Top QDRO Mistakes Attorneys Make - and How to Avoid Them!

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Top QDRO Mistakes Attorneys Make - and How to Avoid Them!

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Presenters

CHRISTOPHER J. BARROWS is an attorney with Barrows Legal Group, LLC, where he practices in the area of family law. He has been a registered family law mediator since 2004, and a certified family law specialist since 2005. Mr. Barrows has presented on numerous family law matters, from basic to advanced, for the Indiana State Bar Association, the Indianapolis Bar Association, the Association of Family and Conciliation Courts, National Business Institute, and ICLEF. He has co-authored the *Indiana Parenting Coordination Guide*. Mr. Barrows has testified on behalf of the Indiana State Bar Association, and as a proponent for parent coordination in front of the Indiana Legislature. He has served on the Association of Family and Conciliation Courts (AFCC) Task Force for court-involved therapists resulting in "Guidelines for Court Involved Therapists." Mr. Barrows is a founding member and current board member for Seminars for Advanced Interdisciplinary Family Professionals. He earned his B.A. degree from Goshen College and his J.D. degree from Indiana University School of Law. Mr. Barrows is a member of the Indianapolis Bar Association (Family Law Section, Executive Committee, past chair), the American Bar Association (member, Family Law Section), the Indiana State Bar Association (member, Family Law Section), the Association of Family and Conciliation Courts (AFCC), and AFCC-IN (past-president).

HOLLY BAUM is a sole practitioner in Buffalo, New York. Since 1995 she has focused her practice in the area of divorce, legal separation and the division of retirement benefits, having previously spent over six years practicing in the area of employee benefits and ERISA. Ms. Baum has lectured on the topic of divorce and retirement benefits of as part of CLE programs sponsored by the Bar Association of Erie County (BAEC) and by the Women's Bar Association of the State of New York (WBASNY). She also has taught in the Graduate Tax Certificate Program at the University of Buffalo School of Management and as an adjunct faculty at the University of Buffalo School of Law. Ms. Baum consults with matrimonial attorneys and divorce mediators, and their clients, with respect to all aspects of dividing retirement assets, including the appropriate language to be included in settlement agreements. She also has extensive experience preparing, reviewing and negotiating QDROs and QDRO-like orders for a wide variety of both private employers' retirement benefit plans and governmental retirement plans (state and federal, as well as military benefits). Referred to by her colleagues as the "QDRO Queen," Ms. Baum earned her B.A. degree from the State University of New York at Binghamton, and her M.A. and a J.D, cum laude, from the State University of New York at Buffalo. In addition, she completed a 40 hour training in divorce and family mediation through the Upstate New York Mediation Training Institute. A longtime member of the BAEC and WBASNY, Ms. Baum has served on numerous committees of both bar associations, and as president of the Western New York Chapter

Presenters (Cont.)

of WBASNY. She has received the Pro Bono Award from the Volunteer Lawyers Project, Inc. of the BAEC, and she has been included in *New York Super Lawyers*, *Who's Who in American Woman, Who's Who in American Law*, and the Buffalo Law Journal, Business First *"Who's Who."*

MARSHAL S. WILLICK is the principal of the Willick Law Group, an A/V rated family law firm in Las Vegas, Nevada, and practices in trial and appellate family law. He is a certified family law specialist, a fellow of both the American and International Academies of Matrimonial Lawyers (the AAML and IAML), former chair of the Nevada Bar Family Law Section, and former president of the Nevada chapter of the AAML. Mr. Willick has authored many books and articles on family law and retirement benefits issues, and was managing editor of the *Nevada Family Law Practice Manual*. He is frequent teacher of continuing legal education classes and is often sought as a lecturer on family law issues. In addition to litigating trial and appellate cases in Nevada, Mr. Willick has participated in hundreds of divorce and pension cases in the trial and appellate courts of other states, and in the drafting of various state and federal statutes in the areas of divorce and property division. He has chaired several committees of the American Bar Association Family Law Section, AAML, and Nevada Bar; has served on many more committees, boards, and commissions of those organizations; and has been called on to sometimes represent the entire ABA in Congressional hearings on military pension matters. Mr. Willick has served as an alternate judge in various courts, and frequently testifies as an expert witness. He serves on the Board of Directors for the Legal Aid Center of Southern Nevada. Mr. Willick earned his B.A. degree from the University of Nevada at Las Vegas, with honors, and his J.D. degree from Georgetown University Law Center in Washington, D.C. Before entering private practice, he served on the Central Legal Staff of the Nevada Supreme Court for two years.

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Failure to Prepare and File the QDRO in a Timely Manner

Christopher Barrows
Barrows Legal Group, LLC
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Malpractice Concerns

- DO NOT WAIT
  - IF YOU WAIT, YOU MAY FORGET
  - ONE OF THE MAJOR COMPLAINTS ABOUT FAMILY LAW LAWYERS IS THE APPEARANCE, IF NOT THE REALITY OF LAWYERS NOT KEEPING A CASE MOVING
  - PAY STATUS ISSUES
  - MARKET FLUCTUATION
- 18 MONTH RULE
  - THE ADMINISTRATOR HAS 18 MONTHS FROM RECEIVING A COURT APPROVED DRO TO DETERMINE IF IT IS QUALIFIED.
- MULTIPLE CORRECTIONS
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- KEEP IN TOUCH WITH THEM DURING THE QDRO PHASE
- CONSIDER ASKING FOR A HOLD ON THE RETIREMENT ACCOUNT IF IT LOOKS LIKE IT MAY TAKE AWHILE
- TAKE THIS TIME TO DISCUSS REFERRALS TO FINANCIAL ADVISOR FOR HANDLING THE FUNDS

QDRO PREPARATION SERVICES

- QDROs ARE SOMETIMES COMPLEX
- QDROs ARE TIME CONSUMING WITH LITTLE REWARD
- THERE ARE SERVICES THAT CAN BE HIRED OR HAVE THE CLIENT HIRE THAT HANDLE NOTHING BUT QDROS

PRE-APPROVAL

- SOME ADMINISTRATORS WILL PREAPPROVE
- SOME WANT A COURT SIGNED ORDER FIRST
- SOME WANT A FEE UP FRONT

FAILURE TO CONDUCT PROPER DISCOVERY AND TAKE PRECAUTIONS

Christopher Barrows
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INFORMATON/DOCUMENT CHECKLIST

- REQUESTS OF OPPOSING PARTY/PARTICPANT
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INFORMATON/DOCUMENT CHECKLIST

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INFORMATION/DOCUMENT CHECKLIST

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-ANY REFERENCE TO PRIOR QDROs

TIPS FOR DEALING WITH UNCOOPERATIVE PARTIES

IF YOU CAN'T GET THE SUMMARY PLAN DESCRIPTION, ANNUAL REPORT OR SUMMARY ANNUAL REPORT FROM THE ADMINISTRATOR, YOU CAN ASK FOR A COPY FROM THE DEPARTMENT OF LABOR;

US DEPARTMENT OF LABOR
EBSA PUBLIC DISCLOSURE ROOM
200 CONSTITUTION AVENU, NW
SUITE N-1513
WASHINGTON D.C. 20210

You will need the Participant's name, and your contact information

TIPS FOR DEALING WITH UNCOOPERATIVE PARTIES

- DISCOVERY
  - MOTION TO COMPEL
  - THIRD PARTY DISCOVERY
- POST-DECREE
  - CONTEMPT
  - MOTIONS TO ENFORCE

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- WHEN CAN A HOLD BE PLACED?
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    -POST-DECREE?

