



Divorce, Pensions and Retirement Benefits

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VALUING A RETIREMENT SAVINGS ACCOUNT (401(k), etc.)

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Practice Tip of the Month:

Dealing with the frustrations you can encounter when working with QDRO reviewers.

In 1985, when Qualified Domestic Relations Orders were brand new, and we began drafting them, it was not unusual to work with a company's outside ERISA attorney to formulate the proper language that would be acceptable. They were knowledgeable and helpful in perfecting the order. As QDRO review is not a profit center for any company, and, as using these attorneys was expensive, companies began hiring legal assistants to perform this task, with the help of guidelines prepared by the ERISA attorney. Again, most were knowledgeable, and could easily and professionally perform the required review.

Today many plan sponsors have prepared "model" orders and are using clerical personnel as reviewers as a less expensive alternative. Often, they work off of a check list and if the proposed order does not have the exact words in the plan's "model" order they will reject it, even though the order is in full compliance with existing regulations and the provisions of the plan to which it is directed. Discussion of the rejection letter with the reviewer will often reveal their ignorance of both legal and actuarial terminology.

To get around these constraints, always determine if the plan has a "model" order before you draft your proposed QDRO. If they do, and you are confident of your own skills, use it. Change those portions of the "model" that specifically address the terms of your settlement agreement to bring it into compliance. Try to change as few words or phrases as possible so the order will look familiar to the reviewer. This will often give you a good shot at approval. If not, it will be easier to prevail if you have to go above the reviewer's level to fight for acceptance. You will be working with a document that looks familiar to company employees and you can more easily explain your reasons for customizing their "model". It will be easier to show how your changes comply with the plan and existing regulations. If the whole order is in an unfamiliar format, prevailing will be much more difficult.

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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VALUING A RETIREMENT SAVINGS ACCOUNT (401(k), etc.)

Defined contribution plans have become a very common marital asset in divorce cases. Knowledgeable attorneys are using Qualified Domestic Relations Orders directed at these plans to access a participant's account balance and tap into this ready source of cash to retire marital debt and/or equalize the property settlement. Adjusting the values of these is usually necessary because of the time factors between the marital cut-off and actual distribution dates. If the account was totally accrued during the marriage, 100% (up to the marital property cut-off date) is subject to distribution. If a QDRO is used the plan will often compute the passive growth on the alternate payee's portion, between the marital property cut-off date and the distribution date to the alternate payee, but not always. The account must be valued, or an amount agreed upon by both parties, if you are offsetting the marital portion against other assets, if the plan will not compute the post-marital passive growth on the non-participant's share or if the participant became a plan member prior to the date of the marriage. If the plan statements are not available it will be impossible to accurately compute the separate property component and the parties will have to negotiate the marital share of the current account balance.

Valuing an account is a straight forward math exercise (but tedious to accomplish and explain) that you can do yourself, subject to review by your opposing counsel. Optionally, you can pay an outside retirement consultant or accountant to prepare the valuation. The goal is to place a value on the separate property component of the account. For example, if the husband began participation in the plan in 1985 and the parties were married on June 1, 1990 and the marital property cut off date was September 6, 2006, the following must be done to identify each party's share.

1. Identify the balance of the husband's account on the date of the marriage. That amount must be imputed if the date falls on any date other than the end of a calendar quarter if the plan provides quarterly statements (the most common plan reporting schedule). Imputing the amount requires using the ending account balances in the quarter preceding the date of the marriage and the ending account balance in the quarter following the date of the marriage and dividing the dollar amount difference in the account on those dates by the number of days in the quarter to determine the daily growth during the quarter. Once that is identified, multiply the daily \$ growth by the number of days between the last day of the preceding quarter and the date of the marriage and add that amount to the ending balance at the close of the preceding quarter. In most jurisdictions this is the participant's separate property and the opening balance of your passive growth calculation.
2. With the husband's opening balance identified, you can now determine the passive growth or loss on his separate property share of the account for each quarter between the date of the marriage and the marital property cut-off date. We average the quarterly balances for accuracy. The computations that must be made each quarter are as follows:

*Ending Quarterly Balance - (Opening Balance of Quarter + Plan Contributions) = \$ **Passive Growth/Loss***

*Opening Balance + (Plan Contributions ÷ 2) = **Average Quarterly Balance***

*\$ **Passive Growth/Loss** ÷ **Average Quarterly Balance** = **Passive Growth/Loss %***

You then multiply the amount of the husband's separate property portion of the account at the close of the previous quarter by the Passive Growth/Loss % and add or subtract that amount to his account. This is done for each quarter until the quarter in which the marital property cut-off date occurs. You will probably have to pro-rate that quarter also.

3. If it is necessary to compute the post marital property cut-off date passive growth or loss on the non-participant's share of the account, you utilize the same methodology, beginning on the marital property cut-off date and applying the exact same method, only in this case you are applying the passive growth percentage to the non-participant's account balance. You will have project forward to allow for the fact that the actual distribution of the money will be made after the latest available account statement if you are using a QDRO. It is more likely that the plan will make these calculations for you if the time span between the cut-off date and the projected distribution date is relatively short.

As I said, the foregoing is tedious to do and explain. If the marital period is relatively short, preparing the valuation can be accomplished fairly easily; but a lengthy marriage means hours and hours of computational time. Unfortunately in a long marriage, rarely does a participant have all of the necessary statements and few plans will provide duplicates. That means the amount of money to be paid, or credited, to the alternate payee will have to be negotiated.

If the marital shares are to be negotiated, you can begin with a simple coverture factor (*total number of months of plan participation during the marriage ÷ total number of months of participation up to the projected distribution date X 50% = alternate payee's share of the total account balance on the actual distribution date [projected]*) and use the amount computed as the starting point in negotiations. Of course, the accuracy of the figure actually utilized in the distribution will be less than exact but in view of the fact that the necessary data is unavailable it will have to suffice. Both parties should understand that.

Whether you choose to do the calculations yourself or hire an expert, the most important thing to remember is that in most cases the defined contribution account will need some valuation work to correctly identify each party's marital share.

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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