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Poorly Drafted Language in Settlement Agreements Keep Courts Busy and Practitioners on the Edge of Malpractice

Kid Off the Grid: 'Sovereign Citizen Parenting' and Its Legal Impacts on Children

Poorly Drafted Language in Settlement Agreements Keep Courts Busy and Practitioners on the Edge of Malpractice

By Denisa Tova-Liebman and Mark I. Plaine

"An ounce of prevention is worth a pound of cure." – Benjamin Franklin

Americans rely heavily on their retirement savings, and for many these are the most significant assets right next to their home. According to Investment Company Institute, as of December 2022, there were $33.6 trillion in total U.S. retirement assets. Unfortunately, the division of these significant assets is not given the attention it deserves when a divorce settlement is negotiated. Often, retirement assets are subject to vague and poorly drafted language in settlement agreements.

This lack of proper attention can lead to post-divorce litigation due to a misallocation, diminishment, or extinction of retirement benefits to the detriment of a spouse. The proof is in the increasing number of cases on the docket of the trial and appellate courts resulting from unclear, vague, or incorrect language pertaining to retirement assets. This is an area where many practitioners struggle.

Ironically, practitioners complain about the delays in the domestic relations order (DRO) process. Yet, the process becomes bogged down due to erroneous or ambiguous language inserted into marital agreements relating to the division of retirement assets. Many agreements contain language that is not clear, leaves too much room for interpretation, and/or contains contradictory clauses. The result leaves courts, attorneys, divorcing parties, and qualified consultants (QDRO experts) guessing as to what was intended.

The expectation of change will not come to fruition when the same process is continually repeated. This is the definition of insanity, and change is needed. Therefore, agreements need to contain correct and specific language regarding the division of retirement assets. This language needs to stand on its merits.

There is no expectation for practitioners to become conversant in retirement plans.

However, a paradigm shift is needed to understand that this is a complicated area requiring a QDRO expert. The earlier your expert is retained, the better. Don't guess, be prepared. It is likewise dangerous to rely on your clients for complete information. They too are often lacking in a complete awareness of their retirement portfolio. Some simply are not able to identify the plans.

Many practitioners do not understand the difference between defined benefit pension plans (pensions) and defined contribution plans (i.e., 401(k)s, 403(b)s, 457s, etc.). These plans are entirely different.

Pensions typically distribute a future income stream based on the plan participant's years of service, average salary, and life expectancy. This plan has no individual account balances, and its value cannot be obtained from a periodic statement. Often, the services of a pension valuator are required to estimate the present value of a plan.

Defined contribution plans have an account balance per participant to which the participants and their employer contribute. These plans can be described as retirement savings accounts where the balance, contributions, earnings, and fees can be viewed at any given time.

When erroneous language is applied to the wrong plan type, such as language specific to a 401(k) is applied to a pension, the result is delays in the DRO process. In the worst case, misidentified plans will lead to a modification to the DRO or post-divorce litigation.

This article profiles several cases involving post-divorce litigation arising from poorly written language in agreements. The result is a direct and negative impact on the division of retirement assets in DROs. In each case, specific problem areas will be highlighted. These areas involve one or more of the following: (a) misidentification of the retirement plan; (b) failure to address survivorship options; (c) failure to distinguish between service related and disability benefits; (d) failure to properly address gains and losses in dividing a defined contribution plan; (e) failure to account for pensions in pay status; and (f) failure to appreciate statute of limitation issues.

The authors will try to impart practical advice for divorce practitioners to keep them away from the razor's edge of malpractice territory. Expert guidance is offered on properly addressing these issues to avoid post-divorce litigation and the risk of a malpractice claim.

Misidentification of Plans

In *D.R. v. C.R.*,[1] a recent decision out of the Nassau County Supreme Court, both parties had retirement assets. A stipulation was spread on the record where it was agreed that the parties' pensions would be distributed in accordance with the Majauskas formula.[2] A dispute later arose concerning to what extent the term "pension" included all retirement assets of the parties. The wife maintained that there was no agreement to divide her annuities. The husband claimed that the parties agreed to a distribution of all of their retirement assets, and that the term pension was used as a catch-all term for retirement plans in general. He argued that, at a minimum,

there was a "mutual mistake of fact" as to the meaning of the word pension.

The Supreme Court ruled in favor of the wife. The husband offered nothing more than "conclusory allegations" to establish that the wife shared his understanding. At best, the court determined that the husband and his attorney were operating under a unilaterally mistaken belief. The court noted that to prevail under a theory of unilateral mistake, the movant must demonstrate that the mistake resulted from a fraudulent misrepresentation. Here, there was no proof that the wife had induced a mistake by virtue of fraudulent conduct. The husband's share of the wife's retirement was limited to one plan alone.