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WHY SHOULD A HOLD BE PLACED ON PARTICIPANT'S ACCOUNT?

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  - ECONOMY BASED
  - PAY STATUS/RETIREMENT
  - CHANGE IN EMPLOYMENT WITH ROLLOVER
  - DEATH

SAMPLE LANGAUGE FOR NOTICE REQUESTING FREEZE

• PRE-DECREE

- PURSUANT TO LEGAL CASE _____, THE PARTICIPANT UNDER ____ MAY BE REQUIRED TO PROVIDE A SHARE OF THEIR ACCOUNT TO AN ALTERNATE PAYEE WHEN THE MATTER IS COMPLETED. PLEASE PLACE A FREEZE ON ANY DISTRIBUTIONS OR CHANGES IN BENEFICIARIES PENDING RESOLUTION OF THE CASE LISTED ABOVE.

SAMPLE LANGAUGE FOR NOTICE REQUESTING FREEZE

• POST DECREE

- THIS LEGAL MATTER HAS RESULTED IN A JUDGEMENT FOR DIVISON OF PARTICPANT'S PLAN AS A RESULT OF DIVORCE, AND AS PERMITTED UNDER ERISA. THE DECREE IS ATTACHED, AND A COURT APPROVED ORDER IS BEING PREPARED. AS YOU NOW HAVE A FIDUCIARY DUTY TO THE ALTERNATE PAYEE, PLEASE PLACE A HOLD/FREEZE ON ANY DISTRIBUTIONS OR CHANGES IN BENEFICIARIES.

BENEFITS AND DANGERS OF USING MODEL FORMS

- MODEL FORMS ARE FOR THE BENEFIT OF THE ADMINISTRATOR

- ADMINISTRATORS DON'T CHECK TO MAKE SURE THE QDRO CONFORMS TO THE DECREE. THAT IS YOUR JOB

BENEFITS AND DANGERS OF USING MODEL FORMS

- BENEFITS
  - EASY TO COMPLETE
  - THE ADMINISTRATOR LIKES THE FORMAT AND MAY APPROVE QUICKER

BENEFITS AND DANGERS OF USING MODEL FORMS

- BENEFITS
  - MAY INCLUDE OPTIONS YOU DIDN'T CONSIDER (SURVIVORSHIP ANNUITY)
  - MAY GIVE EXAMPLES OF HOW BENEFITS CAN BE AWARDED

BENEFITS AND DANGERS OF USING MODEL FORMS

- DANGERS
  - FORM MAY NOT WORK IN FAVOR OF CLIENT (DESIGNED FOR EMPLOYER)
  - FORM MAY NOT INCLUDE ALL NEEDED FOR QDRO (PARTICIPANT, ALTERNATE PAYEE, PLAN NAME, CALCULATION OR PAYMENT AMOUNT)

BENEFITS AND DANGER OF USING MODEL FORMS

- DANGERS
  - FORM MAY INSIST ON ONE PAYMENT METHOD WHEN THERE ARE OPTIONS
  - MAY NOT INCLUDE OPTIONS LIKE
    - COLA
    - EARLY RETIRMENT OPTIONS

SUMMARY

- GET THE INFORMATION BEFORE SETTLEMENT
  - BE SPECIFIC IN YOUR DECREE
- UNDERSTAND THE TYPE OF PLAN AND DIVISION OPTIONS
- GET A HOLD IF THERE IS ANY RISK
- BE CAREFUL OF MODEL FORMS

III. Failure to Recognize the Type of Plan Being Divided

A. Defined Contribution Plans - Qualified or Nonqualified

B. Defined Benefit Plans - Qualified or Nonqualified

C. Hybrid/Cash Balance Plans

D. Interpreting Defined Benefit and Cash Balance Statements (Walkthrough)

E. Easy Tips for Distinguishing Between Plans

A. Defined Contribution Plans – Examples

- 401(k) Plan (employee contributions) with or without employer matching contributions
- Profit Sharing Plan (discretionary employer contributions)
- Money Purchase Pension (fixed/required employer/employee contributions)
- ESOPs (Employee Stock Ownership Plan where shares of stock provided by employer that vest over time) Be careful to allocate tax-basis.
- ESPP (Employee Stock Purchase Plan where employers may purchase employer's stock at a discounted price using salary deduction) - may be qualified or nonqualified

Defined Contribution Plans - Examples

- Thrift Savings Plan (employee contributions)
  - Government/Military
- 403(b) Tax Sheltered Annuity (employee contributions)
  - Public school employees/nonprofits/clergy
- 457 Plan (nonqualified deferred compensation plans maintained by state and local governments)
  - Subject to ERISA's QDRO provisions on or after January 1, 2002 as part of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA)
- Simplified Employee Pension (SEP)
  - Employer may contribute to traditional IRA
- Individual Retirement Annuities/Accounts
  - Traditional IRAs (pre-tax contributions)
  - ROTH IRAs (after-tax contributions)

A. Defined Contribution Plans - Characteristics

- Employer and/or Employee Contributions (subject to limits)
- Contributions based formula (% of income/dollar amount subject to limits)
- Each employee participant has an account balance (or a percentage of the plan assets)
- Employer controls investments or participants control investments individually (from Employer selected range)
- Each participant's future benefit (account balance) depends on contributions and fluctuates based on investment results
  - Employees assume investment risk – no benefit promise

- Qualified(subject to QDROs)/Nonqualified (may not be subject to QDROs)
- ERISA/Non-ERISA – must determine which type of court order may apply

A. Defined Contribution Plans - Characteristics

- Participant's account balance may include forfeitures and employer matching contributions.
- Employee contributions tax-deferred (generally)
- Distribution restrictions apply
  - Should determine if funds available to former spouse as an immediate lump sum distribution

A. Defined Contribution Plans - Terminology/ Language (and Other) Traps

- Elective Deferrals (employee contributions)/matching contributions/profit sharing contributions
- Account balances / Vested account balances
- Vesting (employer/employee contributions)
- Investment gains & losses / dividends / rates of return
- Participant loans / Hardship withdrawals
- Date of division / retroactive date of division issues
- Timing of contributions (delayed contributions)
- Premarital contributions/Postcommencement contributions
- Forms of benefit payments - Lump sum benefit/Annuity benefit
- Beneficiary designation
- Fees – applicable account administrative fees (reasonable expenses) / QDRO review fees (*see* U.S. Dept. of Labor, Employee Benefits Security Administration ("EBSA"), Field Assistance Bulletin 2003-3)

