

PRACTICE AND PROCEDURE: WHAT TO DO WITH ALL OF THIS FUN STUFF

by

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I. OVERVIEW - Different Actions for Different Plans

“The right tool for the right job.” are words to live by in the retirement benefits world, as not all plans are created equally. The *time rule* guides us on the division of the funds.¹ An enforcement order is then required to split the funds, although, the divisional language may be placed into the *Decree of Divorce*. But most often, the division of the retirement benefits is accomplished through the use of a separate “enforcement” order.

Private employer “qualified” ERISA plans employ a qualified domestic relations order (“QDRO”), whether they are Defined Benefit Plans (“gold watch” monthly check style retirements) or Defined Contribution Plans (“401k style”). Many overuse this term to address all divisional orders, but technically speaking, it applies only to private plans. Similar, but different specialized enforcement orders are required for a state public employee [under the Public Employees Retirement System (“PERS”)], a federal employee [who requires a Court Order Acceptable for Processing (“COAP”) approved by the Office of Personnel Management (“OPM”)], and for a current or retired member of the Armed Forces [who needs certain specific language which can be stated in the in the decree, or a separate order, to be processed through the Defense Finance and Accounting Service (“DFAS”)]. These orders, and transfers, must be done correctly, and with view toward avoiding accidentally triggering massive tax consequences.

And as addressed in other sections of the materials, close attention must be paid to survivorship benefits, which if not mentioned, may become the subject of later litigation.²

II. PRIVATE PLANS (qualified ERISA plans)

A. DEFINED BENEFIT PLANS and DEFINED CONTRIBUTION PLANS

Remember - the difference is that the “benefits” plan pays periodic monies based on a formula usually relating to the length of employment and salary, and the “contribution” plan pays according to the retiree’s choice. Here is the “easy part” for you in practice - the same request for information may be used for either style of benefit.

HOW TO GET THE INFORMATION

The following is a *pro forma* discovery request (written from the Plaintiff’s perspective, but either side may use the requests), usually sent as a *subpoena duces tecum*, or a signed

¹ *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989) and *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990).

² See *Wolff v. Wolff*, 112 Nev. 1355, 929 P.2d 916 (1996).

release, to the Plan, which should generate all of the necessary information required to draft a qualified domestic relations order (“QDRO”), and also to evaluate if the “contribution” account has been previously raided:

Copies of any and all retirement benefits information for Defendant, SSN: _____; DOB _____, including any Defined Benefit Plan, Defined Contribution Plan, or Employee Stock Option Plan. The following information is also required:

1. Name of employer.
2. Employer identification number for plan.
3. Full name of plan, if other than above stated.
4. Type of plan (defined benefit, defined contribution, ESOP, etc.).
5. Current total account balance.
6. Voluntary employee contributions to date.
7. Voluntary employee contributions accumulated with interest to date.
8. Mandatory and qualified voluntary employee contributions to date.
9. Mandatory and qualified voluntary employee contributions accumulated with interest to date.
10. Percentage of vesting.
11. If not vested, the date vesting will begin assuming continuous service and description of the vesting schedule.
12. Based on years of service to date, the earliest date the employee could receive full retirement benefits.
13. Assuming the employee terminated employment on the current date and elected a lump-sum distribution, the amount paid out to the employee.
14. What is the earliest date that payment could be made?
15. Accrued monthly benefit based on salaries received and completed service to date payable in the normal form of benefit.
16. The earliest date the employee is eligible to retire and receive any benefits.
17. Based on the accrued benefit shown in item 14, the benefit amount the employee would be eligible to receive on that date.
18. How is the benefit calculated?
19. If the benefit is based on the employee’s compensation, state the relevant years and the employee’s compensation for those years as of this date.
20. What are the employee’s total years of service as a plan participant, and the exact dates of that participation?
21. Has the participant taken any loans or made any withdrawals, excluding withdrawals on termination of employment that the participant has completely repaid under Internal Revenue Code Section 411(a)(7)©? If yes, please state the original amount, date, amount repaid, amount currently owed, interest rate.
22. Amount currently available for loan or withdrawal.

23. Normal retirement age.
24. Early retirement age.
25. Does the plan provide an early retirement subsidy? Yes__ No_ .
If so, how is it calculated?
26. Does the plan provide post-retirement cost-of-living increases?
Yes No . If so, how are they calculated and when are they
paid?
27. Describe the forms of benefit payments that the plan provides and
the procedure to elect benefits.
28. Describe any reasons for which the plan would suspend benefits
which are in pay status.
29. Describe the available survivor benefits and election procedures.
30. Describe the current designated survivor beneficiaries with their
full names and address(es).
31. Describe any prior qualified domestic relations orders affecting the
participant's rights to benefits under this plan.
32. If the parties divide rights to benefits in pay status, may the
alternate payee elect a form of benefit payment different from that
of participant. Yes No . If yes, state the election procedure.
33. As of what date is this information current?
34. PLEASE ATTACH A COPY OF THE SUMMARY PLAN
DESCRIPTION, which must be furnished on request to a plan
participant as required by 29 U.S.C. Section 1024(b)(4) (ERISA
Sec. 104(b)(4)).