In *Dykstra v. Dykstra,*[3] a stipulation was entered into that made no reference to an annuity owned by the husband. The wife claimed that omission of the annuity in the stipulation of settlement was an oversight, and that she was entitled to an equitable portion of same. The husband disagreed and maintained that the annuity was part of his stock portfolio, and that the wife had knowingly waived any claim to this asset. The wife moved for relief based on mistake of fact, which motion was denied by Supreme Court order, and later affirmed on appeal. The Appellate Division found the wife's assertion of a mutual mistake of fact unpersuasive.

These errors could have been avoided by addressing each retirement plan separately within the settlement agreement. Drafters should avoid lumping all "retirement assets" into one paragraph. Instead, identify each plan by their legal plan name, the account holder, and the appropriate division of each asset. Drafters should also address each asset's different components (COLA, Early Retirement Subsidies, Gains/Losses, special retirement incentives, etc.) It should generally be assumed that if the "four corners of the document do not address a benefit or component, it is not assigned."

Failure To Address Survivorship Options

Another problem area results from neglecting to address survivorship, especially when dealing with "governmental" plans that are not covered under The Employee Retirement Income Security Act of 1974 (ERISA), as later amended by the Retirement Equity Act of 1984. Common examples are found in the New York State Teachers' Retirement System, New York State Local and Retirement System, New York City Fire Pension, New York City Police Pension, among others.

The pensions and defined contribution plans either fall under ERISA rules or do not. To simplify the explanation, one may equate the ERISA plans to the "private sector or commercial plans" and the non-ERISA plans to the "governmental plans." This is particularly relevant when addressing survivorship in pensions. ERISA pensions automatically provide survivorship to the former spouse unless the former spouse voluntarily relinquishes survivorship rights with a signed waiver. Non-ERISA plans do not offer the same automatic protection to the former spouse. In order for survivorship rights to be granted to the former spouse, they have to be expressly stated in the agreement. If the agreement is unintentionally silent on survivorship, the former spouse's share ends upon the pension owner's death.

As a general rule, the failure to provide for survivorship benefits in a settlement agreement results in the non-participant spouse waiving such benefits.[4] The Second Department decision in *Coulon v. Coulon*[5] illustrates this point. There, the parties had stipulated that the wife was entitled to a share of the husband's pension in accordance with the Majauskas formula. The stipulation made no mention of survivor benefits. The Supreme Court entered a QDRO which provided for the wife to be designated as a surviving spouse and thereby receive both pre-retirement and post-retirement survivor benefits under the husband's plan. This was reversed on appeal. The Appellate Division held that the parties' agreement contained no provision regarding survivor benefits and, as such, no survivor benefits could be awarded to the wife.

In *Ramadan v. Ramadan*,[6] no mention was made of survivorship benefits in the parties' settlement agreement and the husband, as alternate payee, was entitled to none. The husband's contention that he had proceeded *pro se*, and thereby misapprehended the terms of the parties' agreement, was unavailing.

This is a complex area. The matrimonial practitioner should consult a QDRO/pension expert about acceptable survivorship options and language that meets the specific provisions of that pension. A determination will have to be made as whether survivorship benefits are feasible as well as what type of joint survivorship annuity options are offered (i.e., 25%, 50%, 75%, etc.) and how the plan handles the cost of survivorship, pop-ups, options, etc. Clear language, which is easy to implement, is a must so that the parties' agreement can be interpreted without any ambiguity and so that the language of the agreement meets the provisions of the plan to avoid rejection and delays.

Service-Related Benefits or Disability-Related Benefits

Another common error is addressing disability benefits vis-à-vis service-related benefits. Under New York law, accidental disability constitutes compensation for personal injuries and such compensation is considered separate property for purposes of equitable distribution.[7]

Several governmental retirement systems in New York (such as the New York State and Local Employee Retirement System, the New York Fire Pension or the New York City Police Pension, to name a few), offer a calculation of a hypothetical retirement as if the pension owner retired on service. Those plans will allow a DRO to be drafted to require the plan to calculate a hypothetical service retirement and to which the Majauskas formula is then typically applied. This in turn limits the former spouse's marital share to the hypothetical service retirement benefit amount rather than including the actual disability benefit.

However, the hypothetical calculation is not automatically done by the plan; it has to be specified in the agreement and the DRO. Otherwise, if it is silent on disability, these plans will generally default to dividing the actual disability benefit. This results in the former spouse receiving a share of the disability pension that constitutes compensation for personal injuries in addition to service-related benefits.