B. Defined Benefit Plans – Examples

- Single employer sponsored plans
- Union sponsored plans/Multiemployer plans
- Fully Insured Plans - With a fully insured 412(e)(3) defined benefit plan, regulations mandate using whole life insurance in conjunction with a fixed annuity. Allows business owners close to retirement age to maximize plan contributions. Need to be careful concerning valuation (cash surrender v. benefit) and timing issues. Survivor benefits incidental. Policy must be purchased, surrendered or distributed at retirement or termination of employement.
- Private Sector/Local, State and Federal Government/Military
- Railroad Retirement

B. Defined Benefit Plans - Characteristics

- Employer funds benefits (using actuarial factors)
- Each participant accrues a benefit based on a stated formula
  - Formula may be simple or complicated
  - Factors that may be incorporated in the formula:
    * employee's salary/earnings history (type of earnings included)
    * years of service (or other unit of service-types of service included) credited at retirement/partial service issues/past service
    * age at retirement
- Specified (defined/predetermined) benefit is promised at retirement
- Employer bears the risk of guaranteeing the promised benefit

- me Security Act of 1974 (ERISA) to protect pension **benefits** in private-sector

B. Defined Benefit Plans - Characteristics

- Some plans include employee participant contributions
- Benefit usually paid in the form of a life annuity for participant's (and spouse/former spouse's) lifetime(s)
- Most private sector defined benefit plans are insured (up to a certain limit) by the Pension Benefit Guaranty Corporation (PBGC), a federal agency created by ERISA in 1974 – employers are required to pay premiums for this insurance
- Qualified (subject to QDROs) /Nonqualified (may not be subject to QDROs)
- ERISA/Non-ERISA – must determine which type of court order may apply

B. Defined Benefit Plans – Terminology/ Language (and Other) Traps

- Accrued benefit
- Normal retirement age / Early retirement age
- Disability pension
- Early retirement subsidy / Early retirement supplement
- Vesting schedule/Nonforfeitable benefit
- Normal form of benefit payment/ Optional forms of payment
- Cost-of Living Increases/Adjustments (COLAs)

B. Defined Benefit Plans – Terminology/ Language (and Other) Traps

- Qualified preretirement survivor annuity (QPSA)
- Qualified joint and survivor annuity (QJSA)
- Death benefit
- Beneficiary usually required to be spouse/possibly dependent children
- Separate v. Shared (Joint) Interest QDROs

C. Hybrid/Cash Balance Plans

- Hybrid between traditional defined benefit and defined contribution plans
- Defined benefit plan that defines the benefit in terms of a stated account balance
-
- Individual accounts but no individual investment returns
- Participant receives DB "**pay credits**" each year equal to percentage of salary or flat dollar amount (account contribution) PLUS "**interest credits**" (annual investment earnings set at a specified rate or variable rate of return that is predetermined, but not the actual rate of return)
- Interest credit is guaranteed (not dependent in investment performance)
- Employer bears investment risks
- Accounts are hypothetical (not actual accounts and gains/losses allocable to said accounts)

C. Hybrid/Cash Balance Plans

- Participant may choose to receive account balance in lump sum distribution, but must be allowed to receive annuity for life based on that account balance
- Accounts are portable - lump sum distribution or rollover into IRA (or other employer plan) when employee terminates
- Preretirement death benefit usually 100% of account balance
- PBGC protects benefits (up to certain limits)
- Employers may amend a traditional defined benefit plan to convert the formula to a cash balance formula – but all of the pension benefits accrued must be protected

C. Hybrid/Cash Balance Plans

- Converted plans pay traditional pension *plus* additional benefits earned under the amended formula
- Usually means less pension benefits for participants (especially older employees)
- Class action lawsuits involving funding and earnings potential and how plans credit interest
- More protections are in place – still need to be careful when dividing between former spouses

D. Interpreting Defined Benefit and Cash Balance Statements (Walkthrough)

- Beginning with 2007 plan years, defined benefit plans subject to ERISA must provide participants with a benefit statement at least once every three years (provided the statement is also available upon written request. DOL Field Assistance Bulletin No. 2006-03.

- Defined Benefit Plan Statements generally will include:
  - Date of Hire /Date of Termination (if applicable)
  - Credited Service earned for the plan year and total earned to date)
  - Past service credit (if applicable)
  - Vesting status
  - Monthly benefit accrued to date (formula for determining) at Normal Retirement Date (NRD) and Early Retirement Date (ERD), if applicable
  - Lump sum option/Optional forms of payment if available
  - Projected benefit at NRD as a single life annuity (normal form of benefit if unmarried) based on current service and projected service
  - Projected benefit at ERD (if applicable) as a single life annuity
  - If married, the benefits paid in the form of a qualified joint and fifty percent survivor annuity (QJSA)
  - If married, the qualified preretirement survivor annuity (QPSA) that would be payable to your spouse upon your death before retirement

D. Interpreting Defined Benefit and Cash Balance Statements (Walkthrough)

Defined Benefit Plan Statement

- Participant's Name: Mary Little
- Spouse's Name: Samantha Tall
- Date of Birth: August 21, 1957
- Spouse's DOB: January 8, 1950
- NRD: September 1, 2022
- Date of Hire: January 1, 1977
- Date Terminated: January 5, 1996
- Benefit Start Date: not applicable
- Credited Service: 18 years
- Monthly Deferred Pension at NRD:
  - $ 2,100.00
- Early Retirement Pension – available on or after age 55 (NRD pension reduced for each month by which the date you begin receiving a pension precedes NRD.)
- Death benefit prior to commencement: Spouse entitled to a qualified preretirement survivor annuity equal to 50% of the benefit you would have been eligible to receive on your 55th birthday (or at the time of your death subsequent to age 55) if you had elected to receive your pension in the form of a 50% joint and survivor annuity (QJSA), payable when you would have reached age 55 or later if your spouse so elects. This benefit will continue for your spouse's lifetime.
- Postretirement death: If you die after retirement and you elect a QJSA when you commence benefit payments, your spouse will receive a benefit for your spouse's lifetime equal to 50% of your pension as paid in the form of a QJSA.

