

## **WHAT TO DO AFTER THE DIVORCE UNTIL THE QDRO IS DONE**

BY BARBARA A. DiFRANZA

It is not often that practitioners may take advantage of a one-size-fits-all solution to a nagging problem involving divorce: How to protect the nonemployee spouse who desires to complete his/her divorce before the domestic relations order or QDRO is completed. Here are suggested paragraphs for inclusion in the divorce decree:

Each party (insert party names and addresses) is provisionally awarded without prejudice and subject to adjustment by subsequent domestic relations order, a separate interest equal to one-half of all benefits accrued or to be accrued under the plan [[it is important to name each plan individually]] as a result of employment of the other party during the marriage/domestic partnership and prior to the date of separation.

In addition, pending further notice, the plan shall, as allowed by law or in the case of a governmental plan, as allowed by the terms of the plan, continue to treat the parties as married/domestic partners for purposes of survivor rights/benefits available under the plan to the extent necessary to provide for payment of an amount equal to that separate interest or for all of such survivor benefit if at the time of the death of the participant, there is no other eligible recipient of such survivor benefit.

A copy of any order created under subsection d (2) above, including the Judgment of Status Dissolution, shall be promptly served by \_\_\_\_\_ on the Retirement or Pension Plan Administrator.

The foregoing suggested language and other provisions designed to help the family law practitioner in the area of pensions and survivor benefits were drafted by California attorney, R. Ann Fallon, and Texas/California attorney, James M. Crawford, Jr., as part of 2007 legislative changes to the California Family Code. Appropriate utilization of the suggested provisions may save many out-spouses from loss of benefits and the attendant spillover to actions against counsel.

The suggested provisions may be included in a Qualified Domestic Relations Order (QDRO) for ERISA plans and in a Court Order Acceptable for Processing (COAP) for federal civil service and railroad plans. They should serve to protect the nonemployee spouse's interest in most account balance plans, such as 401(k) plans, teachers' tax sheltered annuities, and the federal Thrift Savings Plan.

It must be noted, however, that in Nevada PERS at this time, the Participant may leave only a relatively small lump sum benefit if single and leave a survivor annuity to his/her new spouse if re-married. The former will likely be insufficient and the latter will be difficult to reach, if at all. Thus in PERS cases, counsel for nonemployee spouses—especially those representing persons who have few other resources for their

retirement years should also consider requesting continued coverage for the nonemployee under available life insurance in the interim period prior to retirement. In the process of completing the PERS QDRO, the attorney for the nonemployee spouse should engage in negotiations with opposing counsel to include a suitable amount of life insurance to protect the nonemployee spouse's retirement interest and/or spousal support needs. The following terms are suggested:

Until further order of the court, [Employee] shall maintain [Nonemployee] as beneficiary of all employer-provided [and privately provided] life insurance policies, including but not limited to [list]. [Terms to insure payment of premiums, notice to nonemployee spouse of lapse with ability to correct, etc.]

Like that donut wheel on your new car, the proposed terminology discussed above may protect against most problems, but is no substitute for a carefully crafted QDRO or other domestic relations order which will provide the best protection for the community and the separate property interests of both parties.

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