



Divorce, Pensions and Retirement Benefits

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HARDBALL DISCOVERY TACTICS

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Practice Tip of the Month:

Try to avoid using dollar amounts when negotiating settlement agreements involving monthly pensions or savings account type of retirement plans.

A pension appraisal is designed to place a value on a moving target and is really only 100% valid on the date that the appraisal is prepared (a very good reason for attorneys to agree beforehand on both the appraisal date and the report date, if they truly want to compare oranges to oranges). The appraisal date should be easy in those states that use the date of filing of a complaint as the marital property cut-off date. If the marital property cut-off date is a separation date or a divorce date, then, the attorneys should come to agreement as to what the appraisal date will be for all of the marital assets to avoid difficult future settlement negotiations. The report date in defined benefit pension plans is critical as most appraisers adjust the appraisal date value up to the report date to reflect the actual present value. Also the available annuity interest rate on the report date is usually used because the appraisal date interest rate is no longer available and does not reflect current value of a replacement annuity. When attorneys try to work with actual dollar amounts there is often room for errors (which we frequently see). Many attorneys (not all) are number challenged when it comes to converting a percentage interest in a pension into a specific dollar amount based on a specific date. They also often fail to take into consideration inflationary adjustments of pensions or post-cut-off date passive increases of the non-participant spouse's share of a lump sum retirement savings account. The fact is they are exposing themselves to potential liability if they are not certain about how to arrive at the figures. Use the marital percentage and let the plan provider figure out the amount and any adjustments, if applicable. If you want, or have, to use whole dollars in the settlement or, offset the value of one plan against another to avoid preparing two QDRO's, it is wise to have your retirement valuation expert make these calculations. Most will do the calculations for little or no cost as long as it is not an arduous task such as identifying the present value of the pre-marital, separate portion, of a retirement savings plan based on passive growth.

HARDBALL DISCOVERY TACTICS

While no attorney is expected to be a private detective or a forensic accountant, what is expected is a “due diligence” effort to identify and value all the marital assets when you are handling a divorce case. In most instances this does not present a real challenge as most divorcing couples live fairly uncomplicated lives. They are usually aware of each other’s personal assets as well as those that are clearly marital. If you, or your legal assistant, conduct a proper intake procedure, you should have a pretty good handle on the assets which with you are dealing and what will be necessary. Valuing houses, cars, furniture, jointly owned stocks and bonds, etc. is pretty straight forward stuff. But employee benefits can be a horse of a different color.

The easiest way to obtain employee benefit information is to get the employee/spouse to sign a release form directed to his/her employer(s), both past and present. But many attorneys fail to do this. They may ask opposing counsel for his/her client’s pension information and the information is provided as requested. But the attorney representing the non-participant spouse failed to ask about any defined contribution plans in which the employee might also participate. And nothing was asked about deferred compensation plans, which are offered by many companies and government agencies and in which the employee/spouse may be a participant. If there are no records of requests being made for the overlooked assets, there is no fraud on the part of the employee/spouse who failed to provide the information. The onus for failing to include all of the employee benefit assets in the distribution falls back on the attorney who failed to ask for them.

Your greatest liability exposure in a divorce case is the failure to identify and include all the retirement assets. In many cases these assets can be extremely valuable. Because of this, you should retain complete control over the gathering of retirement benefit asset data. Don’t expect the plan participant to voluntarily turn over all of his or her benefit documents to you. In many cases (if not most), the non-participant spouse is unaware of all of the retirement benefits the participant spouse may be accruing. Some pension valuation companies will gather the information for you for an extra fee but this is often time-consuming and you are never sure of the thoroughness of their task. You must maintain control of the discovery process if you are doing everything to protect the interest of the client and yourself. Never rely on the participant or his/her attorney to provide the retirement data.

In every divorce case you handle, always ask both parties about past and present employment. Ask about military service and particularly always ask about National Guard or Reserve participation. In the past 15 years reserve military active duty has dramatically increased and with it the value of the pensions they are accruing. If one of the parties worked for a company in the past for more than 5 years they may very well have an accrued pension benefit that pays out at age 65 and has a present value which needs to be included in your settlement negotiations.

So, the rule of thumb is:

- 1. Upon opening a case, ask your opposing counsel to have his or her client sign a release form so that you may deal directly with the employer/benefits provider. (A release form that you can use in all your cases is included at the end of this newsletter).**
- 2. If you do not receive a signed release form within two weeks of requesting it, file a discovery motion addressed to the employer(s) using the language in the release form.**

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

Introductory Special!

Free Pension Appraisal

If you are an attorney who has never used LawDATA, Inc.'s services, then let us prepare a free pension appraisal (a \$150.00 value, the cost of which is usually passed on to your client) 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 customer.

[CLICK HERE](#)

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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