D. Interpreting Defined Benefit and Cash Balance Statements (Walkthrough)

Defined Benefit Plan Statement – Common Benefit Formulas - Examples

Final Average Earnings

Based on average earnings in specified years leading up to retirement

Benefit percentage	2%
Average salary	$50,000
Years of membership	30
Formula	$50,000 x 2% x 30
Annual pension	$30,000

Career Average Earnings

Based on average earnings during entire membership in plan

Benefit percentage	3%
Average salary	$30,000
Years of membership	30
Formula	$30,000 x 3% x 30
Annual pension	$27,000

Flat Benefit

Monthly pension benefit is equal to a fixed dollar amount for each year of membership in the plan

Benefit amount	$50
Years of membership	30
Formula	$50 x 30
Monthly pension	$1,500

D. Interpreting Defined Benefit and Cash Balance Statements (Walkthrough)

Cash Balance Plan Statement

Statement of Estimated Retirement Benefits – Converted Plan

Calculation Inputs

Participant	Jack Miller
DOB	10/1/1964
Marital Status	Married
Spouse's DOB	12/5/1975
Date of Hire	1/10/1987
Date of Term	10/31/2019
BCD	11/1/2019
Lump Sum Date	11/1/2019

Ages

Eligibility Age	55 (ERD)
Joint Annuitant's	44

Service

Vesting Service	32.75
Credited Service	32.75
Participation Service	32.75

Traditional Monthly Accrued Benefit

Accrued as of NRD 11/1/2019:	$4,858.52
Early Retirement Factor:	0.85000
Monthly Benefit 11/1/2019:	$4,129.74
Actuarially Equivalent lump sum	$410,295.89

Cash Balance Benefit 11/30/2019	$135,461.63
Monthly benefit 11/30/2019	$2,233.15

E. Easy Tips for Distinguishing Between Plans

Defined Contribution Plans

- Employer and/or Employee contributions
- No benefit promise
- Investment risk on Employee
- Usually lump sum benefit
- Benefits Portable
- Spouse and other beneficiaries
- No Federal or other guarantee of benefit amount

Defined Benefit Plans

- Employer contribution requirements fund benefits
- Benefit promise
- Investment risk on Employer
- Usually monthly annuity benefit
- Benefits usually not portable
- Usually spousal only survivor benefits
- PBGC guarantees some benefit

F. ERISA/NON-ERISA * QUALIFIED/NONQUALIFIED

- It is important to determine and understand a plan's status because a plan's status effects (a) whether an assignment/award of benefits to former spouse can be made; (b) what rules apply regarding whether and how benefits (including survivor/death/disability benefits/whether remarriage effects rights, *et.al*.) may be divided and paid by the plan; and (c) what type of court order is applicable.

- The **Employee Retirement Income Security Act of 1974** (**ERISA**) (Pub.L. 93–406, 88 Stat. 829, enacted September 2, 1974, codified in part at 29 U.S.C. ch 18) is a federal law that establishes minimum standards (regarding contribution/funding, participation, vesting, withdrawals, et.al.) for pension (DB and DC) plans in private employment. Established a **non-alienation (spendthrift) requirement**.

- The **Retirement Equity Act of 1984** (Public Law 98-397) expanded employee and spousal protections in plans subject to ERISA. Established survivor annuity rules for spouses and former spouses (and waiver/consent requirements) and clarified exception to anti-alienation requirement by establishing QDRO rules. Effective for most plans starting January 1, 2008, the **Pension Protection Act of 2006** (Public Law 109-280) clarified that a "do-over" QDRO must be honored by plans, and expanded the choices regarding the survivor benefit percentage options that must be made available to spouses.

- A **qualified plan** is one that is described in Section 401(a) of the Tax Code and must satisfy certain requirements to qualify for special tax treatment. In general, your contributions are not taxed until you withdraw money from the plan**.** Employer contributions to a qualified plan may be deducted immediately. The employee may also defer taxes on the salary contributed to a qualified plan. These plans are **subject to ERISA and accept QDROs** as the only vehicle for securing benefits for a former spouse**.**
- employee benefit plans. ERISA was enacted to protect the interests

F. ERISA/NON-ERISA * QUALIFIED/NONQUALIFIED

- **ERISA does not govern** plans set up and maintained by **government entities or churches. SEPs** are not governed by ERISA. **Plans may not be subject to court ordered division. If subject to division, alternative orders/documents may be required**.

- **Non-qualified plans** are generally supplemental benefits on top of those provided by a company's qualified retirement plans. They are not required to meet ERISA standards regarding eligibility, participation, documentation and vesting. Non-qualified plans are often used as an added incentive for executives and other highly compensated employees. Contributions to a non-qualified plan are not deductible to the employer until the employee takes a withdrawal and is taxed on the income. **Plans may be subject to court ordered division, but some are not will not comply with such orders**.

Examples of Types of Orders for Non-ERISA Plans:

Military Retired Pay: Qualifying Court Order

Federal Benefits: Court Order Acceptable for Processing (COAP)

* Civil Service Retirement System (CSRS)
* Federal Employee Retirement System (FERS)

On-line Resources

- "What You Should Know About Your Retirement"
  https://www.dol.gov/sites/default/files/ebsa/about-ebsa/our-activities/resource-center/publications/wyskgreenbook.pdf-

- ERISA Governed Plan Annual Returns (Form 5500):
  http://www.dfas.mil/garnishment/FormerSpouseSBPDeemedElection.html

- Fidelity QDRO Center - https://qdro.fidelity.com/

- Military Benefits - http://www.dfas.mil/garnishment/usfspa/legal.html
  DD Form 2293 - http://www.dfas.mil/garnishment/usfspa/apply.html
  DD 2656-10 - http://www.dfas.mil/garnishment/FormerSpouseSBPDeemedElection.html

- Federal Retirement (and Health) Benefits:
  - "Court-Ordered Benefits for Former Spouses "
    https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri84-1.pdf
  - "A Handbook for Attorneys on Court-ordered Retirements, and Life Insurance under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, et.al."
    https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf

FAILURE TO SET A DATE OF DIVISION AND TIMING ISSUES

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VALUATION DATE ISSUES

- WHAT IS THE LAW OF YOUR JURISDICTION
  - DOES IT VALUE PROPERTYAT/NEAR DATE OF FILING
  - DOES IT VALUE PROPERTY AT DATE OF DECREE

VALUATION DATE ISSUES

- WHAT IS THE LAW OF YOUR JURISDICTION
  - IS THERE A CONSIDERATION FOR MAJOR VALUE CHANGES DURING OR AFTER THE DIVORCE PROCESS
  - PRE-MARITAL VALUES INCLUDED?

VALUATION DATE ISSUES

- PRE-MARITAL VALUES
  - DOES YOUR JURISDICTION PRECLUDE PREMARITAL?

VALUATION DATE ISSUES

- PRE-MARITAL VALUES
  - COVERTURE FRACTION
    - A TERM USED TO DESCRIBE HOW TO CARVE OUT PRE-MARITAL VALUES

VALUATION DATE ISSUES

- COVERTURE FRACTION
  - WHAT IT IS
    - MONTHS OF OVERLAPPING MARRIAGE DIVIDED BY MONTHS OF VESTED ACCRUAL
  - 60 MONTHS VESTED/24 MONTHS OF OVERLAPPING MARRIAGE
    - 24/60 = .4 OR 40%
  - For a 401(K) at $100,000 then only $40,000 is marital

VALUATION DATE ISSUES

- DETERMINE THE TYPE OF PLAN
  - DEFINED BENEFIT
  - DEFINED CONTRIBUTION

VALUATION DATE ISSUES

- DEFINED BENEFIT
  - VESTING
  - PAY STATUS
  - EARLY RETIREMENT

VALUATION DATE ISSUES

- DEFINED CONTRIBUTION PLANS
  - MARKET FLUCTUATIONS
    - POST-FILING BUT PRE-AGREEMENT/DECREE
    - POST-DECREE

VALUATION DATE ISSUES

- DEFINED CONTRIBUTION PLANS
  - LOANS
  - EMPLOYER CONTRIBUTIONS MAY BE DEFERRED

VALUATION DATE ISSUES

- DEFINED BENEFIT
  - VESTING
    - IT MAY BE WISE TO PLAN THE FILING DATE AROUND VESTING TIME
    - THERE MAY BE PARTIAL VESTING DATES AS WELL

VALUATION DATE ISSUES

- DEFINED BENEFIT
  - PAY STATUS
    - IF PENSION IS IN PAY STATUS, WHAT HAPPENS DURING THE DIVORCE TO PAID OUT FUNDS?
    - CAN IT EVEN BE DIVIDED ONCE IT IS IN PAY STATUS?

