

## Duty to Refer to Competent Professionals

Under California and Nevada law, a lawyer has a *duty* to refer a client to a specialist if the task called for is beyond the lawyer's expertise. Moreover, the lawyer has a *duty* to refer a client to professionals who are known to be *competent* in the field.

Many lawyers refer their clients to QDRO mills who draft standard pension orders using a one-size-fits-all approach, frequently copying plan-supplied model orders. The difference between a QDRO or pension order from a QDRO mill (or one you draft based on the plan's model) vs. a QDRO or pension order drafted by an attorney or other professional with special expertise in QDROs and an understanding of Nevada's community property system can be astounding in terms of the value your client will receive from the pension. Here are just a few examples:

- \* **Survivor benefit adequacy.** In most defined benefit plans, unless the Alternate Payee ("A/P") receives all of the community property pre-retirement survivor benefits, **A/P will receive less than half of the benefit** anticipated on the Participant's ("P") retirement, if P dies before the A/P commences her pension payments.
- \* **Lifetime Payment for A/P.** If the QDRO fails to specify that the A/P can take a benefit for the A/P's life, some companies will deny this right to the A/P. **Result: no benefits on the employee's death.** Also no way to compensate A/P if A/P dies early—in such a case P would get them back. The QDRO mill may not explain "what might have been" to A/P; A/P won't know that A/P could—with a little extra insight and effort—obtain a benefit for A/P's life.
- \* **Early Retirement Subsidy Loss.** A divorce mill QDRO **may** provide A/P with what is commonly referred to as the early retirement subsidy and then only if the employee is actually retired and receiving it. This subsidy gradually disappears as the employee reaches normal retirement age, typically age 65. But the principles espoused *In re Marriage of Gillmore* (1981) 29 Cal.3d 418, 174 Cal.Rptr. 493, 629 P.2d 1 would compensate the nonemployee spouse for the disappearance of this subsidy because the employee could have made the subsidy available to A/P by immediately retiring. **Result: Potential loss of up to 80 percent of plan benefits.** See more information in materials re Gillmore case.
- \* **Nonqualified Plans.** A divorce mill QDRO will usually cover only the qualified plan. But other "nonqualified" plans may now exist or arise in the future due to tax legislation which legislation places limits on the amount that can be paid by the qualified plan. Where there are highly paid employees there are almost always nonqualified plans. Example: P has \$10,000 a month under the plan formula and A/P is entitled to 40% or \$4000 per month. The maximum payout from the qualified plan is \$5000 per month. **Result: AP will receive \$2000 a month, and A/P will lose 50 percent of A/P's benefit.**
- \* **Health Issues.** Example: Before the divorce P retired from a 32 year career, electing 100 percent survivor benefits for his wife of 16 years. P is in bad health and unlikely to survive more than a couple of years. A/P is in excellent health. The QDRO mill would divide the benefits 75% to P and 25% to A/P during the parties joint lives with the survivor to take all. **Result: P would perhaps only receive 20 percent of the community property value in the pension.**

**Summary:** The order drafted by the QDRO mill or copied from the plan's form QDRO will be faster and cheaper, and it will be enforceable. But if you don't want to participate in the forfeiture of your clients' benefits, refer them to expert and competent professionals who understand the proper application of the principles of community property to pension benefits.

*This information sheet drafted by:*

Donald W. Parkyn [www.justpensions.com](http://www.justpensions.com) - [parkyn@justpensions.com](mailto:parkyn@justpensions.com)

Barbara A. DiFranza, [www.difranza.com](http://www.difranza.com) - [ddf@difranza.com](mailto:ddf@difranza.com)

Copyright by Barbara A. DiFranza and Donald W. Parkyn. Permission is granted for non-commercial use with attribution