



## ADDRESSING RETIREMENT ASSETS IN A SETTLEMENT AGREEMENT INCORPORATING A QDRO

### Introduction:

Assuming that you have been getting and absorbing my monthly columns; then by now you are aware that most Qualified Domestic Relations Order (QDRO) problems can be remedied by preparing a detailed section in the Settlement Agreement that clearly states the provisions of the QDRO to be drafted. This month we are going to dissect the language in the agreement and tell you what is best if you are representing the plan participant or the alternate payee.

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### Tip of the Month:

**To facilitate moving the case along as quickly as possible, have your client provide all the pertinent dates that will be needed to finalize the divorce at the initial appointment.**

When dealing with marital property retirement assets all valuations and distributions are based on properly identifying the marital property components of the asset. That determination is usually identified by a coverture calculation using the marriage date; the employment dates and the marital property accrual cut-off date in your jurisdiction. The birth dates of the parties are critical in determining the present value of a defined benefit pension. If the couple cohabited prior to the actual marriage date, case law permitting, you might want to use the date cohabitation began as the starting point of the marital period.

Have a comprehensive case intake form requesting your client provide all the pertinent dates on his or her first visit. This is to identify what dates are missing and what must be obtained from your client's spouse or his/her employer(s). If the statutory or case law marital property cut-off date in your state is based on the date of filing of a divorce action or the actual divorce date and the parties have lived separate and apart for years prior to that date, you might want to consider using the separation date as the cut-off date. Many jurisdictions permit this if the facts of the case clearly demonstrate that the marriage partnership has been non-existent for years. Getting this information is usually easier when the case is first opened than later when emotions, anger and resentment can make getting any information from the soon-to-be ex-spouse a nightmare. Ideally, once you have the case you should request a release form from the opposing spouse (through his or her attorney if there is one) so getting information from the opposing spouse's employer(s) is easy. Of course your client should also provide one for the opposing counsel.

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## **ADDRESSING RETIREMENT ASSETS IN A SETTLEMENT AGREEMENT INCORPORATING A QDRO**

I am of the opinion that divorce cases should not be won or lost. Still, there are a number of options to be considered that can have beneficial or negative effects on your client. The handling of some of these options has already been addressed in many jurisdictions so the negotiations dealing with some of the provisions of the QDRO are often pre-ordained. Following are two examples of settlement agreement language. The first is more beneficial to the alternate payee while the language in the second is better for the plan participant. The first example is clearly more equitable than the second, which I will explain, in my final paragraphs.

Retirement Benefits 1. – The husband has a General Motors/UAW pension through his employment. The parties have agreed that the wife's share of the marital portion of this pension will be paid to her through a Qualified Domestic Relations Order. The wife's share shall be 50% of the marital portion of the pension determined on the earlier of the husband's pre-retirement death, his pre-retirement employment termination date or his actual retirement date. The marital portion is to be determined by applying the following formula to the husband's pension (the husband's pension is defined as his basic pension plus any early supplemented benefits and post-retirement passive increases that may be provided by the plan). The marital portion of the pension shall be defined by dividing the total number of months the parties were married while employed up until the marital property cut-off date (256 months) by the total number of months of service credited to the husband on the last date of his employment. The pension shall be paid in the form of a 50% survivor annuity with the wife being named as the beneficiary of a portion of the pre-retirement or post retirement survivor annuity in the event the husband predeceases the wife. The portion of the survivor annuity to be paid to the wife shall be determined by applying the marital property formula previously cited in this paragraph (ignoring the 50% provision) to the husband's pre or post retirement survivor annuity. The wife's attorney shall prepare a Qualified Domestic Relations Order (with a copy given to the husband's attorney) and present it to the court for signature and approval prior to submitting the order to the plan administrator to implement the provisions of this paragraph.