The question arises as to the extent to which the pension represents deferred compensation related to service performed during the marriage, thereby constituting marital property subject to equitable distribution,[8] or whether some portion of the pension is in the nature of compensation for personal injuries, such that that portion of the pension is separate property not subject to equitable distribution.[9] Determining into which category the payments fit is a crucial first step in the process. Two recent cases illustrate the need for precision in drafting agreements.

In *K.M. v. R.W.,* a trial court decision out of Richmond County Supreme Court,[10] the parties entered into a stipulation of settlement resolving issues of equitable distribution. Pursuant to the stipulation, the parties agreed that their pensions would be divided by DROs. These terms were repeated in the judgment of divorce.

By March 2016, DROs were entered dividing both the defendant-husband's NYC Fire Department pension and the wife's NYC Department of Education pension. On March 31, 2021, the NYC Fire Prevention Fund awarded the husband an Accident Disability Retirement (3/4 line of duty benefit). The husband thereafter moved for a judgment declaring that the wife had no claim against his Accident Retirement Disability Benefit.

The Supreme Court ruled against the husband. The court found the stipulation to be clear and unambiguous. No distinction was made between that portion that would be considered marital property and the portion that would be considered separate property if the matter were adjudicated pursuant to DRL § 236 (B)(5)(b).

As the proponent of a separate property claim, the husband would be required to demonstrate the portion of the pension that would be separate property.[11] The Supreme Court held that the husband failed to meet his burden of proof. The court specifically opined as follows:

> The defendant was employed in a noble profession where there were many dangers. Some of those dangers could cause injury shortening one's career, and thus the New York City Administrative Code provides for the disability benefit applied for and bestowed upon defendant. Defendant knew or should have known, that the prospect of injury necessitating a disability pension was a future possibility at the time that he consented to the Qualified Domestic Relations Order under the parties' Stipulation of Settlement. The defendant's contention that this court should, in effect, rewrite the terms of the stipulation and deconstruct the division of assets which the parties provided for unambiguously in their stipulation is without merit.

A different result, with similar facts, was reached by the Appellate Division, Second Department in *Gluck v. Gluck*.[12] There, the parties executed a stipulation of settlement which entitled the wife to receive 50% of the marital portion of the husband's New York City Police Department pension. The husband's service with the NYPD occurred entirely during the parties' marriage. However, the pension included benefits both for service and for accident disability. The parties' stipulation did not differentiate between service and disability benefits. It did contain a clause providing that the husband would pay the wife an "'estimated amount' of $1,100 per month" until the amount of the wife's share of the pension was determined.

A DRO was entered. Thereafter the pension plan advised that it would begin paying the wife $3,139.70 per month, which represented 50% of the husband's total monthly pension payments. The husband moved to amend the DRO to provide that the wife would receive 50% of only the service-related portion of his pension. The Supreme Court granted the husband's motion. The wife appealed the Supreme Court order, which was affirmed by the appellate court.

Here the parties' stipulation was found too ambiguous and susceptible to more than one interpretation. This warranted consideration of extrinsic evidence to determine the parties' intent.[13]

The extrinsic evidence presented to the court indicated that the "estimated amount" referenced in the parties' stipulation was very similar to 50% of the husband's service-related benefits alone. This demonstrated that the parties intended to differentiate between service-related benefits and the accident disability portion of the pension. The appellate decision confirmed that the Supreme Court properly relied on this evidence in vacating the original DRO and allowing for the issuance of a new DRO reflecting the parties' intent.

A good policy to follow when addressing disability in non-ERISA (governmental) pensions is to first find out if the plan offers a hypothetical calculation of service-related retirement. If so, be sure to specify it clearly in the agreement and subsequently the DRO. This will avoid the unintended division of the actual disability portion of the pension.

Other reported cases have involved scenarios where a participant spouse has agreed to share his or her disability pension, sometimes unwittingly, though not required to do so. In *Sanders v. Sanders*,[14] the husband was already receiving payments under a disability pension at the time of settlement. Nonetheless, the parties' stipulation of settlement provided in general terms that the wife would be entitled to Majauskas share of the husband's pen-

sion. After the stipulation was executed, the husband argued that he had not waived his right to treat the disability pension as his separate property. This argument failed both in the trial court and on appeal. The appellate court decision noted that division of the pension was governed by the parties' stipulation. It was therefore immaterial what would have resulted from an adjudication based on statutory principles.

