405(c)(1) applies. This would include a garnishment of a lump sum. A garnishment of a periodic payment would not be subject to mandatory withholding.

Circular 230 Disclosure: Except to the extent that this advice concerns the qualification of any qualified plan, to ensure compliance with recently-enacted U.S. Treasury Department Regulations, we are now required to advise you that, unless otherwise expressly indicated, any federal tax advice contained in this communication, including any attachments, is not intended or written by us to be used, and cannot be used, by anyone for the purpose of avoiding federal tax penalties that may be imposed by the federal government or for promoting, marketing, or recommending to another party any tax-related matters addressed herein.