



## Divorce, Pensions and Retirement Benefits

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Paul Commerford - President - LawDATA, Inc.

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### THE MOST CATASTROPHIC QDRO MISTAKE – AND HOW TO AVOID MAKING IT IN THE DIVORCE CASES YOU HANDLE

#### Introduction:

Vero Beach, FL suffered through two catastrophic hurricanes (Frances and Jeanne) in September that devastated beautiful Indian River County. Unfortunately, LawDATA, Inc., like everyone else, endured two weeks without electricity, telephones or mail delivery and a lot of time spent cleaning up and making temporary repairs in the wake of these powerful storms. Down here the word "catastrophe" has become a common word in everyone's vocabulary; hence the title of this month's (overdue) newsletter. We are back in full operation but it has been trying. The catastrophe that I refer to in the title is one that little has been written about but often presents a situation that can be devastating to all involved in the case. And avoiding falling into its trap is so easy that the attorneys who have been faced with this nightmare kick themselves for allowing it to happen.

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#### Tip of the Month:

##### **Timing pension appraisals and Qualified Domestic Relations Orders**

During the information intake process, when you first open a new divorce case, always have a questionnaire that addresses the retirement information. If your client, or his or her spouse, has a defined benefit retirement plan (monthly pension income at retirement) you will need a pension appraisal. If it is your client then you can have him or her get all the information you will need to have a pension consultant value the plan. If the spouse of your client has a pension then immediately obtain a release form signed by the spouse from your opposing counsel so you can get the pension information directly from the benefits provider to give to your appraiser. As the pension has the potential to be the biggest asset in any divorce case, you will need this information before you begin to address your settlement strategy with your client.

If you are representing the non-participant spouse, and are charged with the preparation of a Qualified Domestic Relations Order, the order should be presented to the judge for signature concurrent with the final decree. Any delay in the preparation of an order can have a major negative impact on the financial future of your client if the plan participant should die after the divorce and before the plan has received a signed Qualified Domestic Relations Order. An order cannot be accepted after the death of the participant and any benefits that have been awarded to the alternate payee will not be paid by the plan (unless that death was immediately after the divorce and the judge had previously signed the order which was in transit). If you had the time to prepare the order and simply procrastinated, your malpractice carrier may wind up paying your client a monthly retirement income for the rest of his or her life.

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## **THE MOST CATASTROPHIC QDRO MISTAKE – AND HOW TO AVOID MAKING IT IN THE DIVORCE CASES YOU HANDLE**

As a faithful reader of this newsletter you are aware of many of the potential pitfalls that an attorney can encounter when using a QDRO as a settlement tool. You know why survivor benefits are so important, the difference between the accrued benefit on the marital property cut-off date and the marital portion of the actual pension income at retirement, how to deal with passive pension income increases and many other subjects that are too numerous to list here. But I don't believe we have ever discussed a subject that I believe is the biggest nightmare an attorney involved in a QDRO case can face.

I have been drafting Qualified Domestic Relations Orders for attorneys since 1985. Over the years, the one recurring situation that has presented the biggest problem for our clients (and ourselves) is any case where you wind up with "dueling QDRO's". This happens when each attorney hires an expert to draft an order and one, or both, of the experts write orders that are skewed to the interest of the client of the attorney for whom they are working. As you know from previous newsletters, the drafting of a QDRO involves making many choices that can be favorable or unfavorable to either party.

When this situation arises the only recourse is to look back to the settlement agreement on which the order is based. In almost every case with "dueling QDRO's" that we have encountered, the portion of the settlement agreement dealing with the pension was so vague that whomever drafted the order would have had a lot of latitude in deciding (and would have to do much guessing about) the intent of the parties. Language limited to brief phrases such as; "The wife is awarded her marital interest in the husband's pension plan." or "50% of the husband's accrued pension benefit on the marital separation date is awarded to the wife" provide no guidance to whoever is going to draft the QDRO. Without specific instructions as to survivor benefits, supplemented early retirement income, post retirement passive increases, how to deal with alternate payee's share of the pension if the alternate payee should predecease the participant and a slew of other potential issues depending on the provisions of the particular pension plan being addressed, whomever prepares the order is left with no choice but to guess at the intent. As to be expected, if the participant's attorney pays the expert, the guesses will wind up being to the benefit of the participant and vice versa for the alternate payee's expert.

Once this occurs the parties suddenly become very aware of the importance of each of the QDRO provisions and the attorneys now have the burden of trying to renegotiate the settlement after the final decree has been issued. What also becomes obvious to the parties involved in the divorce is what a poor job their attorney did in representing them. Anger rules and nothing can be agreed upon. The experts are called on to interpret language that does not exist. Most of the time, the case winds up back in front of a judge who is not usually very savvy when it comes to rather arcane QDRO provisions and the interpretation of the retirement benefits provided by a particular pension plan provider. Each side calls their expert who maintains that the manner in which he or she drafted the order is the normal and correct way in that state based on case law. A decision is handed down that pleases nobody and the attorneys find that they have a lot of uncompensated time and two very angry clients. The whole process can drag on for years.

To avoid this nightmare, simply have language in the settlement agreement designating which attorney is responsible for the preparation of the QDRO. As a general rule, this should always be the attorney representing the alternate payee, as this is the attorney who has the greatest potential liability in the preparation of the order.

From the foregoing it is also obvious that specificity in the settlement language is the key to a smooth QDRO process. The attorney for the non-participant spouse should go into negotiations with the terms of the QDRO paragraph for the settlement pre-drafted. This then becomes the negotiating instrument. If the attorney is not sure of how this should be structured or is not comfortable with his or her understanding of the plan provisions, for a very reasonable fee, a pension expert can craft the retirement benefit settlement language. This is the most critical part of the QDRO process and failure to give it the importance it deserves can have very negative consequences in the future.

If one attorney is designated as being responsible for the preparation of the QDRO, there will only be one order with which the clients and the attorneys will be working so if there is any dispute about the QDRO language, reaching agreement will be much easier. If the terms of the QDRO are thrashed out during settlement negotiations and the order is presented for signature by the judge at the time the final decree is signed, it is a done deal. The divorce will really be finalized and "dueling QDRO's" will be somebody else's problem.

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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.

For any questions or ideas for upcoming articles you can reach Paul Commerford at [paul@lawdatainc.com](mailto:paul@lawdatainc.com).

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

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