VALUATION DATE ISSUES

- DEFINED BENEFIT PLANS
  - EARLY RETIREMENT
    - VALUATION OF THE PRESENT VALUE OF A DEFINED BENEFIT PLAN
      - AGE AT RETIREMENT
      - LIFE EXPECTANCY
      - VALUE OF FUTURE VESTING

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - THREE WAYS TO DIVIDE
    - BY PERCENTAGE SPLIT AS OF DATE CERTAIN
    - SET DOLLAR AMOUNT (DATE ISN'T RELEVANT)
    - SET DOLLAR AMOUNT OR PERCENT WITH ADJUSTMENT FOR VALUE CHANGES.

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - BY PERCENTAGE SPLIT AS OF DATE CERTAIN
    - Wife shall receive 50% of the value of the Husband's ABC 401(K) as of January 1, 2016
    - What happened in 2008?
    - What if the value of the funds it is in grows?

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - BY PERCENTAGE SPLIT AS OF DATE CERTAIN
    - Wife shall receive 50% of the value of the Husband's ABC 401(K) as of January 1, 2016, which shall be adjusted for earnings or losses from that date through the date the funds are completely distributed to Wife under the QDRO

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - SET DOLLAR AMOUNT
    - Wife shall receive $50,000 from Husband's ABC 401(K)

      What if Husband's 401(K) has a drop in value below $50,000?

      How does it affect the total division (50/50) if Husband's 401(K) drops significantly?

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - SET DOLLAR AMOUNT WITH ADJUSTMENT FOR VALUE CHANGES.
    - Wife shall receive $50,000 from Husband's ABC 401(K) as of January 1, 2016, which shall be adjusted for earnings or losses attributable to market fluctuations up to the date the funds are transferred via QDRO

PROVIDING FOR GAINS AND LOSSES

- DEFINED CONTRIBUTION PLANS
  - NEGOTIATION THOUGHTS
    - Who should bear the burden of uncertainty?
    - Is it worth compromising the dollar figure if you know it is a set amount?
    - Is there a reason not to include market fluctuations?
    - Did you consider early withdraws, or pay status?

PROVIDING FOR GAINS AND LOSSES

- SUMMARY
  - KNOW THE LAW
  - KNOW THE PLAN
  - NEGOTIATE AND PLAN FOR CONTINGENCIES SUCH AS MARKET FLUCTUATIONS, SECURITY OF A SET SUM, OR EARLY RETIREMENT

FAILURE TO ADDRESS SURVIVING SPOUSE BENEFIT ISSUES

By

Marshal S. Willick, Esq.

The Basics As to Pensions

- What Is Available?
- The Amount To Be Divided?
- When Will The Amount Be Available?
- Are There Survivor Benefits?
- Are There Any Ancillary Benefits?

After The Basics

- Are There Any Required Notices?
- What About Disability Claims?
- Post Divorce Actions And Their Results.

Separate Interest
Or
Shared Interest

Separate Interest

- Establishes A Payment Stream Separate From That Of The Participant
- Continues For The Life Of The Alternate Payee
- Is Usually Adjusted Based On The Life Of The Alternate Payee
- Is Usually Only Available If The Participant Has Not Retired
- Not Available In Military Cases

Shared Interest

- Allows For Payment Of A Portion Of Participant's Actual Benefit
- Usually Required If Participant Has Already Retired
- Pension Benefit Ends When Participant Dies

Surviving Spouse Provisions

Qualified Preretirement Survivor Annuity
(QPSA)
And
Qualified Joint And Survivor Annuity
(QJSA)

QPSA

- Required by ERISA and the IRS
- Applicable to all Defined Benefit Plans
- Can Apply to Former Spouse If Designated in QDRO

QJSA

- Required by ERISA and the IRS
- Available for Every Vested Participant Who Reaches the Annuity Start Date
- Applies to:
  - All Defined Benefit Plans
  - All Defined Contribution Plans (Money Purchase Pension Plan)
  - Some Profit Sharing Plans
  - Some ESOPs

QJSA

- Provides an Annuity for the Life of Participant with a Survivor Annuity for the life of the Spouse for at Least 50% of the Pre-Death Benefit
- Can be Waived by the Current Spouse Before Retirement if not Already Awarded to a Former Spouse

Beneficiary Designations

- QDRO Should Identify What Happens to the Non-Employee Spouse's Benefit if that Spouse Dies Before Full Benefits Are Paid
- The QDRO Should Cover:
  - If the spouse predeceases the employee spouse before either party has begun receipt of retirement benefits;
  - If the spouse is sharing the benefit stream during the life of the employee spouse and predeceases the employee spouse; and

Beneficiary Designations

  - If the spouse is to receive a single life annuity from the plan but dies before that benefit commences.

Beneficiary Designations

- QDRO that allows alternate payee to designate a beneficiary should specify:
  - Beneficiary's name and address, or require the plan provide beneficiary designation forms
  - Direction or mechanism to determine alternate beneficiary if chosen beneficiary predeceases the alternate payee
  - The burden is on alternate payee, or successor in interest, to keep Plan informed of status changes

Military Cases

- Survivor's Benefits (SBP)
  - Retirement Ends When Member Dies
  - Survivor's Benefit Plan (SBP) pays a percentage of the member's retirement to the surviving spouse or former spouse
  - Generally, an election to make a former spouse an SBP beneficiary is not revocable
  - A survivor annuity payable to a widow, widower, or former spouse is "suspended" if the beneficiary remarries before age 55

Military Cases

- Survivor's Benefits (SBP) (Cont.)
  - To initiate a "deemed election," the former spouse must file a written request
  - Written request must be filed within one year of the date of the court order
  - The SBP is an extremely important benefit, which practitioners ignore at their considerable peril in malpractice

Military Cases

- Thrift Savings Plan (TSP)
  - As of October 8, 2001, military members were authorized to begin participating in the TSP
  - For Military, this is a tax deferred savings plan
  - There is currently no matching funds
    - This will change with the new military retirement planned to take effect in 2018
  - TSP is a Defined Contribution Plan

Military Cases

- Ancillary Benefits
  - These include Medical, Commissary and Exchange Benefits
  - Generally, the spouse must have been married to the member for 20 years overlapping 20 years of service to qualify
  - The measurement is to date of divorce
    - So if you value marital property by any other date, remember that these benefits are still based on date of divorce