Additionally, the following passages are a few requests for production of documents you may use during the discovery period:

A complete list of any and all profit sharing, retirement, and/or pension plans in which the Defendant has an interest. Include a history of said plans from inception, a record of when all sums accrued and state current value(s), with sufficient information to permit service of a subpoena.

A copy of each pension, profit-sharing, 401(k), IRA, disability, health insurance, and any other employee benefit plans for the benefit of Defendant which have been in force at any time between 1/1/___ and today.

WHO TO CONTACT

The best place to start is with a call to the Human Resources Department of the employee-spouse. As mentioned in the ERISA section of the course materials, they will freely provide basic retirement benefit contact information, but probably no specific employee information, over the telephone. Common sense also directs us to company websites.

THE APPROVAL PROCESS

Upon receipt of the information for the subpoena, or release, you can prepare the first draft of the proposed QDRO, and submit it back to the point of contact (either the Human Resources Department, or its outsourced service managing the retirement plans. Any free-form transmittal letter should suffice.

The drafting process may take several tries, but eventually, you will narrow the differences between the needs of the case and the needs of the Plan. Once the proposed QDRO is approved by the Plan, it can be sent for countersignature and entry, as any civil practice order. If a problem with cooperation from your opponent arises, please refer to the last section of this Chapter.

B. IRAs - And Now for Something Completely Different

Individual Retirement Accounts (“IRAs”), and “Keogh” plans, are private retirement plans that do not really fit in with the other kinds of retirement benefits. Keoghs are essentially like other private retirement plans, but for sole proprietors, partnerships, or “S” corporations. *Please note* that an IRA can be divided in a divorce action through a *simple order* in the decree, or other “stand alone” order; no QDRO or other special form of order is required.

As a general rule, IRAs can be divided without tax consequence on divorce. Under IRC §408(d)(6), transferring an interest in an IRA to a spouse, or former spouse, under a divorce or separation instrument, as defined in IRC §71(b)(2)(A), is not a taxable event. Provided that the division is made in the decree (or the “stand alone” order incident to a divorce), then a certified copy of the decree to the Plan/Bank will satisfy the institution’s needs for a no tax impact division; a QDRO is not required. However, your client will have to “roll over” or reinvest the funds, or the distribution will cause a tax impact and the imposition of penalties.

PRACTICE TIP - An alternative exists to the simple division and rollover of funds (where there is no penalty or tax impact for the transaction, unless an early withdrawal is made). The decree can direct a withdrawal of a sum certain from the IRA and direct payment to Wife. She then presents the order to the institution for release of funds. If the order and withdrawal are done in the same tax year, there should be no early withdrawal penalties and the tax burden for the pre-tax sum removed from the IRA is borne by the Wife. As she exists in a lower tax bracket, Husband can provide more money to Wife to give her a “lump sum start,” provided that the distribution does not “bump” her into a higher tax bracket.

III. PERS

NRS Chapter 286 provides the framework for the PERS pension benefits. It is a specific system compared to the seemingly “free for all” of private plans. The great variety of drafting proposed orders existing under ERISA plans will probably not be encountered in the PERS setting.

HOW TO GET THE INFORMATION

Similar to obtaining information in private plans, we suggest the use of a subpoena, or a release from the employee spouse. Once you are able to obtain the information relating to terms of employment and service credits, etc., then you can proceed to the drafting phase.

WHO TO CONTACT

Fortunately, there is a lot of free information and “downloadable” forms from the internet at www.nvpers.org/. Additionally, there are free publications. By mail or telephone, the contact information is :

Carson City:
693 W. Nye Lane, Carson City, NV 89703
1-775-687-4200, or toll free at 1-866-473-7768, fax at 1-775-687-5131

Las Vegas:
5820 South Eastern Ave., Suite 220, Las Vegas, NV 89119
1-702-486-3900, or fax at 1-702-678-6934

THE APPROVAL PROCESS

Similar to private plans, you must submit your proposed orders for pre-approval from PERS before seeking countersignature and entry.

PRACTICE TIP - In most instances, the selection of Options can be boiled down to one of two choices: Option 1 allows the parties to maximize their lifetime benefits as there is no reduction for the costs of the “survivorship” election. Also, this reduces the fight between the spouses as to the allocation of the costs. Option 6 allows for the most accurate application of the time rule, and reduces the exposure of “over-insuring” the interest of the non-employee spouse.

