



Divorce, Pensions and Retirement Benefits

Number: 52

Paul Commerford - President Emeritus - LawDATA, Inc.

March 2007

CAN A DEFECTIVE ORDER BE CORRECTED?

(See next page for this month's article)

Practice Tip of the Month:

What is the difference between the two methods of identifying the marital portion of a defined benefit pension?

There are two ways to identify the marital portion of a pension. The most equitable in an immediate offset or deferred distribution case is the Matured Full Benefit approach. The marital property is identified as 50% of the marital portion of the pension when it goes into pay status. The marital portion is determined by a coverture fraction with the total number of months married while accruing benefits divided by the total number of months of employment at the earliest date the participant is eligible for unreduced benefits and including supplemented benefits if included in the plan using his or her present income in the calculation of projected benefits. The same language would be used to identify the marital portion in a deferred distribution only using the actual pension being paid as the starting point and with payments to the alternate payee beginning at the same time as the participant (not before) and the alternate payee being named the beneficiary of, at least, the marital portion of the 50% survivor annuity so that if the participant predeceases, the alternate payee continues receiving the same monthly amount that was being paid prior to the death of the participant. This is the only truly equitable approach in any marriage of substance. This methodology recognizes the asset being valued and, if a domestic relations order is used, automatically adjusts for inflationary increases (the usual basis for salary increases for employees).

Unfortunately, many States do not permit this methodology and require the marital portion of the pension be limited to the vested accrued benefit on the appraisal date payable on the normal retirement date of the participant. This methodology (Deferred Vested) fails to take into account that most pensions have supplemented benefits for long tenured employees and that the years working while married contribute to the minimum years required to receive the supplement. Also, the accrued benefit is based on the average of (usually) the past 5 years so the non-participant spouse's actual share is grossly understated. If you use a domestic relations order in those States, the portion payable to the alternate payee will not increase one cent between the time of the appraisal date and the date that payments can commence. In many cases inflation alone, will eat 50% or more of the purchasing power of the benefit and, if the non-participant is not named a beneficiary for survivor benefits, if she is female, the actuarial adjustments necessary to fund her pension for life could reduce the benefit awarded to her by 50% or more.

CAN A DEFECTIVE ORDER BE CORRECTED?

When a domestic relations order is accepted and approved by a plan, they often will respond with a letter stating their interpretation of the terms of the order and how the pension assets will be divided. At that point the attorney may realize that the implementation proposed was not what he or she intended for their client and is now confronted with a dilemma. If the plan relied on the language in the order and the language in the order relied on the settlement language, can there be any modifications made at this point. The definitive answer is “it depends”.

If the parties intended an equitable settlement, and the divorce was basically amicable, but the attorney used language in the settlement agreement that did not clearly define the intent of the parties, then, with the cooperation of the opposing counsel and his/her client, an amended order can be filed that corrects the deficiencies. But, frankly, this is rarely the situation. Few divorces are that amicable and unless the attorney erred in the preparation of the order and failed to address the specific terms of the settlement, few judges will allow a modification at that point without the cooperation of both parties.

There is another situation which can arise that will offer the attorney the opportunity to modify the order. If the plan rejects the order because it contains provisions that are not allowed by the plan and the parties have agreed to those provisions, it is possible to renegotiate the terms of the settlement to structure a settlement that will be acceptable to the plan. This gives the attorney another shot at making the final order more equitable and often at that point with a much better understanding as to how the plan actually works.

But the unfortunate truth is that if the attorney failed to take into consideration things such as actuarial equivalents, early supplemented benefits, survivor benefits or post-retirement passive increases to the pension (either due to COLA adjustments or renegotiated union contracts), he or she will just be out of luck. They will find themselves with a very unhappy client if they represented the non-participant spouse. As it is the norm for the attorney representing the non-participant spouse to draft the order, they bear the real risk in failing to properly protect their client.

The language in all domestic relations orders is dependent on the language in the settlement agreement. A defective settlement agreement results in a defective order from the perspective of the client who is getting less than they thought was bargained for at the time of the settlement negotiations. When dealing with a pension, statements such as “50% of the marital share”, invite huge problems when you are trying to draft an equitable order. Every provision offered by the plan and everything that the parties have agreed to must be spelled out in the settlement agreement. It is incumbent upon the attorney representing the non-participant spouse to be totally familiar with the provisions of the plan or hire someone knowledgeable enough to draft the settlement language that is most beneficial to their client and use that as the starting point in the settlement negotiations. Getting the plan documents directly from the plan is mandatory as is getting all the information relating to the participant.

The key to dealing with a defective order is not to write any. As an attorney dealing with Family Law issues it is necessary to educate yourself on retirement assets and how they work. Failure to do so can create major problems in the future. Do not rely on boiler-plate language you find in a book or on a model order provided by a pension plan. Both courses of action can create huge problems. There is no boiler-plate that addresses the specific provisions of the plan with which you are dealing, and model orders rarely spell out all the options available to the non-participant spouse.

Take advantage of Family Law Section Continuing Legal Education programs offering topics on retirement assets. Find a local attorney who is more familiar with this stuff than you and discuss your case. Be humble. Nobody can be an expert in everything and retirement assets and actuarial considerations, and the assumptions they imply, are very complicated. Cultivate a relationship with an expert in this area upon whom you can call to discuss a case. Few charge anything for that kind of service. Use professionals to draft your settlement language if you are in any doubt as to all of the plan's provisions and what is most beneficial to your client. Remember it is the settlement agreement that dictates the terms of a domestic relations order and whether or not it will be equitable.

If you start to build some of these procedures into your practice, there will be many fewer times that you have to worry about a defective order.

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.

[CLICK HERE](#)

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.

Web: www.lawdatainc.com
