



Divorce, Pensions and Retirement Benefits

Number: 19

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June 2004

GOVERNMENT FUNDED DEFINED BENEFIT PLAN DOMESTIC RELATIONS ORDERS - (PUBLIC PENSIONS)

Introduction:

In the past we have mentioned government funded pension plans and how they differ from pensions provided by private company plans governed by ERISA regulations and law. There is a certain consistency in dealing with private plans in that you have the guidelines provided by the Retirement Equity Act of 1984 that stipulate what a plan has to do when presented with a Qualified Domestic Relations Order. Plans may interpret those provisions a little differently but basically they know they have to accept the order and you have a basis to appeal a decision that may be adverse to your client. Often when that occurs the company turns it over to their ERISA attorney who will give you a fair hearing and often reverse the decision of the company QDRO reviewer if you are correct. That is not the case when dealing with public pension plan providers. Whether it be a federal, state or local pension, each plan is governed by differing plan specific, and legislative regulations. Even within a single state, what is allowed by the state employee plan may differ dramatically from what a county or city plan provider allows. The reason for this is that many state statutes or case law precedents are so poorly written that public plan administrators often can justify interpretations that are obviously counter to the intent of the state's equitable distribution or community property statute. The only real remedy is usually legislative because conflicting prior case law makes any appellate action a real coin toss. That is not the case in every state but that situation prevails in more states than it should. Fortunately the federal and military guidelines are much more consistent and tailored to provide an equitable settlement of divorce related pension issues.

Tip of the Month:

NO, YOU CAN'T HAVE YOUR FEE PAID TO YOU BY THE PLAN USING A QDRO!

At least once a month we are asked to include language in a QDRO making the attorney an additional payee in the order to insure the fees owed incident to the divorce are paid. Federal law bars all liens against, and assignments of ERISA and IRS governed retirement assets. This is also true of state, local and federal public retirement plans. The only exceptions to the anti-assignment rules, which limits payment only to a plan participant, are spelled out in the Retirement Equity Act of 1984 and the various state statutes. Those changes exempted former spouses and dependent minors from the anti-assignment rules which in turn provided the guidelines for creating the Qualified Domestic Relations Order.

Nowhere is the divorce attorney payment exception noted. A plan would be subject to fines and penalties if it paid retirement funds to other than the named excepted parties.

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We can begin by accepting the fact that when you are dealing with a public plan there is little consistency from jurisdiction to jurisdiction. Some states still bar any payments from a public plan to a former spouse as a property distribution but usually will allow court ordered support payments if the participant is already retired. Of course payment stops in the event of the death of the participant. Some states make the Domestic Relations Order process so unfair to the non-participant spouse that its use as a settlement tool is limited to those cases where there is no other option if any property distribution is to be made. While New Jersey case law is usually enlightened when dealing with the distribution of marital property retirement assets, the state plans (which covers just about every public employee in the state) refuse to allow a former spouse lifetime income protection by awarding him or her survivorship rights. Only the current spouse is eligible. This means if the participant predeceases all payments to the alternate payee stop and the lifetime survivor's annuity is paid to the current spouse even though the first spouse might have been married to the participant for the total length of time the pension benefit was accrued.

One problem with changing the rules when dealing with public plans is the legislators and the judges who can make the changes are all usually plan participants. I am not trying to impugn their objectivity or ethics but there is a perception of conflicted interests when they are asked to make changes that can negatively affect their personal finances in the future. I don't know how to get around this and I don't know how much bad case law or poor legislative effort is related to this. I suspect the bulk of the problems in the area of public plans is due more to a lack of understanding on the part of legislators as to how to bring the rules regarding the distribution of retirement assets in line with the state's equitable distribution or community property statutes.

