



POST-DIVORCE ADJUSTMENTS TO THE RETIREMENT ASSET DISTRIBUTION

Introduction:

Once an equitable or community property distribution of the retirement asset components are made and followed by either an immediate offset settlement or a Qualified Domestic Relations Order, the divorce is finalized and the case is closed. But there are occasions when it is necessary to go back and reopen this issue. The rule of res judicata (the common law principle that applies to divorce actions that says basically "when a thing is adjudicated it is done") will usually preclude this from happening but there are situations when it may be necessary to attempt to reopen the case to rectify a situation that becomes known after the divorce is finalized. The two principal reasons for this happening are because of the deliberate concealment of information by one party to the divorce of all the retirement assets available and their value or because of failure on the part of the trial attorney or the retirement asset expert to properly identify and value the marital retirement assets. This month's article will deal with things that you, as the attorney, can do to preclude these nightmares.

Tip of the Month:

Qualified Domestic Relations Orders and Child Support:

You may think that QDRO's play no part in child support issues but that is not always the case. Unless you are dealing with a military retiree or a retired public employee with a "20 and out" retirement benefit (many police and firemen) rarely will minor children be a factor if the employee is already retired. In those situations involving retired public employees you can prepare a Domestic Relations Order requiring the plan to pay the child support directly from the pension once the participant demonstrates an unwillingness to meet his or her child support obligations. There are provisions in most of the state and federal statutes that govern domestic relations orders that allow placing a lien on the public employee pension for payment of child support. This is also true of all ERISA governed private pensions if the participant is retired and there are still minor children requiring support. A QDRO for child support must be honored by the plan.

But the more common situation is an employee who owes back child support and is not retired. And for these situations there is a remedy that is often overlooked. If the employee participates in a defined contribution retirement plan (401k, ESOP, Employee Retirement Savings Plan, Profit Sharing Plan, etc.) federal law permits serving the plan with a QDRO ordering a lump sum payment for all the back child support owed, plus interest, and, with the court's permission, even payment for future child support obligations. If the account is large enough and the participant is a proven deadbeat you should have little difficulty getting the court's approval.

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Occasionally, after a divorce action is concluded a client will come to you with information concerning a pension or retirement account that was not included in the distribution. He or she may learn of it from an employee, or their spouse, who works with the ex-spouse. The only protection you, as the attorney representing the non-participant spouse has in those situations is the fact that you went through a thorough discovery process.

That means that you did not rely upon your client or the other spouse to provide you with the information about the retirement assets but either obtained a release from the employee or filed a discovery motion on the employer through the court so that all the retirement asset information came directly from the plan. If you have done that and the plan failed to provide all the information it may be possible to reopen the case and address the missing asset or if that does not work sue the plan for withholding information required to properly identify all of the marital assets. In most cases the court will allow you to reopen the case to correct the error. With the court's permission, a modified QDRO can be submitted distributing the overlooked retirement asset or the actual settlement agreement can be amended giving the non-participant spouse an increased interest in the distributable marital assets that were being offset to effect the settlement.

If the participant, during the discovery portion of the case, failed to reveal the existence of a marital property retirement account from a previous employer of which your client had forgotten or was unaware, a modification can usually be made. If the parties can't come to agreement as to how the asset should be distributed the court will usually allow the reopening of the case to properly classify, value and distribute the asset. If the participant lied about the existence of a marital property retirement account that was unknown to your client, then, in addition to modifying the settlement to include the asset, the participant could be subject to criminal contempt or fraud penalties by the court.

If you request the services of a retirement asset appraiser and the values provided incident to your request turn out to be substantially incorrect because of error on the part of the appraiser and the case was settled using those values, then the possible remedies might include suing the appraiser. The court may allow modification but that is doubtful. If the disputed values are the opinion of the appraiser as to the worth of the asset and he has a basis for his conclusions and there is no apparent error, a legal action would not probably be warranted even though another appraiser might have a different opinion as to the worth of the asset.

If you fail to do a thorough discovery and a retirement asset surfaces, after the action is finalized, there is an excellent chance that you could be held responsible for the failure of its inclusion and suffer the indignity of a malpractice action. The best and only protection you have is to always contact the plan provider for the retirement asset information. In your pretrial discovery always determine the names and addresses of previous employers. Have the other spouse provide you with a blanket release so you can contact all possible sources of retirement assets. If that is not forthcoming, file the necessary discovery motions and serve them on every possible retirement asset source.

Determine if the participant is an active participant, or has been an active participant, in the military reserve. Reservists earn pensions and they must be included in the distribution. Some volunteer fire departments provide pensions to their volunteers.

It is incumbent on you, the attorney, to discover and investigate all the potential marital property assets to protect both you and your client. Build this part of the discovery

procedures right into the opening intake process in the handling of your divorce cases. Do not rely on your client for the other spouse's financial information. If you do this correctly and thoroughly then any need to go back and try to deal with an asset missed during the divorce process will not be due to error on your part but simply an occasionally required part of the divorce case.

Again, I am attaching a sample Retirement Asset Release Form you can use to avoid some of the problems previously mentioned.

[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