Military Cases

- Ancillary Benefits
  - Restrictions to the right of former spouses who are eligible for medical benefits as “20/20/20” or “20/20/15” former spouses
    - Former spouse must not remarry. Eligibility for health benefits ceases upon remarriage
    - Former spouse must not be covered by an employer-sponsored health care plan
    - Former spouse must not yet be age 65

Civil Service

- Survivor Benefits
  - If former spouse predeceases member:
    - Former spouse's share revert automatically to the retiree unless the court order provides otherwise
    - Instead of automatic reversion, the court can provide the money is paid:
      - (1) into court (presumably for distribution upon further order);
      - (2) to "an officer of the court";
      - (3) to the estate of the former spouse; or
      - (4) to one or more of the retiree's children

Civil Service

- Survivor Benefits
  - Amendments to orders are possible, but not if issued after retirement or death of employee and they modify or replace the first order dividing marital property
  - Any Order must be:
    - (1) issued prior to retirement or death of an employee; or
    - (2) the first order dividing the marital property of a retiree and former spouse

Civil Service

- Thrift Savings Plan (TSP)
  - FERS employees get matching funds
  - CSRS employees do not get matching funds
  - There are no “survivorship” benefits, as it is a cash plan like a 401(k)
  - Designation of a Beneficiary is important

Civil Service

- Health Benefits
  - Benefits are provided for both employees and their spouses
  - Upon divorce, if spouse desires to remain covered, within 60 days, the spouse must apply for continuation of “FEHB” (“Federal Employees Health Benefits”) and
  - To be eligible to receive those benefits, must receive a portion of the retiree’s annuity under a valid COAP.

Civil Service

- Health Benefits
  - FEHB coverage is lost if the spouse remarries prior to age 55
  - If a spouse is ineligible for any of the benefits, there is a COBRA-like program of carry-over coverage available for 3 years

Language Pitfalls, Do's and Don'ts

- Never use the term "QDRO" or "Qualified Domestic Relations Order" The OPM word is "COAP" ("Court Order Acceptable for Processing").
- Do not use the ERISA term "Alternate Payee." Refer to the spouse of the wage-earner as "Former Spouse"

Language Pitfalls, Do's and Don'ts

- "Accrue" means the commencement of payments under the retirement plan
- "Employee annuity" means recurring payments, not the account itself.
- "Gross" does not mean "all." "Self-only" means all. "Gross" means self-only less survivorship premium.

Language Pitfalls, Do's and Don'ts

- Three separate orders should be in every COAP
  - The lifetime benefits ("employee annuity");
  - The potential refund of employee contributions; and
  - Death benefits ("former spouse survivor annuity")

Language Pitfalls, Do's and Don'ts

- As with ERISA-based private plans, but unlike the military and most State plans, a spouse can be awarded up to 100% of the retirement benefits.
- If the order does not specify, OPM will presume any percentage or fraction payable to the spouse is from what OPM defines as the "gross" annuity (i.e., after deduction for the survivorship premium).

Language Pitfalls, Do's and Don'ts

- Using the phrase "creditable service" tells OPM to calculate the spousal share to include accrued, unused sick leave in addition to actual time in service
- Using the phrase "total service" or "service performed," however, tells the OPM to not include unused sick leave in the calculation

Language Pitfalls, Do's and Don'ts

- The short version is that any practitioner drafting a COAP for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible to fix if incorrect

VI. Failure to Deal with Loans and Delayed Contributions – Defined Contribution Plans

LOANS

- Determine when each plan loan was made to participant
  - Determine if any loans made prior to date of marriage
  - Determine if any loans made after date of division
- Determine whether each plan loan is a marital/nonmarital debt
  - Assume marital if made during the marriage
  - Exceptions may apply to that assumption
- Determine who is responsible for the debt (one or both parties)
  - If participant is responsible, then the outstanding loan amount as of the date of division of the account balance needs to be included in the balance
  - If both parties are responsible, then the outstanding loan amount as of the date of division reduces the account balance as as of the date of division

VI. Failure to Deal with Loans and Delayed Contributions – Defined Contribution Plans

LOANS – Calculating Former Spouse Benefit

Account balance less outstanding loan as of date of division:	$235,000
Total loan made to Participant:	$ 50,000
Outstanding loan balance DOD:	$ 25.000
Participant responsible for loan:	$235,000 + $25,000 = $260,000
Marital share to Former Spouse:	50% of $260,000 = $130,000
Both parties responsible for loan:	$235,000 - $25,000 = $210,000
Marital share to Former Spouse:	50% of $210,000 = $105,000

VI. Failure to Deal with Loans and Delayed Contributions – Defined Benefit Plans

LOANS

- Watch out for loans in defined benefit plans
- Plans that allow for employee contributions and loans
- Loans outstanding at retirement will impact the benefit payable to the parties
- Factor in loan that is marital debt in the division of the benefits
- Factor in the possibility of outstanding loans at retirement when determining nonparticipant spouse's rights

VI. Failure to Deal with Loans and Delayed Contributions – Defined Contribution Plans

DELAYED CONTRIBUTIONS

Generally not an issue if contributions are made each payroll period

Profit Sharing Plans – Profit sharing contributions may be made long after a plan year ends so need to allocate a portion of any contributions made after the date of division that are attributable to service credited through any period up to the date of division

Fully Insured Defined Benefit Pensions: Contributions to pay for premiums usually made once a year so need to allocate a *pro rata* portion of any contributions made for a year during which the date of division occurs.

FAILURE TO CONSIDER FUTURE VESTING POTENTIAL

Can You Say Malpractice?

Stock Options

Military Retirement

ERISA Based Pensions

FAILURE TO INCORPORATE THE NECESSARY LANGUAGE INTO THE SEPARATION AGREEMENT

Introduction

Required Language

- Summary Plan Description
- Name the Parties
- Identify the Plan

Required Language, cont'd

- Alternate Payee's Benefits
  - Types of Benefits
  - Types of Qualified Plans
    - Defined Benefit Plans
    - Defined Contribution Plans

Approaches to Dividing Retirement Benefits

- Separate Interest Approach
  - Issues relevant to defined benefit plans
  - Issues relevant to defined contribution plans

Approaches to Dividing Retirement Benefits, cont'd

- Shared Payment Approach

Commencement of Benefit Payments to Alternate Payee

Survivor Benefits and Treatment of Former Spouse as Participant's Spouse

- Qualified Joint and Survivor Annuity
- Qualified Pre-Retirement Survivor Annuity

Defined Contribution Plans Not Subject to the QJSA or QPSA

Alternate Payee Treated as Spouse

Conclusion

IX Failure to Avoid Pitfalls When Performing an Equalization Transfer for Multiple Plans

- **Reasons to Equalize/Offset Multiple Benefit Plans**
  - Reduce the number of court orders that must be prepared (save money)
  - One or more plans has minimal value (not worth the effort)
  - It is difficult or impossible to transfer assets from a plan to the nonparticipant spouse (executive nonqualified plans (DC and DB) that will not pay the former spouse under any circumstances – even if a court order)
  - The nonparticipant spouse needs cash now/doesn't want to wait
  - Avoid dealing with survivor benefit issues