This also applies to judges. Unless you are thoroughly versed in actuarial theory it can sometimes be difficult to understand how, what might be felt to be a judicious ruling in a particular case, can have disastrous effects on non-participant spouses in a vast majority of other cases. Much of the case law relied upon is based on cases with unique situations. Rarely does the decision go on to limit the applicability of the ruling to the special circumstances that governed the specific appellate case. So trial judges rely on the decision and apply it to all litigated cases when cited by the attorney for the party who benefits. This not unique to rulings governing public plans but the fact that the judge is also a plan participant often gives him or her the idea that they have a better understanding of how public plans work so they get a little more specific, more often than not to the detriment of the non-participant spouse.

Many public plans (uniquely) have built-in annual cost of living allowances (COLA). This must be addressed when you are negotiating the settlement and drafting a public plan domestic relations order. In the absence of language making the portion of the pension awarded to the alternate payee subject to a pro rata increase each year, the participant's share will substantially increase over a lifetime while the non-participant's share loses purchasing power. Until a change in the plan provisions in 2003, state plan alternate payees in Florida had to submit an amended, signed court order each year the pension was in payout status in order to get their share of that year's COLA.

As a general rule (there are exceptions), public plans will not pay the non-participant spouse a lifetime annuity based on her lifetime. This is often referred to as a single life annuity form of payment. While the monthly amount may be substantially decreased because of actuarial factors, at least payment will not stop completely in the event of the participant predeceasing. Knowing that this option is not available in public plans (including all federal plans) it is mandatory that your settlement agreement specifically name the non-participant spouse the beneficiary for the joint and survivor annuity and that the participant

be ordered to elect a retirement option that provides this benefit (some public plans will not honor that portion of the order unless the participant makes the necessary election although I have been told by some public plan administrators that they "make sure" the proper election is made at the time of retirement even though state law precludes them from honoring the terms of the agreement without the participant's cooperation). If this is not part of the settlement then the alternate payee does not get a lifetime benefit, which is what a pension is supposed to be. All payments stop if the alternate payee is predeceased by the participant.

Don't be intimidated when dealing with a public plan. There are a number of things that you can do to insure you don't overlook a plan provision that must be addressed. Make sure you have copies of the public plans that apply in your jurisdiction. That means State, County and Local government plans. Be aware that different jobs have different pensions. Law Enforcement and other hazardous jobs usually have enhanced pension benefits. Public employee unions are a major factor and participants can have better benefits than non-union covered employees. Judges usually have terrific retirement plans as do state legislators. Know the differences and address them in your settlement agreement.

Remember public employees, as a group, usually have much better pensions than people who work for private companies. Besides COLA benefits, most public employees can retire younger with larger pensions than any other group. "Twenty years and out" is the norm for many law enforcement and hazardous duty employees. This applies to the military also. Federal law enforcement personnel and Air Traffic Controllers retire at age 50. Many other public employee groups have enhanced retirement benefits. In very few states do public employees have to work until age 65 to get unreduced benefits. That is the normal retirement age in the private sector. Most are eligible for unreduced retirement at 55 or 60 if they have 20 or more years of service. What this means is if the employee has substantial tenure and is close to retirement eligibility, in all probability this will be the most valuable asset in the divorce. Give it the attention it deserves.

Cultivate a relationship with an expert in the area of pensions so when you run into something of which you are not sure you can call and get a quick answer. Most experts are very knowledgeable of federal and military plans so rely on them unless you want to spend your nights reading federal retirement manuals. If their business is national in scope they will usually have a pretty good working knowledge of the plans covering state employees in your area. Don't hesitate to call local government employees in your area if you have a question. There is always someone in the personnel department who is the pension guru. Find out who they are and get their names on your Rolodex. Just don't ask questions about the specific employee. They are usually very willing to talk about the plan provisions in general terms which is all you really need.

In many parts of the country, where unions and large employer defined benefit pensions are not the norm, you will be dealing primarily with public pensions. Just pre-arm yourself with the knowledge and the resources needed and you will probably be in much stronger bargaining position than your opponent. As always, a little more knowledge and preparation is the winning combination when dealing with pensions.

[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) (<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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