



Divorce, Pensions and Retirement Benefits

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MODEL ORDERS

Introduction:

This month we are going to look at QDRO model orders. A model order is a sample order preformatted to comply with the provisions of the plan as interpreted by the plan's trustees and their advisors. Many private and public employer plan sponsors make these model orders available to attorneys (and individuals) drafting domestic relations orders and many attorneys use them to finalize their divorce cases. Unless you are very knowledgeable about actuarial assumptions and the Retirement Equity Act of 1984, I strongly advise against their use. The majority of model orders that I have seen are crafted to the benefit of the plan participant and do not even allude to the fact that there are many options available to an alternate payee that should be addressed in the domestic relations order. Contrary to the impression the plan provider is trying to create, theirs is not the only way to draft an order. Under the Retirement Equity Act of 1984 they are required to accept any order as long as it complies with the federal and state laws that govern. I will give you an example in the body of the article and discuss why the use of a model order in finalizing the distribution could be detrimental to both you and your client.

Tip of the Month:

Do not rely upon your opposing counsel to get his or her client to obtain the retirement benefit information required for your property settlement agreement.

Most attorneys who do a lot of divorce work get to know the other attorneys in their jurisdiction who do a lot of divorce work. In time, some of these acquaintances develop into friendships. In either case it is much easier to call up your acquaintance/friend and ask him or her to get the retirement information you need from his or her client than requesting a signed release form or going through a discovery motion. Your opposing counsel would convey your request to the client who can easily get the information from the employer's personnel department. The information comes back to you through your opposing counsel and a potentially difficult procedure becomes easy.

Do not give the other spouse control over the information that may play a big part in your settlement. Unbeknownst to your opposing counsel, the participant could have omitted plans and plan provisions or even produced fraudulent company documents that understate the value of his or her benefits. If your client has an interest in the other spouse's retirement assets, you should always obtain the documents concerning these assets directly from the benefits provider. Hopefully, your opposing counsel can get the client to sign a release form for the documents and an authorization for a plan representative to discuss the benefits with you. But if the client refuses to sign a release form you must subpoena the plan to obtain the documents and get the answers to questions that are always necessary to provide a better understanding of the nature of the benefits and the available options.

MODEL ORDERS

Many plans will provide attorneys a "model order" for use in preparing a QDRO. And because of the need for a speedy resolution, many attorneys use them. But in most cases these "model" orders are skewed in the favor of the participant (with whom the plan has an on-going fiduciary relationship). If you have been a faithful reader you know that I maintain the attorney for the non-participant spouse should always prepare the domestic relations order. So it is he or she who should be most concerned with model orders.

To give you an idea of what companies offer as model orders just review the following. The model is provided by an actual Union plan and gives the alternate payee no options. It directs payment only as a reduced single life annuity without survivor rights. This is the most common model order you will encounter. It will require substantial modification to bring it into compliance with any sort of equitable distribution of retirement benefits. It addresses a defined benefit pension and a supplemental retirement savings plan. Obviously there will be discussion, negotiation and rewrites required before this order can be made acceptable to the plan, while retaining the intent of the settlement. The name of the plan has been changed to protect the guilty.

I am only going to reproduce the portion of the model addressing the terms of the distribution. The required ERISA boilerplate and the case heading, captions and closing paragraphs have been omitted.

(A) For the purposes of this order, the term Alternate Payee mean(s) (state name of each Alternate Payee), i.e., any spouse, Participant means (state name of employee) and

Alternate Payee means a former spouse, child or other dependent of a participant who is recognized by a QDRO as having a right to receive all, or a portion of, the benefits payable under a plan with respect to a participant.

(B) On _____, 20__, this court entered a judgment approving [incorporating] a marital settlement agreement [a judgment of this court] pursuant to applicable state domestic relations law, specifically including the (Cite the appropriate State Statute) ("Judgment"). The judgment relates to the provisions of [child support, alimony/maintenance payments or marital property rights of a spouse, a former spouse, child or other dependent of a participant] for (insert name of Alternate Payee), an Alternate Payee, who is a (describe Alternate Payee's relationship to the Participant. i.e.. spouse) of (name participant). (Name of Participant) is a participant in the XXXXXX Workers Union Pension Plan, to which this order applies.

(C) The name, social security number, and last known mailing address of the Participant is:

(D) The name, social security number, and last known mailing address of each Alternate Payee covered by this order is:

Both Participant and Alternate Payee have the duty to notify the Administrator of the Plan in writing of any changes in his or her respective mailing address subsequent to the entry of any Judgment for Dissolution of Marriage, dissolving the marriage of the parties.

