



Divorce, Pensions and Retirement Benefits

Number: 24

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November 2004

GETTING HELP

Introduction:

If you have been a faithful reader of this monthly column, I am sure that you are now much more aware of the many issues you may encounter when contemplating the distribution of retirement related marital assets. This is the kind of knowledge that does not really solve all of your possible problems but alerts you to the fact that there are many of them lurking out there that you will probably run into in your practice. The attorneys who recognize their own limited expertise in these areas are the ones most likely not to have the kind of problems we have detailed in past issues. So what can you do to insure that you don't run into a major potential malpractice problem, or if not that, a problem in getting paid for your services because of your failure to properly identify and negotiate the distribution of a marital property retirement asset? Obviously, in this new world of very specialized knowledge, you need to have resources to call upon when you encounter anything in your practice that you are not 100% certain as to how the situation should be handled. Most medical malpractice practitioners won't even take a case until an outside medical expert reviewer gives an opinion as to the likelihood of success. Yet, attorneys will commence negotiations for very complicated and valuable retirement assets with little or no knowledge of the impact to their client of the many financial and actuarial options that can be the most important aspect of the negotiations. If it is a deferred settlement (QDRO), the ramifications of an inequitable settlement might not reveal itself until some time in the future when the client's only recourse is to look to their attorney for remedies.

Tip of the Month:

Have frequently used retirement plan information on hand and become familiar with the provisions of common retirement programs you will encounter locally.

In almost every jurisdiction, the most likely individual to have a defined benefit retirement asset (monthly pension benefit) is a public employee. If you have a divorce practice you will have to handle many cases where one party or the other has a public sector employer pension. Local government, state government and federal employees are everywhere and growing in number. If you have been in practice for a while you already have much of the documentation for these plans on file. The information does change so always request a new plan booklet when you commence a case but, in all probability the changes will not be that dramatic as to make your prior knowledge obsolete. If you are near a military base then subscribe to the "Retired Military Almanac". This publication is updated every year and is invaluable if you handle many military divorces. If there is a large employer in your area make sure you keep their retirement benefit information on file. Big automakers, and most other manufacturers, renegotiate their union contracts every three years. Keeping the information current is important. While retirement plan provisions and options are not the most stimulating reading material, make it a point to be familiar with them. Of course, this will enhance your perceived value to your clients but it will also give you a leg up when you enter negotiations with your opposing counsel and go a long way towards avoiding future problems.

GETTING HELP

The easiest way to improve your handling of retirement issues in your cases is to cultivate a relationship with a knowledgeable expert in the field. If you need a pension plan valued you will have to call upon one to make the appraisal. Don't let it stop there. We have many clients for whom we have been valuing pensions and drafting domestic relations orders for years but with whom we have only had contact with the secretary when we needed additional information. We have other clients who call us whenever they take a case with retirement assets to pick our brains as to the best way to handle the case based on the plan with which they are dealing. Like most others in our field, we do not charge for that kind of consulting. We view it as a positive encounter for both our attorney client and ourselves. If the attorney is aware of the provisions of the plan he will request the correct information so as to make our job easier whether we are appraising a pension or drafting a domestic relations order.

In many circumstances, we can point out that an appraisal of the present value of the pension won't be a viable settlement option because the plan is too valuable and the parties do not have sufficient assets to make an immediate offset distribution. Knowing that only a domestic relations order can be used as the settlement tool in the case saves the client the cost of the appraisal and eliminates a lot of wasted time for our attorney. If the opposing counsel wants to get an appraisal that's fine and if he or she comes back with an appraisal that is ridiculously low then we will have to prepare one; but that is not usually the case. This scenario is pretty common in divorces with military pensions – very valuable pension asset – limited offsetting marital assets.

Most pension valuation consultants have a broad knowledge of state and federal case law and the various plan provisions you might encounter. They are in a position to direct you to the best settlement options in the specific case with which you are dealing. They can point out the importance of addressing the early retirement and survivorship provisions available in the retirement plan and help you chart a course of action that will be most beneficial to your client. You may not prevail on every issue in the negotiations but at least your client will know that they have been addressed and that he or she made the final decision to abandon something that was at least part of the negotiations. This is the best protection you have against future problems. Again, what I have described thus far is usually provided gratis as part of the relationship you have with your consultant. Not to take advantage of this is foolish.

The best way to be sure that everything is covered and that your negotiations are truly to the advantage of your client is to have your consultant write the retirement asset paragraphs in the property settlement agreement prior to negotiations. The language will be biased in favor of your client but will definitely address all the issues that should be addressed so you can never be criticized for missing anything or not knowing the implications of a particular provision. Again, whatever position you may abandon or negotiate away will be with the acquiescence of your client thereby mitigating future problems. Most consultants charge a small fee (\$100.00 or less) for this service and many will include the rewrite necessary after negotiations are concluded if requested to do so.

If you anticipate that divorce work will be an important part of your caseload for the foreseeable future, consider taking the necessary steps to qualify as a board certified Family Law Specialist. This will give you access to numerous educational resources and keep you abreast of what is happening in your state and how other specialists are dealing with the challenges of a family law practice. It is worth the effort if you are serious about family law.

If you do not believe that family law will remain a major part of your practice in the future, you should still avail yourself of the resources available through your State Bar Continuing Legal Education (CLE) program. If you are currently working with divorce cases, then you should attend Family Law Section CLE courses that deal with retirement assets and

divorce. Through your CLE program, you can order transcripts, workbooks and tapes of previous sessions that dealt with these issues. Cultivate friendships with more knowledgeable colleagues who can be of assistance when you run into a really vexing problem. As long as there is no conflict, many (but not all) knowledgeable attorneys are flattered to be called upon for advice.

And, last but not least, stay on top of the case law. Subscribe to a service that provides immediate notification of relevant cases in the areas in which you are interested. In some states there have been so many appellate cases in the areas of divorce and retirement assets that a Lexis search on a subject like "divorce and survivor benefits" can result in a full afternoon of web reading. Hopefully, your state is a little less litigious.

[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.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

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