



Divorce, Pensions and Retirement Benefits

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IS "WINNING" A DIVORCE CASE A LEGIMATE GOAL?

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Practice Tip of the Month:

Be prepared for some big changes in the world of retirement benefits.

An article written by Robert C. Pozen appeared in the July 31, 2006 *Wall Street Journal* outlining upcoming changes in both defined benefit (DB) and defined contribution (DC) retirement Plans that will affect all of us who deal with retirement benefits and divorces. Congress is about to mandate new funding rules for DB plans (pensions) resulting in very few private pension plans in the future. Also, are changes to DC plans (i.e., 401(k) plans) that increase their attractiveness and increase the annual amounts that individuals and companies can contribute to them. These changes make participation in these plans much more likely to be embraced by younger workers, who currently shun them. These plans are portable, so if you change jobs you take them with you. Other changes will encourage low income families to be participants in DC plans with the government giving tax credits as motivation. Saving the Pension Benefit Guaranty Corp. (PBGC) from bankruptcy is a primary motive for the changes.

So what does this mean to you, the practitioner? In the future the majority of your clients will have gotten married with a DC plan balance that precedes the marriage. In most States you are going to have to segregate the passive growth on the premarital portion before you can identify the marital portion. This is hard work. I know. I prepare "Growth Analysis Reports" to identify the marital portion of the account. Every investment firm uses a different and constantly changing report format. Figuring out the passive growth on a pre-marital account for a 15 year marriage is lengthy and rarely are all the statements available. Right now, the plans refuse to provide copies. There must be changes that require the companies to keep and provide copies of these statements if every other divorce has to utilize them as a valuation tool. These reports can be costly as well as time consuming (we have computerized the calculations but just pulling the numbers off of the quarterly statements can be very tedious and a report explaining what was done must always be written).

These changes will not affect public employee pension plans, nor probably many Union backed plans, but private companies will begin immediately abandoning pension plans and converting them to cash balance plans, frozen DB plans or taking the actuarial value and converting it to a DC plan to avoid the new DB rules. The biggest impact will be the additional cost to the client who has to pay for the analysis, making the divorce more expensive.

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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IS "WINNING" A DIVORCE CASE A LEGIMATE GOAL?

An attorney friend of mine once told me he saw his role as that of a "hired gunfighter". He was hired to win the case for his client no matter what the circumstances were. The rightness or wrongness of his goal was of little interest to him. Winning was all that mattered. This might be an exaggeration but it is not far from the mindset of most attorneys who are litigators, which most divorce attorneys have to be. They have winning hammered into their heads in law school and every case becomes a personal challenge.

Unfortunately this is contrary to the goals of most divorce legislation, whether it is an equitable distribution or community property state. In a divorce case, the intent is to identify the marital assets and to make sure your client gets his or her equal share. Fault is not a factor in most States so who did what to who should really have no bearing (but as we all know it is often impossible to overlook).

Retirement assets make up a substantial portion of the marital property in many divorces. So naturally, getting your client their rightful share should be one of your primary goals. This takes knowledge on your part of how pensions and retirement accounts are accrued, how they pay out, what the available options are in the plan with which you are dealing and the correct way to identify the marital portion. You should possess enough expertise about these assets so that nothing gets overlooked. If you use a domestic relations order for distribution purposes, your settlement agreement should clearly spell out the terms of the order including what is to happen in the event of death. There are many options in distributing these assets so you can expect lengthy negotiations if your opposing counsel is also knowledgeable. But these issues should be able to be worked out in negotiation and not litigation. Unfortunately, there are still many judges who have very limited retirement asset knowledge. Going into court with these issues unsettled can be a crap shoot and not to the advantage of your client. Frankly, in most cases it should be avoided at all cost.

A quick primer on preparing your case if retirement assets are to be included would be:

1. Get a signed release form (a sample form can be found at the end of this newsletter) from your opposing counsel's client so you can deal with the plan directly. Do not rely upon the information provided by your client's mate.
2. Read the information provided and educate yourself on the plan provisions so you can intelligently negotiate.
3. Get any appraisals needed as quickly as possible so you know the worth of the assets and can prepare for negotiations forearmed with these values. Your proposed property settlement agreement can then reflect their true worth. Be very specific in the property settlement agreement because this is your only shot at correctly dealing with these issues. Even if you don't win in all the negotiations, you have documented your attempt to correctly get your client everything to which he or she is entitled. This is particularly important if a domestic relations order is to be used as a settlement tool.
4. If you have any trepidation about preparing the retirement asset section of the settlement agreement get an expert to write it. It is cheap insurance for both you and your client.

Valuing and distributing the other assets is usually much less complex. Cars, houses, brokerage accounts, etc. have fairly easily obtainable values and how they are to be distributed is usually worked out by the parties to the case. Both attorneys should agree at the outset to get their clients to sign information release forms for retirement assets, brokerage accounts, bank accounts, employment records, etc. to avoid costly and time consuming discovery motions.

Usually, only when one of the attorneys is ignorant (usually of the retirement issues) should you wind up in litigation. Most information can be obtained by deposition or discovery and the need for litigation should be very limited. If you have a strong belief that one of the parties is hiding assets, even after you have completed your depositions and discovery motions or if your opposing counsel is just a jerk who refuses to cooperate in negotiations, litigation may be your only option. But it should not be litigation to get your client more than he or she deserves under the law but simply to ensure that equity is obtained. This is the intent of the law and the ethical thing to do.

These goals are not those of a "hired gunfighter" but the goals of someone seeking justice for their client. Divorces are not to be won or lost but rather equitably settled.

SEE LAST PAGE FOR SAMPLE RELEASE FORM

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.

Web: www.lawdatainc.com

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