Failure To Address Investment Gains and Losses

A common practice when dividing a defined contribution plan (i.e., 401(k)plans, 457 plans, 403(B) plans, etc.) is to share the value of same as of the valuation date, with each party sharing any gains and losses on that sum to the point of distribution.[15] Failure to do so may result in one party receiving a windfall.[16] However, a QDRO resulting from a stipulation of settlement can convey only those rights to which the parties agreed.[17]

In *Reber v. Reber,*[18] an Appellate Division, Fourth Department decision, the problem of failing to address gains and losses on a retirement account was front and center. There, the parties' settlement stipulation provided that the wife would receive approximately $71,000 from the husband's 401(k). A QDRO was entered directing the retirement plan to transfer $71,167 to the wife. However, the retirement plan transferred $103,995.35 to the wife, which included not only the sum agreed to, but also investment gain that accrued on the wife's share. The husband moved to be reimbursed for the overpayment, but the Supreme Court denied his motion.

The appellate court reversed the motion court's order. Since the stipulation made no provision for gains or losses on the wife's sum certain, she was not entitled to same.

Careful drafting would have avoided this problem if the intent of the parties were clearly addressed. If the spouse is to be assigned gains and losses, the settlement language should affirmatively state this intent. All language should be clear, concise, and stand on its own.

Plans in Pay Status

Problems may arise in matrimonial practice where a pensioner reaches pay status and is not sharing the payments received with the spouse. The delays attendant to entering a DRO can cause alternate payee spouses to not receive their share of pension payments for a significant period of time.

It has been noted that the entry of a QDRO is not a form of relief itself, but rather a means to effectuate the equitable distribution of marital property.[19] A question often arises concerning at what point in time does the non-pensioned spouse become entitled to his or her share of the periodic payments.

In *Schunke v. Schunke*,[20] the parties' settlement stipulation provided the wife with the right to receive 50% of the marital portion of the husband's New York City Fire Department pension. Due to a delay in implementing a DRO, there was a nine-month period between the commencement of pension payments to the husband and the plan's division of payments between the parties. The wife sought to recoup her share of the payments related to the nine-month period during which the husband received both parties' share. The husband sought to retain the full payments sent to him during the disputed period. In ruling in the wife's favor, the Supreme Court held that the wife's right to her equitable share of pension payments vested upon the execution of the parties' stipulation of settlement. Any delay in finalizing a DRO would not affect the wife's interest. The husband was directed to pay the wife that amount which she would have received had the order dividing the pension been in place at the time of the husband's retirement.

On other occasions, courts have been less generous to non-participant spouses who were attempting to collect pension payments in arrears. In *Scheriff v. Scheriff*,[21] the parties' marital agreement entitled the wife to 50% of the marital portion of the husband's fire department pension. It was further agreed that the parties would cooperate with one another in obtaining a DRO. A DRO was not submitted, and the wife did not receive her share of pension payments upon the husband's retirement. The wife asserted a claim for pension arrears and sought a set-off for lost payment against another marital asset. This argument was rejected both by the trial court and on appeal. The Appellate Division noted that it is generally the responsibility of the party seeking approval of a DRO to submit same to the court.[22] Here, the wife had failed to do so. The court further held that in the absence of a QDRO, there could not be any QDRO arrears due.

The lesson to be learned from these cases is that a DRO should be served on the respective plan immediately upon execution by the Court. Any delay in a submission to the plan can have a negative impact on the financial position of a spouse. For most plans, the negative impact cannot be resolved without additional legal expenses. In some situations, the negative impact cannot be remedied.

Statute of Limitation Issues

Surprisingly, situations arise where a DRO has been entered by the court, but never furnished to the retirement plan. This may well create issues of time-barred claims, as illustrated in the Appellate Division Fourth Department decision in *Mussmacher v. Mussmacher*.[23] There, the parties were divorced in 1994. Their stipulation provided that the husband's pension would be divided pursuant to the Majauskas formula. A QDRO was entered in the Supreme Court. However, the QDRO was never sent to the husband's employer.

In 2003, the husband retired. He commenced receiving pension distributions in 2010. He opted for a lump sum to be transferred from the pension plan to a Vanguard account. He then received distributions from Vanguard until all available monies were depleted in 2018.

On July 29, 2019, the wife filed a motion seeking retroactive arrearages due and owing to her from the pension. After a hearing, the Supreme Court awarded the wife the sum of $75,804.08. This sum represented the wife's Majauskas share of the lump sum that had been transferred into the Vanguard account in 2010. An appeal followed.

The Appellate Division modified the Supreme Court order. The lower court improperly calculated the amount owing to the wife based upon the statute of limitations.[24] An action seeking money damages for violation of a marital agreement is subject to the six-year statute of limitations for breach of contract actions pursuant to CPLR 213. The six-year statute of limitations applied because the wife was seeking money damages for the pension funds she did not receive because the QDRO was never furnished to the plan.[25] The wife's claim was timely only to the extent that she sought pension payments made within six years of the date of her motion (i.e., within six years of July 29, 2013). The Appellate Division trimmed the wife's award to $52,325.93.

