



## Divorce, Pensions and Retirement Benefits

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### ANTICIPATING DEFINED CONTRIBUTION PLAN QDRO POST-MARITAL PROPERTY CUT-OFF DATE PROBLEMS

#### Introduction:

Last month we discussed valuing the Defined Contribution Plan. This is usually targeted to the marital property cut-off date. But the actual property distribution is usually made some period after the marital property cut-off date unless you practice in a state that uses the divorce date as the marital property cut-off date. More and more this is becoming a problem for family law practitioners. In an effort to save money and get a handle on the uncompensated expenses relative to addressing Defined Contribution Qualified Domestic Relations Orders, many companies are refusing to apply the passive adjustments to the non-participant's share of the marital property cut-off date account balance necessary to bring it up to its value on the actual property distribution date. As it is not uncommon for a number of years to separate these dates, determining the correct figure for the current value of the non-participant spouse's share of the award can present some unique difficulties.

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#### Tip of the Month:

##### **"Must use" forms for divorce cases with retirement assets.**

Without good case forms you are facing chaos. Here are three forms that every family law attorney should have in their intake package. They are basic and should be delegated to your legal assistant or secretary to prepare before you meet with the client.

1. Case Intake Form - names, DOB's, marriage date, education, children and ages, names and addresses of current and prior employers along with relevant dates, current and prior job titles and current incomes, list of all marriage property assets and liabilities, all known retirement benefit providers (with addresses and phone numbers) including possible benefits from prior employers, any suspected assets of which the client is unsure such as stock options, deferred compensation plans, etc., military service and, of course, the reason why the client is seeking the divorce.
  2. Standard employment and retirement benefit information release forms to be signed by the employees and sent to their present and prior employers. If the form is inclusive, and cooperation is sought early in the case, lengthy and costly discovery can often be avoided.
  3. Form designed to elicit the settlement goals of your client so you know what you are facing and can begin to mitigate unrealistic expectations if that appears to be an impending problem. Use this form to decide if you really want to (or can) work with this client. Unrealistic clients cause most attorneys to lose money and serenity.
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## **ANTICIPATING DEFINED CONTRIBUTION PLAN QDRO POST-MARITAL PROPERTY CUT-OFF DATE PROBLEMS**

As most marital breakups are not timed to coincide with the date that the defined contribution plan managers issue statements to the participants as to the total value of their account to date (usually quarterly but sometimes monthly), getting the exact marital breakup date value can be hard. While it is true that today all financial investment data is computerized it costs the plan money to produce a statement of the actual account value on a date other than the normal investment period ending date the computer is programmed to provide. Many plans refuse to do this. In the event you encounter this obstacle you have two alternatives. The parties can agree on the closest investment period ending date to the marital property cut-off date for the purpose of valuing the account or, using the investment period statements preceding and following the marital property cut-off date, simply prorate the value on the marital property cut off date. Neither of these solutions will result in an accurate figure because a prorated figure may include a very large gain, loss, or additional contribution that occurred after the marital property cut-off date and using an investment period ending date before or after the marital property cut-off date has to be wrong even if it is only a couple of days away from an ending or beginning investment period date. But if this is the situation you encounter, then you must deal with it.

If you are fortunate and the plan provides you with a statement on the exact marital property cut-off date, the account balance provided could still be wrong. This is because many investment plans post contributions as received but only post the gains, losses or earnings on the individual account at the end of the quarter or in some cases monthly. Of course if an employee retired or left the company the plan has the capacity to figure the exact balance, including up to minute investment results, on the date he or she leaves (and are required to do so by ERISA) but it costs the company money to determine that figure. Needless to say, Qualified Domestic Relations Order compliance is not a profit center for any company and as QDRO's become more common, naturally many companies adopt restrictive provisions in an attempt to bring the cost of compliance under control.

Another problem that is slowly, becoming more and more common, is the refusal by plan managers to update the non-participant's awarded portion of the defined contribution account. Many divorces are not finalized until 2 or more years after the marital property cut-off date. The non-participant spouse's award is specific and current on the agreed upon marital property cut-off date. From that point out he or she is entitled to all earnings and losses on the portion awarded to them until the funds are disbursed. Many plans now want a specific dollar amount to be paid out immediately (usually 60 days after the QDRO is approved). They will not impute any increases or losses to that amount. If the plan refuses to compute these passive earnings (or losses) it becomes incumbent on the parties to either come to agreement on that specific payout figure or pay to have the account analyzed and brought up to a present value.

As long as the quarterly statements are available, an accountant or retirements benefits consultant can figure a reasonable payout amount, even taking into account that the funds won't be paid to the non-participant spouse until a month or two later. The cost for this analysis can be relatively low or very expensive. It depends on the period of time between the marital property cut-off date and the present, whether quarterly or monthly statements are issued, how many accounts are involved, how many investment components are in each account and the availability and completeness of the information.

In the extremely volatile investment climate we now enjoy (or suffer), it is common for defined contribution plan participants, when permitted to do so, to change plan components on a very regular basis (Plan Components = different mutual funds or money market accounts all available through one company sponsored 401k plan but managed by a big mutual fund company such as Fidelity Investments). The only thing that needs to be

determined are the passive changes (Passive Changes = growth or losses in plan value not counting additional contributions made by the participant, or the plan on behalf of the participant. The only variable being determined is the quarterly or monthly changes to the separate property portion of the account on a percentage basis from investments and interest.). Once the growth or loss percentage for each reporting period is determined it will be applied, on a compounded basis, to that portion of the account awarded to the non-participant from the marital property cut-off date to the present. Then using a reasonable projection based on the recent past come up with a figure that both parties can agree to for use in the Qualified Domestic Relations Order.

We can expect to see more and more plans taking the position that they do not have to pay for the valuation of a non-participant spouse's portion of a defined contribution plan. Once divorce is contemplated be sure to advise all concerned parties to save all plan statements. It is to the benefit of both parties that they be available if needed to determine the present value of the marital portion of the account at the time the divorce is finalized.

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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.

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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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