



Divorce, Pensions and Retirement Benefits

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ANTICIPATING THE DEMISE OF PRIVATE DEFINED BENEFIT PLANS AND WHAT CAN YOU DO ABOUT IT?

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Practice Tip of the Month:

How to avoid the most common malpractice trap, when handling Qualified Domestic Relations Orders.

Many attorneys still think that if they detail the terms of the Qualified Domestic Relations Order in the property settlement agreement or the final decree that their job is done. I know that it is hard to believe but we still see that on a weekly basis when the non-participant spouse contacts us and asks when they are going to get their money now that their spouse is retired.

If your case includes a deferred distribution, it is not complete until the Qualified Domestic Relations Order is drafted, signed by the judge and submitted to the plan. It is a good idea to have a checklist whenever you prepare a divorce case that covers every step along the way to avoid missing anything that can get you into trouble. I have spoken before about the importance of a good intake form. But it doesn't stop there. There are numerous procedures that must be taken if the case is to be finalized. Contacting the retirement plan provider and determining their Qualified Domestic Relations Order requirements (they are the final arbiter of whether an order will be finalized) is a necessary part of the process. If your settlement includes an order you will now know what information you will be required to please the administrator. While it is not necessary you follow their instructions to the letter (your settlement may vary from their specific language) using terms with which the reviewer is familiar can help in getting the order approved.

But more important than anything is that the Qualified Domestic Relations Order be filed concurrent with the final decree so that it does not get overlooked. It is too easy to complete the divorce and put the order on the back burner, never to be thought about again.

If the participant were to die before the order is submitted, the plan will no longer accept an order and your client will have no recourse but to turn to you for redress. It happens every day. If you are not comfortable preparing an order, at least arrange for a professional to draft it so you will not be exposed to problems in the future.

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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ANTICIPATING THE DEMISE OF PRIVATE DEFINED BENEFIT PLANS AND WHAT CAN YOU DO ABOUT IT?

The newspapers and the weekly magazines are filled with the financial dilemmas being encountered by the auto and airlines industries and their astronomical defined benefit pension plans (monthly pension) deficits, but, they are not alone. Just about every major company with a defined benefit plan is suffering, or will suffer the same fate. Many companies are applying smoke and mirror or band-aid fixes, but they are temporary at best. The truth is in the in the global economy these rich, post-retirement benefits are unsustainable – and everybody knows it.

So how do you, the practitioner, come to grips with these new realities? For one thing we should rethink the use of the pension appraisal as a viable distribution tool. Only in the case of public pensions will defined benefit pensions probably be around for the long haul. Most of companies who compete on the world markets will have to abandon them as a means of economic survival.

In some ways it is easier. Over the past 20 years many private companies have abandoned traditional pensions in favor of 401(k) plans or other retirement savings schemes. If both the husband and the wife work in the private sector, and have a form of retirement savings benefits, dealing with two defined contribution plans is relatively easy. Whomever has the larger account balance owes 50% of the difference (assuming it is all marital) to the other partner. Distribution can be handled by offset against another marital asset or by use of a Qualified Domestic Relations Order to either transfer the difference to the other partner's retirement account or distribute the funds immediately.

Because the fate of the defined benefit plan will be so speculative over the next 20 years, what I advocate is a gradual transformation to the Qualified Domestic Relations Order as the principle tool to be used the distribution of marital retirement assets. This eliminates much of the guesswork as to whether a plan will survive and, if properly drafted, can insure an equitable distribution.

The difficult part is to know how a company's defined benefit plan will be changed. The present value of the accrued benefit of the plan could be computed and become the opening figure for a Defined Contribution Plan (401k, et al) or it could become the opening figure for a Defined Benefit Savings Plan or an ESOP. The possibilities, while not endless, are myriad. The company might just might just freeze the benefit and eliminate other retirement benefits all together and simply give the employees raises and tell them to establish their own I.R.A.'s,

With this many potential operating models, it will be incumbent on you, the attorney, to cover every contingency if you want to protect your client, while addressing the standard defined benefit plan if the company elects to stay with that model. I know this seems difficult but if you want to really protect your client there is really no other way to do so this than by immediate offset and then you run into another problem – how willing would a pension holder be to do an immediate offset if he thought his or her defined benefit pension was in jeopardy and if he or she lived in a matured full benefit state (pension is valued based on continued employment and retirement is projected to the earliest unreduced retirement date). He or she would be convinced they were giving away something they would never get unless they were very close to retirement age.

Think about this, and I think you will see we all have little choice in the matter. To protect the client we have to transition from Pension Appraisals to Qualified Domestic Relations Orders as the retirement asset distribution tool.

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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