IX Failure to Avoid Pitfalls When Performing an Equalization Transfer for Multiple Plans

- **Pitfalls to Equalizing/Offsetting Multiple Benefit Plans**

  * Different rates of return/investment results for defined contribution plans
  * Nonqualified plans may not be guaranteed to participant – may end up as windfall for nonparticipant former spouse
  * Plans may have different distribution rules/restrictions - beware
  * Present value lumps sum benefits based on (actuarial) assumptions that may not materialize
    - Nonparticipant former spouse receives flexibility at the expense of security/may lose out on benefit increases/subsidies
    - Participant may regret lump sum transfer
  * Tax implications may differ
    - 10% early withdrawal penalty
    - after-tax v. pre-tax contributions

IX Failure to Avoid Pitfalls When Performing an Equalization Transfer for Multiple Plans

- Factors to Consider before Equalizing/Offsetting

    * Relative ages of the parties

    * Relative health of the parties

    * Financial sophistication of your client/risk v. security

    * Financial/employment circumstances/needs of your client

    * How close to retirement each party is at divorce

    * Whether the parties will/can have an amicable ongoing relationship going forward (whether minor children are involved)

FAILURE TO FOLLOW THROUGH WITH THE PLAN ADMINISTRATOR

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FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- RISKS OF NOT FOLLOWING THROUGH
  - MALPRACTICE
  - PAY STATUS
  - MARKET FLUCTUATIONS
  - DEATH OF PARTICIPANT OR ALTERNATE PAYEE
  - CHANGE OF EMPLOYMENT

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- MALPRACTICE
  - FAILURE TO FOLLOW THROUGH ON FINALIZATION OF A CASE IS MALPRACTICE
  - IF YOU AREN'T BEING PAID, OR CANNOT GET THE QDRO DONE, THEN WITHDRAW
  - LETTERS TO CLIENT TO ADVISE OF STATUS AND COSTS

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- PAY STATUS
  - QDRO APPROVAL MAY TAKE MONTHS OR YEARS
  - A PARTICIPANT CAN GO INTO PAY STATUS DURING THAT TIME
    - CONSIDER A COURT ORDER ON HOW TO HANDLE PAYMENTS MADE BEFORE APPROVAL
    - CONSIDER A LIFT OF ANY FREEZE AS WELL

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- MARKET FLUCTUATIONS
  - DELAY IN PUSHING FORWARD ON APPROVAL CAN HURT ONE OR BOTH PARTIES
  - DON'T ALLOW YOUR CLIENT'S FUNDS TO BE UNDULY AFFECTED BY MARKET FORCES DUE TO LACK OF DILIGENCE

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- DEATH
  - IF A PARTICIPANT OR ALTERNATE PAYEE DIE POST-DECREE BUT PRE-QDRO APPROVAL, WHAT WILL HAPPEN?
  - PUT ENOUGH INFORMATION IN THE DECREE TO BE TREATED AS A QDRO
  - DILIGENCE

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- CHANGE OF EMPLOYMENT
  - ERISA IS NOT SPECIFICE ON THE TIMING FIDUCIARY DUTY OF THE ADMINISTRATOR TO AN ALTERNATE PAYEE
  - IF THERE IS NO FREEZE, THE PARTICIPANT COULD ROLL OVER HIS ACCOUNT
  - IF THE ADMINISTRATOR IS ON NOTICE, THEY CAN PREVENT THIS AND POSSIBLY FREEZE THE ACCOUNT

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- BEST PRACTICES
  - INFORM THE CLIENT EARLY AND OFTEN OF
    - TIME
    - COSTS
    - COMPLEXITY
  - CYA LETTERS
  - ADMINISTRATION APPROVAL LETTERS

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- BEST PRACTICES
  - FOLLOW-UP WITH ADMINISTRATOR AND CLIENT UNTIL THE ACCOUNT HAS BEEN TRANSFERRED IF IT IS DEFINED CONTRIBUTION
  - FOLLOW-UP WITH THE ADMINISTRATION AND CLIENT UNTIL THE ADMINISTRATOR HAS SET-UP THE CLIENT WITH THEIR OWN ACCOUNT IF IT IS DEFINED BENEFIT

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- BEST PRACTICES
  - SENDING A QDRO TO THE ADMINISTRATOR DOESN'T MEAN THEY RECEIVED IT, OR THAT THEY APPROVED IT
    - SEND CERTIFIED MAIL
    - GET PROOF OF RECEIPT (EMAIL, LETTER)
    - GET PROOF OF APPROVAL

FAILURE TO FOLLOW THROUGH WITH PLAN ADMINISTRATOR

- SUMMARY
  - PLAN AHEAD
    - EARLY RETIREMENT
    - PAY STATUS
  - DOCUMENT
    - TO CLIENT
    - FROM ADMINISTRATOR

XI. Best Practice Tips for Other Mistakes Attorneys Make – Beneficiary Designations and More

- ERISA plans - surviving spouse protection (as provided by the Retirement Equity Act of 1984 "REA") ends at divorce unless the parties' agreement (or the Court orders) that survivor benefits are to be provided and QDRO (or other applicable order timely submitted).
- If the participant is already retired before the divorce occurs *or* before a QDRO is submitted, the benefit payment option put in effect at retirement cannot be changed under most circumstances.
- **Delay in concluding QDRO** (or other required Order) as soon as possible after the divorce is finalized may put former spouse at risk (participant may retire and/or withdraw/rollover funds), especially with respect to post-retirement death of the participant or if participant remarried. Participant may not be allowed to name former spouse without proper court order. The **Pension Protection Act of 2006** ((Pub. L. 109-280), 120 Stat. 780) revived viability of post-death QDROs. (*see also* Department of Labor clarification in 29 CFR 2530.206 - Time and order of issuance of domestic relations orders.)Still risky to delay. Note, a participant is likely to be responsible for some or all benefits not paid from plan to former spouse if QDRO not timely implemented.
- Unless parties live in a community property state, an IRA owner may designate whomever the owner wishes—but if a divorce agreement or order provides for a beneficiary designation of the non-owner spouse, the owner must comply.
- Participant may have to affirmatively make spousal beneficiary designations in accordance with the parties' agreement and/or court order.

XI. Best Practice Tips for Other Mistakes Attorneys Make – Beneficiary Designations and More

- Participants should change beneficiary designations upon divorce **unless** required to maintain designations (after QDRO accepted by plan). Settlement agreement should require beneficiary designation to remain in effect (to the extent possible and) to the extent of the awarded benefit until QDRO accepted by the plan.

Additional Pitfalls

- Watch out for lump sum severance or other benefits that may be paid to the participant spouse during or after the divorce is concluded but that is based on employment that occurred during the marriage.
- If benefits (including survivor benefits) cannot be paid to the nonparticipant spouse for any reason, determine when and how those benefits will be transferred to the nonparticipant spouse.