IV. CIVIL SERVICE (COAP and TSP)

While not intentional, it would appear that the Civil Service system has been designed to defy all common usage of the English language. The initial drafting of the COAP (“Court Order Acceptable for Processing”) can be frustrating as terminology which seems common

to other retirement division orders, has its own groupings and meanings in the world of COAPs. Please do not mistake this statement for “impossibility” of drafting, but rather “caution” in drafting to ensure the assigned terminology is being used. We refer to that section of the materials for a detail of the options and the corresponding terms. Additionally, in format, the COAP appears as any order of the Court may look.

PRACTICE TIP - Any COAP should provide orders dealing with each of the three types of benefits addressed in the regulations: the lifetime benefits (“employee annuity”), the potential refund of employee contributions, and death benefits (“former spouse survivor annuity”).

Optional to all Civil Service employees is the Thrift Savings Plan (“TSP”). The TSP is a defined contribution (cash style) type of plan for federal employees; FERS employees get matching federal contributions up to a certain level. While the program is open to CSRS employees, there are no matching contributions for them. It is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board), which has its own governing statutory sections and regulations. As the TSP is a cash plan (like a 401(k)), there are no “survivorship” benefits.

PRACTICE TIP - After division, please remind your client (in writing) to designate a beneficiary for the account.

HOW TO GET THE INFORMATION

For information concerning date service began and date service terminated, it may be necessary to obtain the information from the Federal government. Many times, trial is approaching and the opposing party is uncooperative in getting the information, and Courts are reluctant to hold the opposing party responsible for their failure to obtain the information. The quickest and least expensive way to obtain the information may be to get it directly from the Federal government. As we know, the Supremacy Clause means that federal law trumps state law. As such, Federal agencies are free to ignore any requests for information via from state courts. However, if you send them a subpoena duces tecum signed by a judge, they will generally quick to tell you they do not have to honor the subpoena, but as a matter of courtesy, provide you the requested documents.

Railroad Retirement benefits are a quasi-federal entitlement. There are Tier I and Tier II benefits. Tier I benefits are fully divisible as any ordinary retirement benefit. Tier II benefits, however, are similar in nature to social security benefits, and as such, are non-assignable. Under the Code of Federal Regulations, 20 C.F.R. § 295.6, the Railroad Retirement Board is not required to honor subpoenas, but rather the subpoenas may be treated as requests for information. Again, a subpoena, signed by the court can be sent to the address listed below, and as a matter of courtesy, the information will be provided.

WHO TO CONTACT

For Federal Employees:

Court Ordered Benefits Branch
Claims I Group
United States Office of Personnel Management
P.O. Box 17
Washington, DC 20044-0017
(202) 606-0222

For Railroad Employees:

Subpoenas should be sent to:

Railroad Retirement Board
Arizona District Office
Financial Plaza, Suite 4850
1201 South Alma School Road
Mesa, Arizona 85210-2008

Qualified Domestic Relations Orders should be sent to:

Deputy General Counsel
Railroad Retirement Board
844 North Rush Street
Chicago, Illinois 60611-2092

THE APPROVAL PROCESS

The approval process for COAPs is long and arduous.

1. The rules require that a former spouse (personally or through a representative) must apply in writing to be eligible for a court-awarded portion of an employee annuity. A cover letter is fine. A certified copy of the court order acceptable for processing that is directed at employee annuity.
2. A certification from the former spouse or the former spouse's representative that the court order is currently in force and has not been amended, superseded, or set aside.
3. Information sufficient for OPM to identify the employee or retiree, such as his or her full name, CSRS or FERS claim number, date of birth, and social security number. This is, of course, contained within the COAP.

4. The current mailing address of the former spouse which is also contained within the COAP.
5. If the employee has not retired under CSRS or FERS or died, the mailing address of the employee, which is contained within the COAP.

After about four months, the paralegal assigned to your case will tell you if the Order is approved or not. If the COAP is approved, you can move on to other tasks. If the COAP is not approved, then the changes the OPM requires must be made to another COAP, which must be signed by the Court and certified, and then sent back to OPM. Then, after another four months, they will advise whether the COAP has been approved. Reminder letters appear to fail in speeding up the process.

Railroad Retirement Benefits are divided by Qualified Domestic Relations Orders rather than COAPs. The process is much easier as the Railroad Retirement Board is much more responsive. You may send the Qualified Domestic Relations Order to the Board requesting their approval prior to getting the Court's signature. Once the Qualified Domestic Relations Order has been approved by the Board and signed by the Court, simply send the Board a certified copy.

