



Divorce, Pensions and Retirement Benefits

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WHY AN EQUAL DISTRIBUTION OF ALL THE RETIREMENT ASSET COMPONENTS IS MANDATORY IN A LENGTHY MARRIAGE

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Practice Tip of the Month:

Determining the financial capacity of your client to avoid the all too common problem of not receiving your full fee.

When a client comes to you requesting your services in a divorce action, there are a lot of things to take into consideration. It is not uncommon for financial difficulties to be a motivating factor in seeking the dissolution in the first place. You have to be paid for your services if you want to continue in practice. No matter how sympathetic you might be to the plight of your new, potential client, you have to be realistic in assessing whether you can afford to provide the services they are going to need.

Today, many of the steps involved in preparing for the divorce are going to require the services of outside, expert help. Each will expect to be paid at the time their services are rendered. Few will wait to see if you are paid by your client before expecting payment. That means that you have to receive a retainer of sufficient size that anticipates these out of pocket expenses. If there is a house or retirement assets they will have to be valued. There can be expenses in the drafting of Orders to divide retirement assets. You might even anticipate the need for forensic accounting help if the husband is self-employed or controls many business assets. More importantly, you must be paid for your services and also cover your office overhead

When preparing the initial divorce intake sheet don't just look at the assets involved. Get into the habit of evaluating what the costs attached to valuing those assets are going to be. If your client is a wife with little means of her own, what sources, outside of her husband, can she tap to pay for your services? Does she have wealthy parents who are sympathetic to her plight? Does she have her own bank account or credit cards that can be used? Most clients maintain their spouses have more money than the actually do have. Counting on the court to award you your fees is risky. Initially you are relying on the allegations of your potential client as to the financial resources of their mate. Often, after going through discovery, the picture that emerges is not quite so rosy.

Unfortunately, taking this hard-nosed approach will mean that you have to say "no" more often, but it also means that you will not wind up absorbing expenses yourself and providing free services.

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.

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**WHY AN EQUAL DISTRIBUTION OF ALL THE RETIREMENT
ASSET COMPONENTS IS MANDATORY IN A LENGTHY
MARRIAGE**

Unless you practice in a State that requires that pension asset divisions only be made on a separate interest basis (the non-participant spouse is awarded the actuarial value of the participant spouse's accrued pension benefit on the marital property cut-off date), anytime you handle a lengthy marriage, this kind of distribution should be avoided at all cost if you represent the non-participant spouse. Winning the argument to provide him or her their rightful share of the pension asset that the courts have decided, is in fact, a joint marital asset, is not difficult if you have the facts as to how financially harmful this kind of award would be to your client.

Throughout the marriage, the parties were expecting that the pension would take care of their retirement years, and I am sure were aware it was a benefit for both of them. The law requires that at the time of retirement the participant elect the 50% joint and survivor annuity option, unless the wife insanely provides notarized documentation of the waiver of this right. In other words this is the normal form of payment for a married couple. If the participant predeceases the non-participant, the non-participant would receive 50% per month of what the participant was receiving at the time of his death, for the balance of the non-participant's life. If the participant was in a plan that provided, early supplemented benefits, and elected to take them (i.e. unreduced retirement benefit at 55 years of age if there were 25 years of pension service at that time) then, naturally the wife would be participating in this supplemented benefit. They might have been planning an early retirement until the marriage broke down. To provide this form of benefit the participant's gross monthly benefit is usually reduced by about 10% for life but that is cheap protection for both of them.

Domestic relations orders can be provided on either a separate interest basis for the non-participant or on a sharing basis which provides the benefits described in the previous paragraph. If the marriage is lengthy, then, State law permitting, it is very risky for the attorney to not have the order drafted on a sharing basis. The problem is the attorney cannot simply insert language into the property settlement agreement that says something like "the wife will receive her marital share of the pension" and expect to get a sharing basis award. Courts throughout the Country have said if it is not spelled out, then only the

actuarial value will be awarded. The exact terms of payment of the pension and the requirement that the participant elect to retire on a "50% Joint and Survivor basis" must be stated. Language saying that both parties will share in the reductions necessary to provide this benefit on a *pro rata* basis must be carefully spelled out in the property settlement document. The alternate payee loses the right to retire before the participant but as you will see in the next paragraphs, in most cases, that's a worthless option. In a domestic relation order, drafted on a sharing basis, both parties will begin receiving their benefit at the same time

