



Divorce, Pensions and Retirement Benefits

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THE TEN MOST COMMON RETIREMENT ASSET PROBLEMS

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Practice Tip of the Month:

Things you can do to assure that you receive your pension appraisal in a timely manner and avoid wasting time.

Pension (defined benefit plans providing a monthly pension at retirement based on a formula) information should be obtained as quickly as possible to insure you are aware of their value and their impact on the whole marital property distribution process. When you submit a request to a pension expert to prepare a present value appraisal, be sure you include all that will be needed to prepare the appraisal. Most experts or services have forms that you are required to complete. Make sure all the data requested is provided to avoid telephone calls requesting the missing data and delaying the report. Always include a timely accrued benefit statement near the appraisal date, a plan description you have obtained from the plan provider and any statement that details the benefit available to the participant assuming he or she works until the earliest, unreduced benefit retirement date. If the employee has left employment or is retired, a statement as to the retirement benefit earned as of the last day of employment, and the actual date the employment stopped, is required.

Certain defined benefit plans (cash balance plans) and all defined contribution plans (retirement savings plan with values expressed as lump sums like 401(k) plans, ESOP's, company sponsored Retirement Savings Plans, etc.) are not pensions and are not subject to defined benefit plan pension valuation methodology. If the employment encompasses the total marital period, then the value to be used for distribution purposes is simply 50% of the account balance on the appraisal date (as set by case law or legislation in your State) plus any passive growth on the non-participant's share between that date and the date of distribution by the plan. Normally QDRO's are used for these distributions and most plans will compute the passive growth. In those instances don't waste your time by submitting the information for an appraisal. What it is, is what it is.

If the participant commenced participation in a defined contribution plan prior to the marriage, you might need your pension expert to compute the passive growth on the non-marital portion during the marital years. This can be a costly and time-consuming process depending on the length of the marriage. In order to perform this kind of appraisal you will need most (if not all) of the participant's quarterly account statements which were provided by the plan. If they are not available you will have to negotiate the non-marital portion of the account by assuming an interest growth rate.

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.

[CLICK HERE](#)

THE TEN MOST COMMON RETIREMENT ASSET PROBLEMS

This month we are going to discuss the ten most common ways attorneys get themselves into trouble when dealing with retirement assets. This list is not all-inclusive but targets what we see as the most common things that attorneys either do or fail to do when dealing with pension or defined contribution plans in divorce cases.

10. **Failure to get all the pension information at the commencement of the case from your client.** If your intake process is thorough, once you have a client, all the information known to them about all marital retirement assets, should be included in the questions on your case intake forms. This tells you with what you are dealing and gives some idea of how much discovery will be involved. You want to know the value of the retirement assets as quickly as possible because they will play a major part in your crafting of the settlement agreement and tell you whether a QDRO will be necessary.
9. **Relying on the opposing counsel or his/her client to obtain the retirement information.** At the beginning of the process release forms should be prepared for your opposing counsel's client for all the known retirement asset plan providers for signature. If he or she fails to comply, then you will have to go through the discovery process. Do not rely on information provided by your opposing counsel's client. It might be incorrect or not include all the accounts he or she might have. An example of that would be pension information limited to the accrued benefit with no information on supplemented early retirement assets or failure to include data on 401 (k) plans that he or she might have in addition to the pension (see sample release form at the end of this newsletter).
8. **Using a model order provided by a pension plan to draft a QDRO without understanding of how the plan works or the enhanced benefits available to a long tenured employee.** This is a real risky area for family law attorneys. It is easier to get an order approved if you use the pension plan's model but rarely does

the plan provide one which includes all the options available to the alternate payee. You can use the model as the basis of your draft but you will have to make the necessary changes to assure that survivorship, supplemented, early retirement benefits and post-retirement passive increases (COLA, etc.) are addressed, if they are provided by the pension plan. Rely on an expert to be sure you have covered everything unless you are very familiar with the plan.