V. MILITARY RETIREMENT (and TSP)

Additionally, military members may, after the year 2001, participate in the Thrift Savings Plan ("TSP"), as like Civil Service employees, and thus have both a "defined contribution plan" styled benefit *and* a "defined benefit plan" styled benefit.

PRACTICE TIP - Do not forget to somehow account for the survivorship benefits program under the military retirement system, known as the Survivor's Benefit Plan ("SBP"). There is a limited one year window from retirement for its designation, and failure to do so will result in its loss.

PRACTICE TIP - Do not leave the allocation of paying for the SBP to chance, and develop a plan for its payment within the divisional order.

HOW TO GET THE INFORMATION

As noted above, because Thrift Savings Plans are part of the Federal government, they are free to ignore subpoenas from state courts. Again, you send them a subpoena duces tecum signed by a judge, they will generally, as a matter of courtesy, provide you with the requested documents.

WHO TO CONTACT

Thrift Savings Plan Service Office
National Finance Center
4277 Poche Court West
New Orleans, Louisiana 70129
ATTN: Legal Department
504-255-6000 or 504-255-8777

or

Thrift Savings Plan Office
National Finance Center
P.O. Box 61500
New Orleans, LA 70161-1500

or

Office of General Counsel
Federal Retirement Thrift Investment Board
815 15th Street, NW
Washington, D.C. 20005-2207

THE APPROVAL PROCESS

The approval process is similar to COAPs. Send a cover letter along with a certified copy of the Order dividing the account. Again, after some period of time, the Thrift Savings Plan will advise if the Order is approved. If so, then you can move on to other matters. If not, the changes requested will have to be made, then a new Order will have to be submitted the Court for its signature, it will have to be certified and then returned to the Thrift Savings Plan.

VI. OTHER ISSUES - Entry of the Orders or Omitted Items from Prior Decrees

ENFORCEMENT ORDERS AND THE CONCEPT OF "THE LAW OF THE CASE"

Once the *Decree* is entered (or *Order* depending upon the circumstances), the ensuing QDRO (or other style of retirement division document) is an "enforcement order," *not* a new matter between the parties. Therefore, there is no need to obtain a new "D" case number, and entry of the QDRO is procedurally handled as a "post-divorce motion practice" item. In other words, the *Decree* establishes the rights and obligations of the parties, and later entry of the divisional order (e.g., QDRO) reflects the "Plan specific language requirements" to effectuate the division without causing a tax event to your client. Thus, the *Decree* becomes "The Law

of the Case” for the Court to use as a precedent enter the enforcement orders. The following may be used as a partial argument in your motion practice:

Centuries of established English and American common law have established the “Law of the Case” doctrine. This doctrine holds that a decision rendered in a former appeal of a case is binding on a later appeal. Black’s Law Dictionary 893, (7th ed. 1999). The doctrine is fully applicable in the State of Nevada. See *Hornwood v. Smith's Food King No. 1*, 107 Nev. 80, 807 P.2d 208 (1991); *Wickliffe v. Sunrise Hospital*, 104 Nev. 777, 766 P.2d 1322 (1988). Specifically, the doctrine holds that “when an appellate court states a rule of law necessary to a decision, the rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.” *Wickliffe* at 1324.

WHAT IF THE RETIREMENT ACCOUNT WAS LEFT OUT OF THE ORIGINAL DECREE YEARS AGO?

This event occurs with enough frequency, especially with the growing numbers of IN PROPER PERSON filings to be considered an “epidemic.” As stated in the other chapters of this Course, once the Plan reaches “pay status,” most options beyond mere division are lost. However, the case law of Nevada allows for partition of the assets under the procedure of post-divorce omitted assets.

Our state law on this point is currently a bit confused, but bringing inconsistent case law precedents in line is now before the state Supreme Court. For the past 12 years, in an unbroken chain of cases since *Amie v. Amie*, 106 Nev. 541, 796 P.2d 233 (1990), the Nevada Supreme Court has ruled that any community property not specifically disposed of by a decree remains owned by the parties as tenants in common, leaving it subject to partition by way of later motion or action. But the Court never overruled (or later acknowledged) its decisions to the contrary in a pair of military cases in the late 1980s. See *Tomlinson v. Tomlinson*, 102 Nev. 652, 729 P.2d 1363 (1986) and *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989).

PRACTICE TIP - Decrees should reflect the lawyers’ choice of evils. If it is thought that there is a greater risk that the other side might be hiding some property than a fear that the other side might litigate truly trivial property matters for the purpose of harassment, then a clause specifically permitting an *Amie* action should be inserted. If the fear of baseless litigation is greater, than an anti-*Amie* clause (prohibiting later litigation, and stating that whoever gets possession of unmentioned property keeps it) should probably be used.