



BECOME A SETTLEMENT LANGUAGE PRO

Introduction:

This month we are going to spend some time looking at the riskiest part of setting up a divorce related deferred distribution of retirement assets - the settlement language. Normally, by the time we are asked to prepare a Qualified Domestic Relations Order, the settlement has been finalized either in a property settlement agreement, a separation agreement or, in an actual transcript of a hearing or trial. We often have to tell an attorney that the settlement that has been negotiated is impossible to implement because the language is asking for something the plan cannot do or that the settlement language is unknowingly detrimental to the interest of his or her client. From our prospective these are mistakes that should never happen.

Tip of the Month:

Be sure to include all the retirement assets in your settlement.

The divorces with which we usually work involve individuals in their 40's who have amassed sufficient marital property (and kids) to preclude a truly uncontested divorce. Many issues come in to play that make it difficult for the attorneys trying to tailor an acceptable settlement. Amazingly, most of these divorces are settled without actual courtroom litigation but often assets are overlooked for the sake of expediency. Before any settlement is proposed it is incumbent on the attorney to identify all of the marital assets. Real estate, vehicles, cash and even investment equities are usually known to both parties so they are quickly identified. This is not always the case with retirement assets. A release form from each party should be obtained to permit the attorneys to contact their employers and specifically question the existence of any and all retirement assets. Many employees who work for large companies have a number of retirement plans. They may have a defined benefit pension plan that will pay monthly retirement income for life, a 401k savings plan, a company ESOP, a deferred compensation plan and even a stock option plan. The only way you as the attorney can be sure you have identified all the needed financial data is to get it from the employer. Also, if one or both of the parties had previous employment there may be vested retirement benefits with the previous employer that is marital property. On your case intake form always get the names and addresses of all employers each party has had. And, don't forget military reserve participation. Reservists have pensions.

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Let me start with an example of what we often see in a typical settlement language document.

The husband is a participant in a retirement plan incident to his employment with the XYZ Corporation. The wife is awarded 50% of that portion of the pension that was accrued during the marital period, January 15, 1985 until May 11, 2001 (i.e. \$1,000.00 per month payable for life commencing on the 65th birthday of the participant). As the husband commenced employment on February 15, 1988 all of the accrued benefit is marital property. A Qualified Domestic Relations Order will be submitted to the court to accomplish this transfer of the pension asset.

The language in the settlement agreement dictates the language in the Qualified Domestic Relations Order. What this language is telling the plan is that the wife will receive 50% of the accrued benefit that was credited to the husband on May 11, 2001 payable on the husband's normal retirement date (usually at age 65). If the husband were to die prior to commencing receipt of his benefits she would not get anything because she has not been named a beneficiary of his pre-retirement survivor annuity. If he were to die after he retires all payments to her would cease because she has not been named the beneficiary of the post-retirement survivor annuity. She could have had the portion paid to her based on a single life annuity based on her life which would have continued payment to her after his death, all be it on a substantially reduced basis, but that provision was also omitted. The term accrued benefit means that the portion awarded to her will not increase one cent over the years. The pension is simply a promise on the part of the plan provider to pay a future monthly income. The income is usually determined by a formula such as the average high salary based on your highest five year salaries at the time of retirement times a multiplier (i.e. 1.5%) times the years of credited service at retirement. This is how most (U.S. Civil Service, IBM, GE, state and local government, etc) defined benefit pensions work. Because the language in the settlement limits her portion to that portion that was accrued on May 11, 2001 no increases are possible. Even if inflation were to rage at 15 or 20% over the next ten years no adjustment in the amount payable to the former spouse could be made

Even if your case law limits how the language should be structured you can alternatively insert the correct language if you use "weasel" words with phrases such as "while current case law does not permit a distribution based a coverture formula applied to the actual pension amount when it goes into pay status, this settlement agreement permits an amended order be entered to address any changes that may be permitted in the future when retirement assets are more equitably addressed by case law or legislation". Also, as you know, the parties to the divorce can agree to distribute the pension assets in any form as long as it is acceptable to the plan. If you represent the alternative payee you should attempt to address all the plan provisions and negotiate a settlement that truly represents equity. In many cases you can get the parties to agree to a more equitable settlement even when you have case law that limits equity when you appeal to a sense of fairness on the part of the plan participant spouse. Following is the kind of settlement language that should appear in your settlement.

The husband has a pension with XYZ Corporation. He commenced employment on February 15, 1988. The parties were married on January 15, 1985 and filed for divorce on May 11, 2001. The parties were married during the employment period for 196 months during which time the pension was

accrued. The wife is awarded 50% of a fraction of the pension when it goes into pay status. This fraction shall be determined by dividing the total amount of the available pension at the time of the retirement by 196 months divided by the total number of months credited to the participant at the time of his retirement. The pension will be paid in the form of a 50% joint and survivor annuity with the wife named as the beneficiary of the pre and post retirement survivor annuity. If the participant qualifies and receives a supplemental benefit and or post retirement cost of living, or pension benefit increases, then the wife shall participate in such supplemental or post-retirement benefit increases on a pro rata basis. If the husband has the right to receive a portion of his retirement benefit in the form of a lump sum benefit and elects to do so then the wife shall also have the option to receive her portion of the lump sum on a pro rata basis or to elect to receive all of her share in the form of monthly payments.

Specificity is the key to drafting adequate settlement language. What is left unsaid becomes the snake that can bite you in the butt. Even if your current case law does not permit a truly equitable distribution, insertion of the correct language with a proviso stating that if it is not currently permitted under your state current legislative or case law it is understood that if the laws are changed the non-participant spouse reserves the right to submit an amended order. You may not prevail but your attempt will certainly preclude any possibility of a future liability.

[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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