Retirement Benefits 2. – The husband has a General Motors/UAW pension through his employment. The parties have agreed that the wife's share of this pension will be paid to her through the use of a Qualified Domestic Relations Order. The wife's share shall be the actuarial equivalent of 50% of the husband's accrued pension benefit on the marital property cut-off date, November 14, 1999. The wife's share shall be payable on the husband's normal retirement date. The wife can elect to receive this benefit any time after the date the husband reaches his early retirement date (age 55). If the wife elects to receive her share prior to the husband's normal retirement date, the portion awarded to her will be actuarially reduced to reflect early retirement. This benefit will be payable to the wife in the form of a single life annuity and be paid to her for the balance of her life. The husband's attorney shall prepare a Qualified Domestic Relations Order (with a copy given to the wife's attorney) and present it to the court for signature and approval prior to submitting the order to the plan administrator to implement the provisions of this paragraph.

Retirement language #1 gives the wife her actual marital share of the benefit the husband will receive. The plan has 30 year and out provisions and the wife will share in the marital portion of these supplements. If the husband starts receiving his supplemented benefits at age 51 after 30 years of employment then the wife will also begin receiving her share at the same time. If he elects early supplemented retirement benefits he will receive about \$27,000 per year until he is 62 and Social Security kicks in. The pension would then

be reduced to about \$15,000 + Social Security for the balance of his life. Using the marital portion formula as stated in the first example, the wife would receive 50% of 71.111% of the husband's pension or 35.5% of the \$27,000 and the subsequent \$15,000. Assuming the parties were the same age, commencing at age 51 the wife would receive about \$9,600.00 per year until she was 62 and then \$5,325.00 + Social Security for the balance of her life. During the marital partnership it was this valuable retirement asset that both parties thought they were working towards. To provide for her as the beneficiary in the event of the death of the husband the total monthly benefit will have to be reduced by approximately 10% which will be shared by both. This form of retirement asset deferred distribution is referred to as the "sharing" method and is the case law in the majority of the states.

The second example, on the surface, looks equitable because she is getting 50% of the pension that was accrued during the marriage. But this is not really true. The accrued benefit is what the husband would receive if he quit his job on November 14, 1999. The most valuable component of his retirement, the supplemented "30 and out" benefit, for which the wife was his marital partner for 21.33 years, is totally ignored. Also, the fact that the normal retirement option for married couples is a 50% Joint and Survivor annuity is totally ignored and in so doing completely destroys any resemblance to the goals of equitable distribution or community property. Under the language in example 2 (and the provisions of the GM-UAW pension plan) the wife will get the actuarial equivalent of 50% of \$618.57 per month beginning at age 65. In other words the actuarial equivalent of \$309.29. After the actuarial reduction, required because as a woman she will live about eight years longer than a man, her monthly income will be reduced to \$123.40 per month or \$1,480.80 per annum. Remember her husband gets about \$27,000 per year beginning at age 51 and only when he is 65 will her normal pension begin. At that time his pension will be reduced by \$3,711.48 per year to fund her share. GM-UAW benefits being paid to retirees are usually increased every three years when new contracts with the automakers are negotiated. The wife's portion will never increase. If she elected to begin receiving her share of the pension at age 55 she would only get \$61.70 per month or \$740.40 per year after the additional reductions required for early receipt of the benefit. None of this even begins to address the purchasing power her static benefit will lose simply because of even very minimal inflationary factors.

It doesn't take Solomon-like wisdom to see the patent inequity of the language in Example 2, but even in states that permit a QDRO with sharing provisions, as in Example 1, we see totally inequitable distributions because of the ignorance of the attorney representing the non-participant spouse. If you are not sure of the ramifications of the retirement benefit language in a settlement agreement have somebody knowledgeable review it before having your client sign it. Even better, have someone familiar with these concepts draft that part of the agreement for you. Your client is relying on your expertise. Use it to get expert assistance to avoid big problems in the future if you are not completely comfortable working with actuarially valued assets or pension plan provisions.

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### **[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.

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