



Divorce, Pensions and Retirement Benefits

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QUALIFIED DOMESTIC RELATIONS ORDERS - 101

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Practice Tip of the Month:

How you can deal with the growth in a retirement savings plan (defined contribution plan) between the marital property accrual cut-off date and the date of the actual distribution to the alternate payee.

The alternate payee is entitled to all the passive growth or losses (growth not attributable to contributions to the account made by the participant or plan sponsor) between the marital property cut-off date and the date the funds are distributed to the alternate payee. Some plans will compute that for you upon receipt of a QDRO, but many will not. Before commencing your settlement negotiations you will have to contact the plan and see if they will make these computations for you.

If the participant has all of his/her quarterly or monthly statements you can compute that amount yourself if your math skills are up to it. If not, you can have a pension consultant, or an accountant, compute the growth (or losses) for you.

If the statements are unavailable you will have to address this issue in your settlement negotiations. Usually the parties can agree upon a growth factor (i.e. 1.5% per fiscal quarter) and then it is relatively easy to determine the amount to be paid to the alternate payee. You usually have to impute the next quarter to bring the account up to date, after allowing for processing time by the Plan if you are using a QDRO. If the participant is making payment by means of immediate offset against another marital asset (i.e., the marital residence) it is usually fairly easy to get the parties to agree on a figure.

The most important thing to remember is that a statement like "the spouse is entitled to 50% of the plan participant's 401(k) account as of the marital property appraisal date", is not sufficient. You have to address the passive growth between the cut-off and distribution dates.

Introductory Special!

Free Pension Appraisal

If you are an attorney who has never used our services, then let us prepare a free pension appraisal (a \$150.00 value) so that we can demonstrate to you the outstanding support and expertise we provide to every one of our attorney/clients. We make this offer knowing that once you try us you will become a regular client.

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QUALIFIED DOMESTIC RELATIONS ORDERS - 101

Whether this is a refresher course or a beginner's is unimportant. We are aware that many attorneys do not know what they can or can not do with a Qualified Domestic Relations Order (QDRO) and are not that familiar as to how to protect themselves or their client's interest when employing an order for distribution purposes. This article will deal with the basics and give you tips so you don't get yourself in trouble. I will be dealing with ERISA based orders but much of what I say also applies to non-ERISA based public plans.

Allow me to list some basics, of which we all should be aware.

1. If the specifics of the distribution (including survivorship) are not spelled out in the final decree or settlement agreement, your options for the order for your client are very limited. The key to an equitable order is a well drafted settlement agreement.
2. You can not use a QDRO for payment of your legal fees. A QDRO can only provide direct payment to a former spouse or the guardian of any children if the QDRO is being used for child support.
3. The QDRO has to be drafted to properly address the requirements of the plan. The retirement plan administrator is the final arbiter of whether a QDRO is qualified under the rules of ERISA and IRS. The local court does not have jurisdiction in this matter. If you feel the plan is not complying with the laws governing domestic relations order you have to bring action in a federal court in an attempt to get compliance. It is an action under the ERISA statutes.
4. Technically, unless the plan receives an order, signed by the judge, prior to the death of the participant, the order is null and void. We are aware of some situations where attorneys have submitted unsigned orders for prior approval that were honored by plans when the participant died while the order was awaiting approval but plans are under no legal obligation to honor unsigned orders. Even if a signed order is rejected, the portion awarded to the alternate payee is preserved in the event of the death of the participant. Working with the plan, the attorney has 18 months to perfect the order. You are taking a real chance when you try to get prior approval because if the participant were to die, your client could receive nothing. Attorneys like to get prior approval so they won't have to go back for the Judge's signature twice. Not a very good defense if your client were to lose their interest in a substantial retirement asset because of your failure to submit a signed order.
5. For the same reasons cited in the previous paragraph, it is very important to submit the order in a timely manner. We always suggest the order be submitted to the Judge concurrent with the final decree. If that is done, and the order is immediately submitted to the plan, the potential death of the participant should not obviate the terms of the settlement.
6. The attorney representing the alternate payee should always assume responsibility for the drafting of the order. It is their client whose interest has to be protected and it is the only way you can be sure the order is properly submitted in a timely manner. The attorney representing the participant reviews the order to be sure it complies with the terms of the settlement.
7. In today's dynamic economy mergers and acquisitions have become the norm. Always include a statement in the order that the order "applies to any successor plans". It may not

afford your client full protection if the plan is terminated but its absence could be disastrous in the event the existing pension is rolled into the acquiring company's plan. Also, a statement that the "court reserves the right to modify the order" is required because if the settlement does not comply with the plan's provisions and there is no way to craft language that will get around this, and maintain the intent of the settlement, it may be necessary to renegotiate the terms.

8. Many plans have model domestic relations orders. A model order is a sample order preformatted to comply with the provisions of the plan as interpreted by the plan's trustees and their advisors. Many private and public employer plan sponsors make these model orders available to attorneys (and individuals) drafting domestic relations orders and many attorneys use them to finalize their divorce cases. Unless you are very knowledgeable about actuarial assumptions and the Retirement Equity Act of 1984, I strongly advise against their use if you are dealing with a defined benefit plan (pension). The majority of model orders that I have seen are crafted to the benefit of the plan participant and do not even allude to the fact that there are many options available to an alternate payee that should be addressed in the domestic relations order. Contrary to the impression the plan provider is trying to create, theirs is not the only way to draft an order. Under the Retirement Equity Act of 1984 they are required to accept any order as long as it complies with the federal and state laws that govern. We often use the plan's model order as a starting point so the reviewer will have some familiarity with the language and format but modify it to address the settlement provisions.

I hope the foregoing is helpful whether it is new information or it is just jogging your memory. QDRO's are an excellent settlement tool and the better their limitations and strengths are understood by the attorney, the more often they will find themselves using them. A Defined Contribution Plan (401(k) plan, etc.) QDRO is often the only way the parties can get immediate access to substantial funds to settle marital debt issues. They also can be used for back child support problems. The more you know and understand about Qualified Domestic Relations Orders, the more valuable their use to the Family Law practitioner will be.

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 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.

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