



50% JOINT AND SURVIVOR ANNUITY BENEFICIARY DESIGNATION

Introduction:

This month we are going to explore the importance of understanding the election of the "Joint & Survivor" option when negotiating a Qualified Domestic Relations Order. This can be the most dangerous element you will have to deal with when writing settlement language if a QDRO is used to distribute defined benefit pension assets (remember last month we discussed the difference between defined benefit and defined contribution retirement plans. Defined benefit plans provide monthly income for the life of the participant.) There is always a substantial risk of liability if you represent the non-participant spouse, use a QDRO as a settlement tool and you don't fight for the continuance of the Joint and Survivor designation for your client. You may not always win because of other issues in your case but failure to try to get it is the pitfall.

Tip of the Month:

While few attorneys relish drafting the Qualified Domestic Relations Order, it is mandatory if you represent the alternate payee.

Controlling the preparation of the order is the only way you can fully protect yourself and your client. If you represent the non-participant spouse your control of the QDRO preparation is mandatory. In every order there are a number of decisions to be made that may or may not have been addressed in the settlement. You want to be making those decisions. Many plans provide model orders that may or may not protect your client's interest or really address the terms of the settlement. Unfortunately many (here read most) attorneys are not familiar with the actuarial and ERISA jargon found in many model orders so they can not be sure if their client will be getting what was agreed to in the settlement. You don't have to write it yourself if you are not completely comfortable doing so. There are a number of services that will prepare the order to meet the terms of the settlement and their costs can be passed on to the client. As a bonus, outsourcing adds another layer to your malpractice protection.

50% JOINT AND SURVIVOR ANNUITY BENEFICIARY DESIGNATION

First, let me show you a hypothetical situation. A pension appraisal of the participant's pension benefits determined that as of August 1, 2002 the marital property portion of the plaintiff's Wahwah Axle Company Pension Plan was \$42,972.00 per annum beginning at age 65. This benefit had a present value of \$187,058.82 based on a marital property accrual cut-off date of September 1, 1998. Under normal circumstances, using an immediate offset settlement option the wife would receive 50% of that amount or \$93,529.41. The parties agreed that there was not a practical way that the participant could buy out the non-participant's interest in the pension so the intent was to use a Qualified Domestic Relations Order for settlement purposes. Because of the length of the marriage (25 years and three months as of the divorce date, 22 years and 9 months as of the marital property cut-off date) the parties verbally agreed that the wife would receive her share of the pension as payable in the form of a 50% Joint and Survivor Annuity benefit with the wife named as the beneficiary of the marital portion of the plan provided pre-retirement and post-retirement survivor annuity. Utilization of this methodology would result in each party receiving their rightful marital portion of the plaintiff's pension.

The husband reneged on the previously agreed (verbally) terms of the proposed Qualified Domestic Relations and instead agrees to only give the wife her marital share as payable in the form of a Single Life Annuity actuarially based on her life. In order to receive a pension in the form of a Joint and Survivor annuity, at the time the participant retires the gross pension is reduced by about 10% in order to provide the alternate payee continuing income should the participant predecease her. This is the normal form of payment for married participants and reflects the asset the parties were actually accruing during the term of their marriage. When the pension is paid in the form of a 50% Joint and Survivor annuity with the wife named as the beneficiary the reductions necessary to provide a life income for both parties are determined using the life of both parties as the measuring stick. Women live longer so the husband's projected shorter life when combined with the wife's longer life enables the plan to provide actuarially based life incomes to both parties with only a minimal reduction (about 10%).

Payment in the form of a single life annuity is very different. This form of pension asset distribution, which, while on the surface seems fair, (50% of the marital portion of the pension paid in the form of a single life annuity based on the wife's life) in reality, deprives the non-participant of a substantial portion of the value of the pension to which she would normally be entitled based on the facts of the case. Using a 50% Joint and Survivor Annuity benefit form of payment each party would receive an \$18,263.59 annual pension, which represents the portion of the pension accrued during the marriage reduced by 10%. The single life annuity would provide the alternate payee an income of approximately \$9,131.79 per annum (all dollar figures quoted in this document are unadjusted for future inflation).

