



SUGGESTED NEW YEAR'S RESOLUTIONS FOR FAMILY LAW PRACTITIONERS

Introduction:

As we begin another new year, I thought it might be appropriate to suggest a few resolutions for you to consider if you will be dealing with the distribution of marital retirement assets in the months ahead. Also, this is kind of a wish list for me. If our clients heed these suggestions, it will make my life easier by limiting the number of cross-examinations I will have to endure in cases that needlessly go to litigation. These suggested resolutions are just common sense approaches to handling the settlement process in a way that will better protect both the attorney and the client. Most have been much more thoroughly covered in previous newsletters. As I have said in the past, while it may appear as though I am favoring the non-participant spouse, that is not the case. The reality is that it is the attorney who represents the non-participant spouse who has the greatest exposure in marital property distribution cases involving retirement assets. Also, if your practice deals with family law you are going to be on both sides of these issues depending on the client of the moment. The more aware you are of the potential pitfalls (and windfalls) with which you will be dealing, the better representation you can provide your client. This is true whether your client is the plan participant or the non-participant, or, as is the reality in many cases, both. If you can adopt some of these suggestions to your case intake and negotiating processes, they should make your life easier and provide your client with a more equitable distribution of these assets.

Tip of the Month:

Have a standard retirement asset information release form on hand and use it for both your client and his or her spouse.

An all-inclusive retirement asset release form will save you a lot of frustration when dealing with marital retirement assets. Once you have an opposing counsel, forward the form immediately for signature by his/her client. If your client's spouse is pro se then forward the form to him or her. The sooner you have this information, the easier it will be to formulate your settlement agreement strategy. If your client has retirement assets then get him or her to sign one also and forward it to his or her employer(s) and to your opposing counsel. This gesture will defuse any resentment on the part of your opposing counsel's client to sign one for you. Do not rely on your client to provide you with their retirement benefit information. Believe it or not, some clients are reluctant to reveal all of these assets. When you have to deal with a previously undisclosed asset, your task becomes much more difficult. It also tends to make the whole process more acrimonious. At the end of this newsletter you will find a generic Retirement Asset Release Form attached. Look it over and use what you want. The form is all-inclusive but also very general so it should be easy to adapt to any case on which are working.

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1. Have a Dissolution Case Intake Form available and use it at the inception of every case. Have the client fill it out with the help of your assistant. Use your own format but be sure it includes all pertinent dates (marriage, separation, if it applies, birthday of both parties), current addresses and phone numbers (home and work), current employers and dates that employment commenced for each party, incomes and the nature of employment. Have the client list all known prior employers and length of service for both. If there is any military service (Reserve or Active) get the dates and the rank (i.e. E-7, W-3, O-5, etc.) if known. Have them list all the assets of both parties and approximate values, if known, as well as their debts. To this list you can add anything you feel is pertinent; such as minor children, fault, financial obligations from previous marriages, etc.

2. Obtain, and keep, current retirement plan booklets for all your local public sector employers – city, county and state. Unless you practice in an area where labor unions and national private employers (IBM, GM, GE, etc.) predominate, the bulk of the defined benefit pension plans with which you will be dealing will be public plans. As public plans provide different benefits based on job classifications, familiarize yourself with the different provisions. As a general rule, in a lengthy marriage with a public plan participant in a hazardous duty classified job (police or firefighters) the pension will be the most valuable marital asset with which you will be dealing. If the area in which you practice has one or two very large employers who provide pension benefits, then keep current copies of those plans on hand. Having the information readily available makes it easier to get a valuation very early in the case so you can plan how you are going to deal with the value of this intangible asset.

3. Develop an on going relationship with a pension and retirement benefit consultant. Most consultants, like myself, are willing to discuss your case, on a no-fee basis, if you have questions on how to handle a distribution problem involving a retirement asset. If we are going to get involved in a case in the future (or even if not) we want you to avoid doing things that will make it harder to settle the case. Consultants are available to draft separation language involving retirement assets for the protection of you and your client as well as valuing pension assets and drafting Qualified Domestic Relations Orders. They are usually willing to strategize with you, again on a no cost basis, and educate you in the intricacies of dealing with these assets. Unless you have expertise in these areas beyond that of most board certified family law attorneys you are foolish to go forward without first discussing the case with an expert early on in the process before you make an incorrect assumption or a mistake that will be difficult to correct once the positions of the parties have hardened.

4. Commit yourself to being specific when dealing with retirement assets. We subscribe to LEXIS for family law cases in all 50 States. I see more and more case law from appellate courts saying that if a retirement benefit component is not specifically identified as a marital asset being distributed in the Property Settlement Agreement, then it cannot be included in the domestic relations order, if that is the vehicle being used to distribute the asset. That means if you do not specify that the non-participant gets survivor benefits, supplemented early benefits, post retirement COLA's, or any other valuable plan benefit of which you might be unaware, then there is no way you will be allowed to include it in a Qualified Domestic Relations Order after the final decree. The non-participant spouse could suffer losses in the hundreds of thousands of dollars because of these omissions. If you think I exaggerate consider the following.

Many police officers can retire with 50% of their final average salary after 20 years of service and many public plans (unlike private plans) provide post-retirement Cost of Living Adjustments (COLA). A typical nightmare scenario might go like this. Your client, a non-participant spouse was married to a police officer for 19 years during which time he

was employed. They divorce in the 19th year and you get your client 50% of the marital portion of the pension when he retires. A final decree is signed and a Domestic Relations Order awarding your client, the wife, 50% of a fraction of the husbands pension when he retires is entered and accepted by the plan administrator. The fraction is defined as 19 years divided by the number of years of credited service at the time the ex-husband actually retires.

You did not include survivor benefits in the property settlement agreement and your opposing counsel refused to allow them in the Domestic Relations Order. You did however get your client the marital share of the annual 3% COLA. The husband retires the next year, at the age of 41 with a final average salary of \$86,000 and a pension of \$43,000 so the wife gets income of \$20,425 per year (47.5% of the gross pension based on the coverture calculation). The husband has since remarried and when he retired he named his present wife as his beneficiary. This meant that his share of the pension had to absorb the full 10% reduction necessary to fund the survivor's benefit (20% of his share of the pension) but as he was beginning a new career this was not of paramount concern.

Two months after his retirement he is killed in an auto accident. The new wife gets 50% of 90% (the gross pension after the 10% reduction needed to fund the survivor annuity) of his pension or \$19,350 plus a 3% annual increase for the balance of her life. Your client received two monthly checks of \$1,702.09 each and that is all she is going to get. Public plans have no provisions for paying an alternate payee a lifetime income unless he or she is named as the beneficiary of the survivor annuity. The 39-year-old new wife gets a lifetime income of \$19,350 per year plus a 3% annual compounded COLA increase. This pension benefit has an actuarial present value of \$663,880. That is how much a single premium annuity with the same income and COLA provisions for a 39-year-old female would cost. That is the amount of money your 39 year old, non-participant spouse, female client will lose because she was not named the beneficiary. This is not "chump change."

[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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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 and defined benefit 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