A separate interest benefit is rarely in the best interest of the alternate payee, especially if she is female. True, she would have more control over the timing of her receipt of the benefit but the financial hit she would take for that control can really be severe. A separate interest would be paid to her on an actuarial basis. That is, her sex and age would impact the benefit she would receive. As a woman, she is automatically assumed to have a life expectancy of about six years more than the participant. If she were five years younger that means that there is now an 11 year spread. Her normal benefit would commence at age 65 (she cannot participate in the early, supplemented pension benefit) on a separate interest basis. Most plans are written with a normal retirement age of 65 with any benefits being paid earlier treated as a supplement and an additional benefit for the participant and not available to an alternate payee on a separate interest basis..

Assume the benefit to be split is \$2,000 per month. We start with her share being determined at age 65 as the present value of a man's benefit of \$1,000.00 per month at age 65. A normal male has a life expectancy of about 13 years at age 65 so the present value at that time would be the amount of money needed to provide that benefit for 13 years or about or \$139,962.98 if he were 65 today and began receiving his monthly benefit today. Now the present value of her benefit at age 65 is limited to the same as the man's or \$139,962.98 but as a separate interest pension, to get a pension with that present value she would have to wait until she was 65 and then they would usually compute her benefit by dividing the \$139,962.98 by 19 years (13 years plus 6 years for her gender) so she would only get \$7,366.47 per year instead of the \$12,000.00 the man would get. That means at age 65 she would get \$613.87 per month instead of \$1,000. Now if she elected to commence receiving her share before age 65, for each year earlier the benefit would be reduced by 5%. At age 55, the earliest she could commence receiving benefits, she would get \$306.50 per month.

If the benefit were paid under the shared interest basis, she would begin receiving her share when the husband began getting his, and his gross pension would be reduced by about 10% to provide a 50% joint and survivor annuity, so the amount she was getting would stay the same, if he were to predecease. Each would get \$900.00 per month instead of \$1,000.00. If the 50% joint and survivor option wasn't provided, she would get \$1,000.00 per month, as would he, but all payments to her would stop if he predeceased her. A 50% joint and survivor is the normal form of payment for a married couple and what they were expecting upon retirement and working as a marital partnership to receive.

The problem is if all this isn't spelled out in the settlement agreement or the final decree, the assumption is going to be a separate interest pension. It is going to be impossible to get the ex-husband to give up 10% of his pension to provide a 50% joint and survivor if it was not already a done deal and she would be crazy to take a chance on him living longer than her. If she elected to receive her shared interest without the protection of the 50% Joint and Survivor annuity, she would be risking that her benefit could stop the day after he retired if he were to

drop dead, or more likely the payments would stop when she is an old lady and leave her in a financially perilous situation.

As a practitioner, if you are dealing with a lengthy marriage (15 years or more) the alternate payee should get 50% of a fraction as applied to the pension benefit on a sharing basis when it goes into pay status. The fraction would be determined by dividing the number of months the parties were married while the benefit was being accrued by the total number of months of credited service the participant had at the time of retirement. This is not giving the non-participant more than they should be entitled to receive in that their interest is limited by the marital fraction. What it does do is recognize the actual asset the parties were accruing while they were married, and working as couple for their retirement.

You can see the risk to you if your client were to find out, after the fact, that the amount of pension income they thought they were going to receive based on words like “50% of the marital share” was in fact a miniscule portion of that. I view this as one of the most hazardous situations an attorney can face when trying to resolve a case that includes a defined benefit pension (monthly pension income). I have written about this before but we still get requests for QDRO’s from attorneys in States that have case law allowing the pension be split on a sharing basis, without the language in the agreement to accomplish this. When informed of their error, they usually say to just go ahead and write a separate interest order because the participant would never agree to a sharing basis pension with a 50% joint and survivor annuity after the fact. And they are right. It is going to cost the participant money and if he had a pension with supplemented benefits his ex-wife would be getting the pension at the same time that he would, instead of having to wait until she is 65. These cases are potential time bombs if you don’t handle them correctly.

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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