



# Divorce, Pensions and Retirement Benefits

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## SOME CREATIVE SETTLEMENT STRATEGIES

### Introduction:

Once you determine the value of the retirement assets to be distributed, making the distributions can often be very difficult. Some states do not allow DRO's (Domestic Relations Orders) on public plans. In Florida, where the legislature has permitted DRO's on state run plans for many years, a number of municipalities, that provide their own retirement plans for city employees, have taken the position that their plans are exempt from DRO's (completely ignoring the state's equitable distribution statute). Unless some wealthy client or interest group comes forward with pockets deep enough to run these issues through the appellate system, these bars to obvious settlement solutions will remain in place.

Sometimes an employee absolutely refuses to allow a provision in the Qualified Domestic Relations Order granting survivorship for the ex-spouse because of a strong desire to protect a potential new spouse with survivor benefits. Of course litigation might resolve the issue creating the impasse, but the cost and uncertainty of outcome often precludes the non-participant spouse from using this obvious potential remedy. It will be up to you to come up with acceptable solutions to dilemmas such as these by use of creative solutions acceptable to all parties. But whatever solution you use you still have to be sure to keep your client's interest in the forefront to avoid future problems that could impact on your practice.

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### Tip of the Month:

#### **Get all of the facts!**

Quite often attorneys fail to take full advantage of the discovery process. Upon opening a divorce case your first priority is to get the all information that will be needed.. Most of the marital assets and their values will be relatively obvious but that is not always the case with retirement assets. If you represent the non-participant spouse and rely on the participant spouse to obtain the information you need to identify and value the retirement assets, you are putting your client at risk. Divorcing people are just not always forthcoming about assets!

The easiest way to address this issue is to get a signed release form from the participant directing the employer to provide the retirement asset information directly to you. Be specific in your request and cover all the possible benefits the participant may have (see attached sample release form). Either by release or subpoena, have the employer give you a current statement of the participant's accrued benefits and account balances as well as the accruals on the marital property accrual cut-off date as dictated by your state statutes. Get the plan booklets covering each plan so the pension appraisal consultant who will be valuing the benefits has everything needed. Be sure to determine if there is a secondary source of retirement benefits such as a military reserve pension or prior service with another employer. If the participant refuses to co-operate you will have to file a discovery order on the plan provider(s).

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## SOME CREATIVE SETTLEMENT STRATEGIES

Let's begin with some situations with which you may find yourself involved:

1. Retirement assets attributable to the marital period are marital assets subject to equitable or community property distribution. How they are valued and distributed can be very problematical if the plan provider has rules that make achieving an equitable distribution more difficult than it should be. Many public plan providers, not subject to ERISA rules, create barriers to achieving equity. It is up to the attorneys involved in the case to recognize these barriers and try to overcome them.

2. You may run into cases where participant spouse doesn't want the non-participant to remain the beneficiary for the marital portion of the survivor benefits. This often occurs when the participant is planning to remarry. Survivor benefits provide the lifetime security the parties were working towards while they were married. It was assumed (and it is the law) that at the time of retirement the pension would be reduced (usually 10%) to provide payment in the form of a 50% Joint and Survivor Annuity. This was to insure that both parties were able to survive with some dignity in their retirement years. If the parties were married at the time of retirement this is the normal form of payment. Only with the written (and witnessed) permission of the non-participant spouse could this provision be waived. Based on the foregoing you should be able to put together a successful strategy to get the non-participant spouse her share of the pre and post-retirement survivor annuity.

3. If the plan refuses to honor an order that provides an equitable distribution the non-participant spouse is still entitled to be compensated for the value of the asset that the plan refuses to distribute. In some states public plans do not permit former spouses to be designated beneficiaries of the survivor's benefit. This is also true with military pensions when the marital period does not span ten years of military service. If the participant does not have sufficient assets to do an immediate buy-out, the non-participant is still entitled to 50% of the value of the marital portion of the retirement asset being lost.

4. Public plans have no provisions for awarding a non-participant spouse a single life annuity, which would provide income for life (although substantially reduced). The federal Retirement Equity Act of 1984 permits single life annuities for former spouses in private company sponsored plans. This is true whether you are using a DRO to settle an 8 or a 30-year marriage. This was the joint asset the married couple had accrued during the marriage, in order to provide income for life for both parties. Fairness dictates that, if you use a DRO to distribute the marital portion of the pension from a public plan provider the non-participant spouse must be named the beneficiary for the marital portion of the survivor benefits in the event the participant should predecease.

Now that we have looked at some of the potential problems you might run into when trying to reach a settlement let me throw out some ideas that may work for you in dealing with some of the situations detailed above:

1. If the plan refuses to allow the former spouse to be named the beneficiary of the 50% Joint and Survivor annuity, consider ordering a pension appraisal to place a value on the survivor annuity unavailable to the non-participant spouse. If she is a little younger than the participant you may really be surprised as to how valuable survivor benefits can be. With your appraisal in hand you can then negotiate additional marital assets to offset the loss of survivorship. Alternatively, the participant can be ordered to purchase a life insurance policy on the participant's life with the non-participant spouse named as the beneficiary.

