



Divorce, Pensions and Retirement Benefits

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USING A QDRO AS A SETTLEMENT TOOL

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A Personal Note:

This is the first newsletter I have written since June. My absence was due to illness which I believe is now under control. For the time being I will be issuing newsletters every other month. I hope that is satisfactory for my readers. I hope to return to a monthly schedule in the next couple of months.

Practice Tip of the Month:

Disability Pensions and how they are treated.

A few States do not consider disability pensions marital property, while most others do. The U.S. Military will not allow the use of a Uniformed Service Former Spouses Protection Act order (military QDRO) on any portion of the pension which is deemed to be attributable to a disability (a military member can have his pension apportioned to consider any injuries incurred during his or her tour of duty and receive that portion tax-free). It is common to see awards of 25% (more or less) of the pension as disability related and not permitted to be distributed with a QDRO.

The most common problem you run into when dealing with disability pensions is when the disability is work related. In most cases the injured participant receives a substantially higher pension, payable immediately, then the portion of the pension that was actually earned during the marriage, to compensate for lost, future wages. New York State seems to have come up with the perfect compromise (*Dolan v. Dolan*, No. 198, Court of Appeals of New York, 78 N.Y.2d 463; 583 N.E.2d 908; 577 N.Y.S.2d 195; 1991 N.Y.). In that case the injured worker received 75% of his final pay for life, payable immediately, due to a work related injury. The appeals court found the alternate payee should receive a domestic relations order totaling 50% of the portion of the pension that was actually earned during the marriage but also payable immediately. If there is no guiding case law, we always encourage our clients to use this approach.

Introductory Special!

Free Pension Appraisal

If you are an attorney who has never used our services, then let us prepare a free pension appraisal (a \$150.00 value) 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 client.

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USING A QDRO AS A SETTLEMENT TOOL

Many attorneys shy away from QDRO's because of anticipated problems that they may incur in writing them and getting them approved by the plan. It is true that drafting QDRO's has gotten harder as companies dumb-down the review process. It is much more common to have to rewrite them before final approval. In an attempt to save money on a process that is not a profit center for the company, many have hired lesser skilled employees or out-sourced the process to reviewers who work off of check lists or model orders. They often have little knowledge of actuarial calculations or what is permitted in the Retirement Equity Act of 1984. With most attorneys billing \$200 per hour and up, it is difficult to get reimbursed for the time and research necessary to draft an acceptable order. Unless you are very familiar with domestic relations orders it is always more economical for you to out-source them to a service that guarantees acceptance at no extra charge and simply add on your cost of having the judge sign it, while you just file it and forward it to the plan. While you are still responsible for the order you have the expertise and third party malpractice insurance of the preparation service to better protect you. Also, cost is known beforehand and your client can be advised accordingly.

The reason I encourage the use of QDRO's is not simply because we are in the business of drafting them but because in many cases they are the only source of cash necessary to settle the case. Most employees of larger companies and government agencies now have a 401(k), 457(b) or some other kind of retirement savings plan. Many of these accounts have very substantial balances (in the hundreds of thousands of dollars). These funds can only be accessed by the employee quitting his or her job and paying early-withdrawal tax penalties or by using a QDRO. These funds can be used to retire marital debt, equalize assets or to give the spouse with the lesser earning power, lump sum alimony. They can be used to pay off back child support and for various other settlement requirements. You can not order the plan to directly pay your fee but the available cash will be there if it is paid directly to the non-participant spouse.

If a portion of the account is paid to the alternate payee directly, there is no early-withdrawal penalty. The amount of the direct distribution is added to the income of, the usually lesser paid spouse, and taxes are owed on the distribution in the year of receipt. If the money is being used to pay off joint marital debt the taxes that must be paid by the non-participant spouse should be added to the distributed amount so both parties are paying their fair share.

QDRO distributions can be very flexible. The portion necessary to pay off marital debt can be paid directly to the non-participant spouse and another portion used to equalize marital assets can be paid with a trustee-to-trustee transfer with no taxes incurred by either party. The non-participant spouse simply has to set up an I.R.A. to receive the non-taxable portion. The plan must be advised accordingly. The specific instructions can be included in the QDRO to insure plan compliance. If there is also a defined benefit monthly pension, the distribution of that asset can often be incorporated in the same order at no additional cost, if prepared by a QDRO preparation service.

In summary, if your practice includes Family Law cases you owe it to yourself and your clients to become more familiar with the use of QDRO's in settlements. More often than not you will find they make settlement of what would be a difficult case, much easier.

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 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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