



Divorce, Pensions and Retirement Benefits

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RETIREMENT ASSET DISTRIBUTION METHODS

Introduction:

This month we are going to look at your options when a determination has to be made as to how the retirement assets should be distributed. There are a number of factors to consider that involve the ages of the parties to the action, the type of retirement plan, the total value of the other marital assets and the preferences of the clients. After valuing the assets involved, the only real difficulty is helping your client to determine what is best for them and assuring yourself you know how the plan actually works so this determination is based on fact and not wishful thinking. At that point you are ready for some serious settlement negotiation. How well you do is totally up to you but I will give you some insights on utilizing some different approaches in your never-ending quest for equity. Remember, QDRO's are not the only form of deferred distribution. Another approach might work better in some cases where an immediate offset is out of the question because of a paucity of tradable marital assets. Learning to be creative and flexible when negotiating retirement asset distributions can remedy a number of potential impasses and serve your client well.

Tip of the Month:

When depositing your client's spouse, be sure to ask the right questions as you attempt to identify all of the marital property retirement assets.

Life, and particularly the corporate employment sector, has become a lot more chaotic in the past 20 years. Unlike their parents, few employees in the private sector will retire from the same company where they began their career employment. Unbelievably, in some cases, the non-participant spouse is clueless about their mate's retirement benefits, especially those earned with previous employers. A signed release form or a discovery motion can only be directed to those employers who are known to your non-participant client. Multiple corporate mergers and bankruptcies often make prior employers difficult to find even if you know their names. If the employee has a vested pension benefit left behind at a former employer, that benefit is still there. If all or some of it was accrued during the marriage, it is marital property. If the company went bankrupt, there will be a pension provided by the Pension Benefit Guaranty Corporation if the bankruptcy occurred after January 1, 1975. Ask the employee spouse to give you a detailed work history naming employers and last known addresses. Ask him or her what happened to their retirement benefits in each case? Ask them specifically if they have or had any correspondence from those employers about their accrued pension or retirement account benefits? Ask them about supplementary retirement benefits from a military reserve unit or some volunteer activity (volunteer firefighters are given small pensions in some parts of the country). Ask specific questions about IRA accounts or employer/employee funded retirement savings accounts. Whether or not you are satisfied with the responses get signed releases from the employee, or in the alternative, file discovery motions, for every possible retirement benefit provider if your client is willing. These documented efforts will protect you and allow this issue to be revisited if undisclosed retirement benefits are revealed in the future.

RETIREMENT ASSET DISTRIBUTION METHODS

Retirement assets are either distributed using immediate offset methodology (real estate, cash, autos, other assets, etc.) or deferred by use of Qualified Domestic Relations Orders (or Domestic Relations Orders if the retirement plan is a public plan or a private plan not covered by ERISA). For younger individuals the easiest way to distribute pension values is by immediate offset. In most of those cases, their pensions are not as valuable as those of older clients because of fewer years of participation under the retirement plan and the substantial time that must pass before they are eligible to commence receiving their benefits. There will usually be a sufficient amount of marital assets available to allow the plan participant to retain his or her pension benefits. The non-participant spouse can be compensated with additional interest in the marital real estate or some of the other marital assets. This is even more appropriate if the right to receive the pension is still decades in the future. If the parties to the divorce are relatively young and do not possess sufficient marital assets to make the offset then the amount owed the non-participant spouse can be established and an amortized payout over a period of years can be structured to compensate the non-participant spouse for his or her share of the pension. If both parties have pensions or defined contribution accounts, then, after determining the value of each party's retirement benefits, the difference should be distributed by the individual whose benefits have the greatest value using either an immediate offset against other marital property, a QDRO if the funds can be immediately paid out to the alternate payee from a defined contribution account or by amortized payments over a period of time.

If a pension is available to the participant at a very young age it will usually have a very high present value preventing the use of an immediate offset distribution. If that is the case, then the only way to accomplish an equitable distribution will be with a Domestic Relations Order. I use the term Domestic Relations Order here because it is usually only public pensions that provide such early retirements. The term "Qualified" legitimately only applies to private sector retirement benefits providers whose plans "qualify" under the IRS regulations governing deferred retirement income.

The danger in relying on a public pension for distribution purposes is that the alternate payee cannot be sure when the funds will actually begin being paid. The marital portion of a public pension will not begin being paid to the alternate payee until the participant actually retires. There are no provisions in most public plans (as there are in private ERISA covered private plans) for the alternate payee to begin receiving benefits prior to the participant actually electing retirement and beginning to receive his or her pension.

If the participant can retire with unreduced benefits after 20 years of service (i.e. members of the military, public employees engaged in hazardous duty, etc.) but elects to continue working for another 10 or 15 years, the alternate payees will just have to wait to receive the portion of the retirement benefit awarded to them. When participants delay entering pension payout status, once they are eligible to receive unreduced benefits, the value of the pension is actually being dissipated. While the dissipation may be unintentional on the part of the participant, the alternate payee does actually suffer a financial loss.

One way around this is to have the participant begin to pay temporary alimony beginning on what would have been his or her normal 20 and out retirement date and continue to make these payments until such time as he or she elects to retire and make the alternate payee eligible for direct payment by the plan. As this is a joint marital asset, fairness dictates that the alternate payee should be compensated in some way for the value of his or her share of the retirement asset lost due to the participant electing to continue to work. Alimony payments, in the same amount that would have been paid to an alternate payee if the participant had retired beginning on the first date of retirement eligibility (with appropriate annual COLA adjustments, if provided by the plan) is one way to address this issue. The settlement agreement should specify that the amount being paid to the alternate

payee by the employee spouse, as alimony, during this period of continued employment after attaining immediate, unreduced retirement eligibility, should continue to be paid to the alternate payee, in the same amount but directly by the plan provider, after the actual retirement of the participant.

A Domestic Relations order should be entered concurrent with the final decree that addresses the foregoing contingency. Negotiating this in the settlement agreement creates a trade-off in that the alternate payee will not get the benefit of the higher monthly pension amount that will be paid to the participant due to his or her continued employment but, more importantly, the alternate payee will not suffer the losses inherent in the deferment of a retirement income when unreduced benefits are actually available.

If the individuals are older, have had a lengthy marriage and a substantial stake in the pension due to the length of employment, then the value of the benefits and the fact that the pension payment commencement is in the foreseeable future usually means that a Qualified Domestic Relations Order will be the preferred method of distribution. An older, non-participant female spouse usually places a higher value on pension income and is much more likely to insist on a Qualified Domestic Relations Order and survivor benefits to protect her in the not too distant future. This has been something she has been counting on for decades and it is highly unlikely that a court (or a soon to be ex-spouse) would deny her this expectation.

What we have been discussing are the various situations that can dictate how defined benefit pension assets are usually distributed. When employees only have defined contribution plans the scenarios are very different. In almost every case distribution will be made by use of a Qualified Domestic Relations Order. This always makes sense because of the fact that, with a Qualified Domestic Relations Order, distribution can usually be immediate and current federal tax laws provide for a tax-free exchange in divorce cases.

[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) (<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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