A review of these cases leads to the conclusion that division of retirement assets is a complex area requiring a good deal of research and expertise. The matrimonial practitioner should retain a qualified consultant for assistance not only to finalize domestic relations orders, but preferably to assist in drafting marital agreements. Proper drafting will avoid the majority of problems illustrated herein. It is never too early to begin planning for the division of these valuable assets.

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Endnotes

1. 75 Misc. 3d 1208(A), 167 N.Y.S. 3d 771 (Nassau County Supreme Court 2022).
2. *Majauskas v. Majauskas*, 61 N.Y. 2d 481, 474 N.Y.S. 2d 699 (1984).
3. 211 A.D. 2d 745, 621 N.Y.S. 2d 693 (2d Dep't 1995).
4. *Kazel v. Kazel*, 3 N.Y. 3d 331, 786 N.Y.S. 2d 420 (2004).
5. 82 A.D. 3d 929, 918 N.Y.S. 2d 779 (2d Dep't 2011).
6. 195 A.D. 3d 1174, 150 N.Y.S. 3d 365 (3d Dep't 2021).
7. *Mylett v. Mylett*, 163 A.D. 2d 463, 558 N.Y.S. 2d 160 (2d Dep't 1990); *Rizzo v. Rizzo*, 120 A.D. 3d 1400, 993 N.Y.S. 2d 104 (2d Dep't 2014).
8. *Dolan v. Dolan*, 78 N.Y. 2d 463, 577 N.Y.S. 2d 195 (1991).
9. *Berardi v. Berardi*, 54 A.D. 3d 982, 865 N.Y.S. 2d 245 (2d Dep't 2d 2008).
10. 75 Misc. 3d 1204 (A) (Richmond County Supreme Court 2022).
11. *Palazzolo v. Palazzolo*, 242 A.D. 2d 688, 663 N.Y.S. 2d 58 (2d Dep't 1997).
12. 205 A.D. 3d 1006, 166 N.Y.S. 3d 876 (2d Dep't 2022).
13. *Rosenberger v. Rosenberger*, 63 A.D. 3d 898, 882 N.Y.S. 2d 426 (2d Dep't 2009).
14. 143 A.D. 3d 1213, 39 N.Y.S. 3d 843 (3d Dep't 2016). *See also, Van Orden v. Van Orden*, 140 A.D. 3d 1282, 32 N.Y.S. 3d 730 (3d Dep't 2016).
15. *Culen v. Culen*, 157 A.D. 3d 926, 69 N.Y.S. 3d 702 (2d Dep't 2018).
16. *Brown v. Brown*, 235 A.D. 2d 383, 652 N.Y.S. 2d 75 (2d Dep't 1997). *See also, Fleischmann v. Fleischmann*, 24 Misc. 3d 1225(A), 897 N.Y.S. 2d 699 (Westchester County Supreme Court 2009).
17. *McCoy v. Feinman*, 99 N.Y. 2d 295, 755 N.Y.S. 2d 693 (2002).
18. 173 A.D. 3d 1651, 103 N.Y.S. 3d 711 (4th Dep't 2019).
19. *See Joann P. v. Nicholas V.*, 29 Misc. 3d 1227(A), 920 N.Y.S. 2d 241 (Suffolk County Court 2010); *Patricia A.M. v. Eugene W.M.,* 24 Misc. 3d 1012, 885 N.Y.S. 2d 178 (Erie County Supreme Court 2009).
20. *Schunke v. Schunke*, 55 Misc. 3d 1104, 49 N.Y.S. 3d 882 (Rockland County Supreme Court 2017).
21. 152 A.D. 3d 724, 60 N.Y.S. 3d 185 (2d Dep't 2017).
22. *See Kraus v. Kraus,* 131 A.D. 3d 94, 14 N.Y.S. 3d 55 (2d Dep't 2015).
23. 200 A.D. 3d 1702, 161 N.Y.S. 3d 601 (4th Dep't 2021).
24. *See Bielecki v. Bielecki*, 106 A.D. 3d 1454, 964 N.Y.S. 2d 832 (4th Dep't 2013) *lv dismissed,* 22 N.Y. 3d 1035 (2015) rearg denied 26 N.Y. 3d 945 (2015).
25. *See Boylan v. Dodge,* 42 A.D. 3d 632, 839 N.Y.S. 2d 580 (3rd Dep't 2007).