The plan determines her life annuity by first identifying the portion of the husband's pension earned during the marriage, \$42,972 per annum commencing at age 65. The husband would receive \$21,486 per annum as his share of the pension earned during the 22 years and 9 months of the marriage up to September 1, 1998 while the wife receives \$9,131.79. Her share is reduced because the plan cannot be asked to provide a benefit that would cost them more than they would have paid in the absence of a QDRO. As a female, the wife will actuarially live 8 years longer than a male and she is 7 years younger in this hypothetical case. She will conceivably receive income for 15 years longer than the

husband. The plan determines the present value of the marital portion of the gross pension and spreads payment of the non-participant's share over an additional 15 years. This is what accounts for the substantial reduction in the annual pension benefit she retains. As a very simple example a \$250,000 present value spread over 13 years (the participant's life expectancy at age 65) provides a \$19,230 per annum pension while the same \$250,000 dollars spread over 28 years only provides an \$8,928.57 per annum pension benefit.

Once these numbers are put to paper it becomes obvious why the participant refuses to have the pension paid in the form of a Joint and Survivor annuity with each party receiving \$18,263.59 per annum for their marital contribution to the pension accrual. By refusing to provide a Survivor Annuity the plaintiff's marital share increases to \$21,003.12 instead of \$18,263.59 under the Joint and Survivor option and as the separate property portion of the pension would have to be reduced by 10% he feels he is paying too much for fairness. But had he stayed married that is exactly what would have happened. None of this takes into account the additional separate property pension he will earn between September 1, 1998 and his actual retirement.

Few attorneys realize that in lengthy marriages it is impossible to equitably distribute the pension assets using a Qualified Domestic Relations Order unless a Joint and Survivor annuity is utilized. The longer the marriage and the older the parties to the case; the more unconscionable the settlement disparities become when Joint and Survivor options are not awarded to the non-participant spouse. In this marriage of 22 years and 9 months, survivor provisions should not be even considered as a bargaining tool.

When you settle a case with a pension and there is a \$40,000.00 pension earned during the marriage and the non-participant spouse is awarded 50% of the marital portion payable when the participant retires, she expects to get around \$20,000 per year. If it were payable in the form of a Joint and Survivor annuity she would get \$18,000 per year. If it was payable in the form of a single life annuity based on her life she would get about \$9,000 per annum using the same case facts preciously laid out. That may be acceptable to her if she is fully informed. But if not, she is going to be very unhappy when she finds out what she really is getting.

In a lengthy marriage it is only fair the non-participant spouse receive her share of the benefit they were both counting on. This means a pension paid in the form of a 50% Joint and Survivor Annuity with her named as the beneficiary of the marital portion of the 50% survivor annuity so that in the event of the death of the participant before the non-participant she will continue to get her share of the pension until her death. The non-marital portion of the 50% Survivor Annuity can be paid to a subsequent spouse if the participant so elects.

The foregoing addresses an ERISA based pension benefit. This only applies to private companies. If you are dealing with a public plan, whether local, state or federal, you will find they do not have a single life annuity option. If the non-participant spouse is not named the beneficiary of the 50% Joint and Survivor Annuity benefit all funds being paid to her or him will stop upon the death of the participant. There is no option here. The non-participant spouse must be named as beneficiary. This is usually an easier sell because there really is no fall back option (i.e. Single Life Annuity).

I hope all of this alerts you to the realities, and the importance, of getting survivor benefits for the non-participant spouse. In shorter marriages, 10 years or less, the non-participant spouse has the opportunity to pick up his or her life and earn a pension to provide for their retirement. But in a longer marriage the employability of the non-participant spouse is usually in doubt and the pension that was accrued during the bulk of

what would have been his or her working life is all there is going to be. It is up to you to recognize this and try to maximize this asset for your client.

[Model Property Settlement Language](#)

Download our settlement language form and let the experts at LawDATA, Inc. [draft model property settlement language](#) (<http://www.lawdatainc.com/SetLanForm.pdf>) that deals specifically with the pension plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

Web: www.lawdatainc.com

©LawDATA, Inc 2003