7. **Failure to be specific in the property settlement agreement.** Lack of specificity in the property settlement document is the basis for most QDRO problems. Problems created by lack of specificity can rarely be corrected. Terms like “50% of the pension on the appraisal date” do not begin to identify the asset you are distributing. Failure to address survivorship or supplementary benefits in the settlement document precludes their inclusion in the QDRO.
6. **Not talking, or developing a relationship, with a plan representative who can explain the ins and outs of the plan.** It is critical to be able to ask questions of someone at the plan if you want to be sure you are addressing all the contingencies (pre and post-retirement survivorship, post-retirement passive increases, supplemented benefits, etc). Your release form or discovery motion should provide you with this option.
5. **Not talking, or developing a relationship with a pension expert, for the very same reasons as cited in the previous paragraph.** The difference is they will be able to help you craft your strategy for the most favorable outcome for your client. This is how you can be sure that you are proceeding on the right course.
4. **Failing to make the client aware that this is a negotiation process and not everything will be obtained that is to their benefit.** Even when you know the best possible outcome for them when dealing with the retirement assets – don’t over-promise. Keep them aware that you are trying to get everything you can for them but, so is your opposing counsel for his or her client. Know beforehand what is negotiable and what is not. Discuss with your client the trade-offs. The more your client is in the loop the more satisfied with your services he or she will be.
3. **Not seeing the real value of a defined contribution plan in the settlement process and using it as a tool.** A 401(k) plan, and most other kinds of retirement savings accounts, can be a source of immediate funds to resolve marital debt problems and can provide immediate funds to a spouse with limited means. The only way you can access these funds is with a QDRO. If you use it to pay marital debt be sure to take the tax consequences to the non-participant spouse into consideration as he or she is the only one who can receive the funds.
2. **Not filing the QDRO concurrent with the final decree.** Failure to do this is fraught with danger to the attorney. No matter how well you did in negotiations, the QDRO is worthless if the participant were to die prior to its filing. The longer you wait the greater the chance this could occur. A plan will not honor a QDRO on a dead participant unless one had already been filed prior to his or her death. It does not have to be approved. You can bring it into compliance with the plan’s provisions if it is rejected, even if the participant were to die while the process is on-going.

1. **Entering into negotiations without first drafting a settlement agreement that is most beneficial to your client.** The only way you can be sure you are really representing the best interests of your client is to write the settlement agreement first. If your opposing counsel does not do the same thing then negotiations will be based on your language. If you are dealing with a pension and are not absolutely certain about actuarial assumptions and how they apply to defined benefit pensions, have a pension consultant draft that part of your settlement and explain to you why each provision in their language is important to your client. The more knowledge you bring to the settlement table the better the outcome. Remember if it is not in the settlement agreement, it can't be in the final decree or the QDRO.

As I said in the beginning these are just a few of the more common problems we have seen, and suggestions we have found helpful, over the years. There are many more but if you take heed of the foregoing you will certainly have fewer problems when dealing with retirement assets.

Below you will find the sample release form:.

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.

Web: www.lawdatainc.com

RETIREMENT ASSET RELEASE FORM

I, _____, do hereby instruct a representative of
(Plan Participant - printed)

(Name – address – phone # of benefits provider)

to cooperate fully with _____
(Name of attorney - address - phone #)

_____ or his/her designee and answer any and all questions relating to my pension plan or any other retirement or deferred income plans in which I participate. I also request that you furnish this individual a current plan booklet and a current accrued benefits statement, and a statement as

of _____,
(Marital Property Cut-off Date)

of all of my accrued retirement benefits including any defined contribution, defined benefit or deferred compensation plans in which I am a participant. The defined benefit plan statements should detail the accrued vested benefit payable to me on my normal retirement date along with a statement of projected pension benefits, including supplemental benefits, if any, payable to me on the earliest date that I may receive them on an actuarially unreduced basis (based on my current income) assuming continued employment to that date. If my benefit is contingent upon my classification or job level or contribution level please so state and advise what that may be. Also, please provide a statement showing my service computation date (first day of employment), dates of all breaks in service (if any), my current salary and my annual salary for the past five years, the legal names of the plans in which I participate and their addresses and the name, address and telephone number of the person to be contacted if additional information is needed. I authorize that person to answer all questions incident to this request. The defined contribution plan statements should show my current plan balances as well as my account balances on

_____ and on _____.
(Marital Property Cut-off Date) (Date of Marriage)

Signature of Plan Participant

Today's Date

Date of Birth

Social Security #

Witness # 1 - Signature

Witness # 2 - Signature

Witness # 1 - printed

Witness # 2 – printed