2. There are cases where the participant may be adamant about not sharing his pension by means of a QDRO. It may be his share of the other marital assets doesn't cover

the 50% value of the pension (this is common in military cases). In those cases you have to take all of his assets and try to do a DRO on the balance owed. That amount will probably be small enough to get him over the hurdle of his reluctance to a DRO. If not see #4 below.

3. Even if the pension distribution is made by immediate offset, in a lengthy marriage the non-participant spouse can and should be designated the survivor beneficiary for the 50% Joint and Survivor benefit. The non-participant, if she is female, needs the survivor annuity because of the strong probability she will outlive the participant. The normal form of payment of a pension for married couples is a 50% Joint and Survivor annuity with the spouse named as the beneficiary. This was an important characteristic of the benefits being earned during the marital period and what each believed would be available upon retirement.. The Joint and Survivor annuity is needed to provide a decent standard of living for each party in their later years. Divorce does not alleviate this need. Be prepared to go to the mat on this issue. If it is a lengthy marriage the odds are the judge would award survivorship to the non-participant spouse.

4. If the participant absolutely refuses to share any of his pension income with a DRO while he is alive, then, after getting all the other marital assets you can for your client, if there is still money owed based on the present value of the pension, do an amortized buyout of the balance. This could be an attractive alternative. If the remaining balance is substantial this might represent 10 or 15 years of decent monthly income to your client. You can secure these payments with a salary lien while he is working and a QDRO (using amortized monthly payments and time limited as it is only valid until the debt is repaid). This is permissible under the Retirement Equity Act of 1984 because the debt is part of the property settlement incident to divorce. For example a \$100,000.00 debt amortized at 6% will pay the non-participant spouse \$800.00 per month for 16.41 years. This is not a support obligation so remarriage will not effect the payment obligation.

5. If existing case or statutory law in your jurisdiction only recognizes the vested benefit on the appraisal date as marital property and does not recognize a shared QDRO.(a sharing method QDRO determines the pension amount payable to the non-participant using a coverture calculation and the amount of the actual pension at retirement) try to avoid the use of a QDRO as a settlement tool other than getting survivor benefits. There is no way you can achieve an equitable distribution if the only way your state allows QDRO's is "50% of the accrued benefit on the marital property asset cut-off date".

This means the amount of the pension on the marital property cut-off day will never increase for the alternate payee's share. The participant's pension is based on his average salary over the previous 3 or 5 years when he retires so his annual accruals during the marriage years are constantly being increased (for inflationary factors) while the alternate payee's share is constantly losing purchasing power. If the entitlement to receive unreduced benefits is only a couple of years away you might consider using a QDRO but anything more than 5 years away destroys the intent of equitable or community property distributions and has really adverse effects on the non-participant spouse.

Try to take the computed present value of the pension from either defined contribution plans or real estate. Understand that the computed present value of the pension is grossly understated when you are limited to only considering the accrued pension on the marital property cut-off date. Being unable to use early supplemented benefits (which require service during the marital period for the participant to qualify and definitely have a marital property component in a marital distribution action) can be devastating to the computed value of the pension. Know this and point it out to your opponent. Get as much of the other marital assets as you can.

6. Always negotiate for pro rata share of the survivor benefits based on the actual amount of the pension at retirement and not on the accrued benefit at the time of

dissolution if you represent the non-participant. This is also true in those states that only allow deferred vested pension valuations and distributions..

7. Never allow a non-participant spouse to pay the total reduction needed (about 10% of the gross pension per annum) to offset the cost of her being designated the survivor. To show why this is unacceptable lets look at a possible scenario. The couple were married for 20 years and the participant commences retirement after 30Years of service. Using a formula that awards the non-participant spouse a 50% interest in the marital portion of the pension when it goes into pay status, she would get 1/3 of the pension ( $20 \div 30 = 66 \frac{2}{3} \div 2 = 33 \frac{1}{3}$ ). If they were married at the time the participant commenced receiving his pension of \$24,000 per annum his pension would be reduced to \$21,600 per year in order to pay for the 50% Joint and Survivor beneficiary designation for his wife. Divorced non-participant spouses should get their pro rata share of the pension and the survivor benefits.. The cost of the 50% Joint and Survivor annuity is \$2,400 per year. Now as a married couple neither he nor she thought they were working for a \$24,000 per annum benefit. They were looking forward to a \$21,600 per annum benefit, which would protect them in their old age. If the participant should predecease, the surviving spouse would get \$10,800 per annum over her lifetime. That was the joint asset they expected to receive at retirement. If the non-participant pays for the survivorship reduction then 1/3 of 21,600 or \$7,199.00 less \$2,400 or \$4,799 per annum would be paid to her. The participant gets  $\$14,399.86 + \$2,400 = \$16,799.86$ . She is entitled to 33.33% of the pension and gets 22.22%. He is entitled 66.66% of the pension and gets 77.77%.

We will continue to touch on creative solutions in future newsletters. The problems you can run into in settling a divorce case with retirement assets may seem infinite but most can be addressed. Your ability to prevail in those cases is totally dependent on your understanding of retirement assets.

RETIREMENT ASSET RELEASE FORM – Attached is a sample asset release form, which you can printout and use in your practice.

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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.

For any questions or ideas for upcoming articles you can reach Paul Commerford at [paul@lawdatainc.com](mailto:paul@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 and defined benefit 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