



## ***Divorce, Pensions and Retirement Benefits***

Number: 50

Paul Commerford - President Emeritus - LawDATA, Inc.

January 2007

### **SPECIFICITY AND ITS IMPORTANCE TO THE FAMILY LAW PRACTITIONER**

(See next page for this month's article)

#### ***Practice Tip of the Month:***

**Avoid the “Garbage In, Garbage Out” syndrome when obtaining retirement information.**

The one phrase most synonymous with the world of data processing is “garbage in, garbage out”. It is particularly true in the world in which we choose to dwell: pension appraisals, QDRO drafting for attorneys, settlement agreements and growth analysis reports to analyze the marital portion of a defined contribution account. If we are provided with inaccurate or incomplete data, our work product will not reflect the true value of the asset being analyzed or the actual intentions of the parties to the settlement.

The only way to avoid this trap is get the required data directly from the actual source of the retirement benefits, the plan provider, and never to rely on either party to the divorce to obtain or provide you with this information. It should be an integral part of your intake process to have the parties sign release forms so you can deal directly with the retirement benefit provider to get the information necessary for any valuations that must be made as well as any specific QDRO requirements that have been instituted by the plan. It is the plan that has the final say as to whether your order qualifies and will be honored. Failing to take this very necessary step can jeopardize both you and your client, in that the settlement you achieve might not include all of, or the actual value of, the assets with which you are dealing.

It may be necessary to go into court for a discovery motion if a plan participant refuses to provide a signed release form but if that is necessary then that is what you have to do. In many situations the retirement assets are the most valuable asset being distributed incident to the dissolution. To fail to give these assets their proper attention leaves you in potential jeopardy. To provide the retirement consultant, on whom you rely on for the needed values, and possibly the drafting of your QDRO's and/or settlement language, the necessary information to achieve an equitable resolution, you must give him or her accurate information. Garbage in; garbage out. **(Attached is a sample release form which you can use if you have not already prepared one for yourself.)**

***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](#)**

## SPECIFICITY AND ITS IMPORTANCE TO THE FAMILY LAW PRACTITIONER

Whether or not a contract is enforceable often hinges on a single word. So it is true for Family Law attorneys. The settlement agreement or final decree has to reflect exactly what has been agreed to by the parties or ordered by the judge. Yet, too often, attorneys will use “boiler plate” language that does not address the actual assets being distributed when dealing with retirement benefits. These documents are contracts that have been either agreed upon by the parties, or ordained by a judge, and should reflect the same specificity as any other legal contract if they are to be enforceable as intended. The attorney has to be familiar with the retirement plan in order to craft language that addresses the particular plan assets being distributed. The attorney has to be sure that the language used results in the settlement intended by the parties.

There are hundreds of thousands of retirement plans in the country and each has its own provisions for the payment of benefits. Many, if not most, pension plans have generous early, supplemented benefit options to reward employees with long tenure. Most defined contribution plans (401(k)'s, ESOP's, Retirement Savings Plans, etc.) will pay out the funds awarded to an alternate payee immediately upon approval of a domestic relations order, but some won't. Unless you have familiarized yourself with the specific provisions of the plan being addressed you can not be specific as to the assets you intend to distribute.

Survivor benefits are an important part of every pension plan and provide a lifetime income for the spouse in the event of the pre or post-retirement death of the participant. In order to fund these benefits the actual pension is reduced (usually about 10%). Yet many of the requests we receive to prepare domestic relations orders are silent as to how this valuable asset is to be handled. If the settlement agreement or final decree is silent then there is no distribution of the survivor benefits which, in the theory behind the law making retirement benefits a part of the marital estate, both parties were working to acquire throughout the marriage. The pension is supposed to provide security to both in their older years. It is possible to pay the pension on an actuarial basis, thereby giving the spouse an income for life, but the reductions necessary to do so make this asset practically worthless. I have explained in previous newsletters how the actuarial calculations required to pay the benefit on an actuarial basis result in severely devaluing the payments to the alternate payee. Even if you practice in a State that requires that only the benefit accrued up to the marital property cut-off date be included in the distribution, you can still award a portion of the survivor benefits in your settlement. In reality, this is the only equitable thing to do as they are an integral part of the asset being distributed.

Many settlement agreements have language stating the non-participant spouse is awarded 50% of the marital portion of the 401(k) or other defined contribution retirement plan accrued up to the marital property accrual cut-off date. That is o.k. (*but inadequate - see next paragraph*) if the participant commenced participation in the plan after the date of marriage but if he or she was enrolled in the plan prior to the date of marriage, that language is worthless. The plan will not compute the marital portion. If all the quarterly statements from the date of the marriage to the present are available a growth analysis appraisal can be made and the marital portion identified. If not, then there either has to be a coverture calculation made (account balance X 50% X a fraction. The fraction being determined by dividing total number of months married, up to the marital property cut-off date, while the participant was in the plan by the total number of months the participant was in

the plan) or the parties have to agree upon the amount to be distributed. In any event, the language awarding 50% of the marital portion is totally inadequate.

Whether or not the parties were married during the total period of participation in the plan, you still have a problem that is created by lack of specificity. It is assumed that the alternate payee is the owner of his or her share of the account from the marital property cut-off date forward and is entitled to any passive growth that has accrued on that portion up to the date of the actual distribution of the funds. Some plans will compute that amount for you but many won't. You will have to check with the plan to see if they will compute the present value of the alternate payee's share of the account on the date of distribution. If they won't, you will either have to get the account statements from the cut-off date to the present and compute the passive growth and project another month or so to allow for processing of the order. Alternatively, the parties have to agree upon some figure or % to use to bring the account up to the value to be distributed. You can not simply say "50% of the marital portion" without being more specific. If there is a long period of time between the cut-off date and the distribution, the amount of passive growth can be substantial.

Time and space constraints only allow me to touch on a couple of examples where the lack of specificity can cause problems for the attorney. In the area of retirement benefits there are myriad others. In particular, dealing with the valuation and distribution of defined benefit assets (pensions) is fraught with the absolute need for specificity. The one thing that is obvious is that the attorneys must familiarize themselves with the workings of the plan being addressed or have an outside consultant draft the settlement language to be sure that nothing is overlooked.

As we begin a new year, a good resolution might be to always contact the retirement plan and get the plan documents before beginning the settlement process. Adding this step to the processing of your future cases where retirement assets are an issue would be a good start to becoming more specific in your handling of these cases.

**(See below for the sample retirement asset release form)**

---

---

## ***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](mailto:paul@lawdatainc.com).

**Web: [www.lawdatainc.com](http://www.lawdatainc.com)**

---

---

# 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, defined benefit or deferred compensation 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