



## *Divorce, Pensions and Retirement Benefits*

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### Practice Tip of the Month:

#### **How do I deal with a client's spouse who is acting as his or her own attorney (*pro se*)?**

Many Family Law attorneys will say that having to deal directly with the opposing spouse is a nightmare. Often, the individual acting *pro se* has little or no knowledge of procedural or courtroom requirements. Because of this, there can be an inherent delay in resolving the case. Another factor is that the spouse acting *pro se* is emotionally involved in the action and will use tactics to try to cause undue difficulties for your client if the *pro se* spouse feels they have been wronged, or really do not want a divorce. Their goal is more in the line of exacting retribution. They often cannot grasp the concept that, in most jurisdictions, divorce is a no-fault action. Your goal should be to try to resolve the major issues as quickly as possible and to try to keep the judge informed of the problems you are running into so he or she can counsel the *pro se* spouse as to what is expected and warn them that if there is any deliberate misconduct or inexcusable failure to meet deadlines, they can be held in contempt. In many cases, if the judge explains all that is involved and how unwise it is to act *pro se*, the individual may decide to seek counsel. But, if there are no funds available to do this, it may be wise to suggest to the judge that he or she should be a little more available to the *pro se* spouse to avoid unnecessary delay and help them understand that their spouse is not on trial. They should understand that divorce is a process that hopes to insure that both parties are treated fairly in the distribution of assets and/or liabilities.

It can really become a nightmare if there are minor children and custodial issues. It becomes even worse if the mother has taken up with another man. Many attorneys have withdrawn from these cases because of the anger and unreasonableness they encounter. The fact is that there are some people with whom it is impossible to deal reasonably. They can often become dangerous as their rage focuses more on their spouse and their spouse's attorney. They are usually cunning enough not to reveal their anger level to the judge but unfortunately, they are rarely intimidated by their spouse's attorney. If it gets that personal, withdrawing and even losing money might be a better course of action for both you and your client than to exacerbate the situation. I realize this is not really an acceptable solution but another attorney might have better luck in dealing with your client's spouse. Once you are perceived as a contributor to a highly emotionally charged situation, then it will probably be better for you and your client to recommend an attorney who may be better able to finalize the divorce.

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## SURVIVOR BENEFITS

For married couples, the normal form of monthly pension payment is 50% and Survivor Annuity Benefits. This means that if the participant spouse were to predecease the non-participant spouse, the non-participant would receive lifetime benefits of 50% of the gross pension that was being paid during the lifetime of the participant. In order to provide this dual pension, the gross pension earned by the participant is reduced by approximately 10% at the time the pension goes into pay status but that is still a very good deal.

Many attorneys don't understand the importance of survivor benefits and their impact on the amount of pension that will actually be paid in the future. A non-participant spouse can receive as little as 50% of what he or she thought they had bargained for if the survivorship issue is not dealt with properly. Attorneys are not expected to, and usually do not, understand actuarial calculations.

For Qualified Domestic Relations Orders, the general rule is when the parties in a plan providing benefits at age 65 have had a lengthy marriage (15 years+) and if during a good part of that time the participant was earning the retirement rights included in the divorce, then the non-participant should always be named as beneficiary for at least the marital portion of the survivor benefits. They were working as partners for security in their older years and the participant never expected to receive the full 100% of his pension. They were working for the Survivor and 50% benefit to protect each in the event the participant should predecease (the norm).

With five to fifteen years of marriage during employment, survivorship can be a bargaining tool with possibly the non-participant agreeing to pay for some of the reduction needed to fund his/her benefit. Less than 5 years – no survivorship.

Of course everything is relevant. A ten year marriage to a policeman or soldier with a 20 and out pension at any age would give the non-participant spouse a stronger case for getting survivorship. A 15 year marriage to a factory worker who had to work 40 years for full retirement would weaken the non-participant's case.

In an immediate offset distribution of the present value of a pension, 100% of the accrued pension is valued and divided. Without a Qualified Domestic Relations Order, it is assumed the participant will be unmarried at the time of his/her retirement and will receive all of his/her earned pension. I think you are getting the idea.

In New York State there is case law (*Irato v. Irato*, 288 A.D.2d 952, NY 2001) ruling that anything not included in a property settlement agreement cannot be awarded to the other party, after the fact, without the permission of both parties. The issue in contest was whether joint and survivor benefits could be included in a domestic relations order if they were not awarded to the non-participant spouse in the property settlement agreement. The Appellate Court said absolutely no!

This is just one example of what can happen if you leave out a (very important) retirement option from an agreement. In the instant case the pension plan in question was a government plan that had no provisions for providing the alternate payee her share of the monthly pension if the ex-husband predeceased the wife unless she was named the beneficiary of the marital portion of the joint and survivor annuity. In a private company, ERISA governed plan, a non-participant spouse could get income (albeit, significantly actuarially reduced) for the balance of his or her life whether or not the plan participant spouse predeceased them. Rather, in this case, without the wife being named as the beneficiary of the

marital portion of the post-retirement survivor benefit, in the event of her ex-husband's death, before or after his retirement, she will lose all rights to any future pension income.

We anticipate any court that reviews this issue will come down with the same decision. In order to provide survivor benefits the participant's *gross* pension is usually reduced by about 10% to fund the necessary joint and survivor annuity. This is the normal form of payment for a married couple and the benefit that was anticipated by the husband and the wife throughout the marriage. Both parties then share in the reduction on a *pro-rata* basis applied to the share of the monthly income awarded to them. Because there is a cost involved to the plan participant, this makes it a property component to be included in the property settlement agreement at the time it is prepared. While there is no doubt that in a lengthy marriage survivor benefits should be the norm whether it is a private company or government agency plan, if it is not included in the property settlement agreement the non-participant spouse will be out of luck.

In the past, when a Qualified Domestic Relations Order was used as the settlement tool, many attorneys would use very simple pension property settlement language such as "the husband has a pension with the XXXX Corporation and the wife is awarded 50% of the marital portion of the pension by means of a Qualified Domestic Relations Order". A pension consultant or an attorney specializing in Qualified Domestic Relations Order preparation would then draft an order, addressing all the plan contingencies. In most cases the order would be acceptable to the opposing attorney and the judge because, frankly, not many attorneys were very familiar with Qualified Domestic Relations Orders or pensions. Over time, this has changed dramatically. Continuing legal education provided by state Bar Associations and attorneys learning of other attorneys getting into malpractice problems because of ignorance in this area have begun to educate most attorneys on the myriad problems that pension issues in divorce cases can cause unless there is complete understanding of how pensions and Qualified Domestic Relations Orders work. To deal with this vexing settlement issue, knowledgeable attorneys seek the assistance of pension professionals to be sure all the contingencies in the retirement asset distribution have been addressed. Survivor benefits are one area that can still generate a lot of problems for both clients and attorneys.

### ***Introductory Special!***

#### **Free Pension Appraisal**

If you are an attorney who has never used LawDATA, Inc.'s services, then let us prepare a free pension appraisal (a \$150.00 value, the cost of which is usually passed on to your client) 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 customer.

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## **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.

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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.

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