(E) Basic Plan - The Alternate Payee is assigned a benefit equal to 50% of the actuarial present value of the Participant's benefit accrued during the period of, 19_ through, 20_ to be paid in the form of a single life annuity with no survivor benefits, for the life of the Alternate Payee. The Alternate Payee's benefit is payable, at her election, as early as the participant's earliest retirement age under the Plan. The Alternate Payee is to be treated as

the surviving spouse for purposes of the qualified pre retirement survivor annuity with regard to 50% of the participant's benefit accrued during the period of, 19_ through, 20__

Supplemental Monthly Account - The Alternate Payee is assigned a benefit equal to 50% of the Participant's Supplemental Monthly Account (SMA) balance accrued during the period of, 19 _ through, 20 _ plus interest accrued on that portion of the account up to the time of distribution. The Alternate Payee's benefit is payable, at her election, as early as the Participant's earliest retirement age under the Plan.

(F) The Alternate Payee shall have no rights as to the portion of the Participant's benefits not attributable to the parties' marriage nor any increases in Participant's accrued benefits subsequent to the date of entry of the judgment dissolving the parties' marriage. These benefits shall be paid to Participant or any subsequent spouse or other beneficiary either designated by Participant or in accordance with the provisions of the plan that are applicable when Participant does not designate any beneficiaries to receive the payment of benefits other than those assigned to Alternate Payee.

(G) Nothing in this order requires, and the order shall not be construed to require:

1. the XXXXXX Workers Union Pension Plan to provide any type or form of benefit or any option not otherwise provided under the Plan or to provide increased benefits; or
2. the payment of benefits to (each Alternate Payee) which are required to be paid to another alternate payee under an order previously determined to be a Qualified Domestic Relations Order.

As you can see this model order is hardly the answer to all your QDRO drafting problems. As an attorney, it will be very difficult to structure the order to meet your distribution goals. Even a very knowledgeable Board Certified Family Law Specialist would have difficulty restructuring this order to comply with a settlement agreement crafted to address equity and yet this example is representative of the most common model order addressing a monthly pension benefit that you will encounter. Remember the plan has an on-going relationship with the participant and that is a real factor in their objectivity.

Herewith are some obvious problems:

- The alternate payee's share is determined based on the participant's accrued benefit as of the marital property cut-off date, which could be 15 years prior to the date the alternate payee can commence receipt. This means the monthly dollar amount payable to the alternate payee will stay the same during those 15 years. With just a reasonable inflation factor of 2.5% per annum, over 44% of the purchasing power of those dollars will be lost. The participant, on the other hand, will be paid the portion of the pension attributable to the marital period based on the purchasing power of a dollar at the time of retirement. This method of identifying marital property is contrary to the statutory and/or case law in the majority of the states. So if you practice in one of those states and use this model order language you are in jeopardy of a future malpractice suit.
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- The model only gives the alternate payee an interest in the pre-retirement survivor annuity. There is no option for a post-retirement survivor annuity.
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- Because of the lack of post-retirement survivor benefits, once the alternate payee elects to commence payment of the portion of the monthly pension that was awarded at the time of the divorce, the monthly amount will be actuarially reduced in order to provide the alternate payee a lifetime benefit. If the alternate payee is female and five years younger than the participant, then, the monthly benefit could be reduced by another 40%, or even more. This on top of the fact that the alternate

payee is already going to receive substantially less than the participant for the actual pension paid based on the marriage because of the plan's insistence on locking her into a benefit amount 15 years ago. I could use some dollar amount examples to show you the patently unfair results this model produces but I think you get the point.

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- While the plan provider has the option to amend their by-laws to permit immediate payout of the lump sum supplemental plan, they have elected to retain those funds (the alternate payee's property) until the participant is eligible for retirement. There should be language requiring immediate payment if the plan changes those provisions in the next 15 years.
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- The plan language provides for no contingent passive post-retirement benefit increases, which are common in Union plans. This is particularly unfair if there should be a high inflationary period in the future. The participant would get the alternate payee's share of the passive adjustment added to his monthly benefit while the alternate payee's purchasing power is further eroded. This passive increase is an unearned benefit payable to everyone receiving a pension and the alternate payee is rightfully entitled to receive the adjustment.

Because we are knowledgeable in drafting domestic relations orders, we often use model orders as a starting point. The reviewer is familiar with the format and is more likely to understand the changes we have to make to bring the order into compliance with the settlement. Still, in most cases, any changes will trigger a rejection followed by negotiation and meaningless rewrites to get approval for the settlement intended by our client. If you are very comfortable with actuarial assumptions and ERISA, go ahead and use the model, modify it to fit the circumstances of the settlement and be prepared to fight. You will probably win because there is no legal reason anyone should be limited to the use of model order language.

There are model orders that offer more options but I have never seen one that really addresses all the provisions that should be considered when drafting an order to comply with an equitable settlement.

[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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