XI. Best Practice Tips for Other Mistakes Attorneys Make – Beneficiary Designations and More

- Watch out for plan mergers (predecessors and successor plans) or plan terminations.
- Early withdrawal penalty does not apply to distribution from a qualified plan pursuant to a QDRO (similar order) – but does apply to distribution from an IRA.
- IRA distribution to non-owner former spouse must be made directly to IRA for the benefit of the non-owner former spouse or owner will incur taxes.
- Watch out for premarital contributions issues in defined contribution plans. Changes to the record keeper can create challenges for determining premarital share of accounts – or if division does not take place soon after a divorce is concluded.

XI. Best Practice Tips for Other Mistakes Attorneys Make – Beneficiary Designations and More

Legal Separations and Beneficiary Designations

- ERISA/REA survivor annuity rules apply if still married.
- 401(k) Plans: A special rule applies to 401(k) plans and other qualified defined contribution plans governed by federal law: Your spouse is entitled to inherit all the money in the account *unless* he or she signs a written waiver, consenting to your choice of another beneficiary. If a QDRO will be implemented during a legal separation, the nonparticipant spouse must execute the plan's waiver and consent or that nonparticipant spouse will receive more than what was bargained for if the participant dies.
- Defined Benefit Plans subject to ERISA: If the nonparticipant spouse does not waive the survivor spouse benefits, the rights will remain in effect, notwithstanding any provision of the parties settlement agreement.

Ethical Issues Regarding the Division of Retirement Benefits in Divorce

Most Relevant Ethical Rules/Guidelines

- Know when you have an ethical dilemma
- Where should you go for advice?

Attorney-Client Confidentiality

- Making sure your client understands
- Protecting the privilege in the electronic communication era
- Retainer agreements

Establishing Reasonable Attorney's Fees

- ABA Model Rule of Professional Conduct 1.5
- How to bill for drafting of QDROs?
- Mitigating costs

Conflicts of Interest and Other Ethical Scenarios

- Competency
- Know it when you see it
- Loyalty to a client
- Liability of an Attorney

Conflicts of Interest and Other Ethical Scenarios

- Timing
- The minimum duty required
- Retainer Agreements/Engagement Letters
- What should you do?

Educating your Clients
How to Explain Complex QDRO Scenarios

- State and Federal law
- A free education
- Stick to the basics

Failure to Prepare and File the QDRO in a Timely Manner

Submitted by Ryan C. Cari and Kevin M. Urbik

That is a brief introduction into what it required under ERISA to draft a QDRO and qualify to effectively divide benefits under a qualified plan. With that background, we will get now get into some of the mistakes and challenges attorney's face when working with QDROs.

II. Failure to Prepare and File the QDRO in a Timely Manner

a. The "difficult" case:
   i. Any of you that practice family law have no doubt dealt with that divorce case that would never end; it may have involved any ugly custody battle, division of a complex marital estate with the parties having a high net worth, child support and maintenance.
   ii. On top of that, perhaps your client, the opposing party, or opposing counsel conducted themselves in such a fashion that made you ready for a career change. We have all been there.
   iii. At the end of the 5 day trial, you take that file, hand it to your paralegal and tell your staff not to utter the name of the client again. You may not have ever actually done this; but we have all wanted to.
   iv. Those that have literally done this, run the risk of failing to timely file the QDROs.

b. Timing Issues
   i. First and foremost, we want to take care of our clients and protect their interests in the marital estate, which may include an interest in a qualified plan. We owe our clients certain duties under the Rules of Professional Responsibility (of course), and we also want to do right by those that we represent.
   ii. A second concern or risk would be a potential malpractice claim or disciplinary proceeding against a practitioner that fails to timely file and prepare the QDRO on behalf of the client. It is from these cases that we can learn what not to do.

1. Failure to file QDRO with the Court.
    a. One of the most common mistakes that I observed when researching this topic area was the attorney that simply fails to prepare and file the QDRO after the divorce case has concluded. In many of the cases, you would read fact patters that were nearly identical. Counsel for one of the parties would make a statement on the record at the final hearing that the "QDRO will be prepared in a week or two following the final hearing", only it never was done.
    b. The key in many jurisdictions, and the fate of the attorney that will ultimately be held responsible, is the language contained in the divorce judgment or order that is filed with regard to the divorce case. In many jurisdictions, it is common for the QDRO language to be in a <u>separate document</u> that is filed in along with or after the divorce judgment is filed.
    c. While that is a perfectly acceptable manner in which to file the QDRO, in the event that the QDRO document never gets filed, serious issues will arise.
    d. In many cases, discovery of the omission occurs after it is too late; when the plan participant has retired OR when the plan participant dies; the alternate payee then realizes something is wrong, and it is often too late.
    e. Take for example where the judgment does not contain any QDRO language and we have an instance where the QDRO order is not filed. The plan participant dies, but was remarried before his or her death. The former spouse, who had been represented by a lawyer in his or her divorce case, had believed the attorney had prepared and filed the QDRO.

f. In those cases where the divorce judgment itself does not include any QDRO language, many courts have held that the applicable statute of limitations begins to run when the divorce judgment was filed. And in this case I am referring to, since the order did not contain the QDRO language, courts have ruled that the injury occurred at the time the divorce judgment was entered, and the if statute of limitations has tolled, it will leave the alternate payee without any benefit in the plan.

g. In this case, the specific injury was caused because the divorce judgment itself did not contain the language necessary for the judgment to constitute a Qualified Domestic Relations Order; lacked most all of the necessary language that I went over during my introduction.

h. As a result, the alternate payee's only recourse was against the attorney for his failure to protect her interest in the plan.

2. Failure to Provide QDRO to Plan Administrator.

   a. Another common mistake is when the attorney prepares the QDRO, files it with the court, but fails to provide it to the plan administrator.

   b. In one particular case out of Kentucky, a divorce judgment was granted, and the husband was to designate the couple's minor son as the primary beneficiary of a life insurance policy that he had obtained through his employer.

   c. After the divorce, the judgment was prepared, and it contained language in it about the policy and the requirement that it be left to the parties' minor son.

   d. However, the lawyer did not take the next step and provide a copy of the order to the plan administrator.

   e. The husband subsequently remarried, and named his new spouse as the primary beneficiary.

f. When the husband died, competing claims for the insurance proceeds were made; one by the new spouse, and the other by the ex-spouse on behalf of the parties' minor son.
g. The plan administrator was then provided with a copy of the judgment, and determined that it contained the proper language under ERISA to award the plan to the minor son, and that it should be given to the ex-spouse as guardian for the parties' son.
h. An administrative appeal was filed by the new spouse; before the appeal could be heard, the parties' settled the dispute and split the proceeds 50/50.
i. However, the matter did not end there.
j. The ex-spouse decided she would try and make up the difference by suing her former attorney for malpractice for his failure to protect her interest by failing to notify the plan administrator.
k. Unfortunately, this case did not get into a discussion on whether the attorney was required, pursuant to his representation of the spouse, to provide the order to the administrator. Instead, the decision centered on whether the order met the requirements of a QDRO, and since the court determined that it did, the court ruled in the attorney's favor.

c. QDRO not filed because client did not want to pay for it
    i. This can certainly happen, and in those cases, a strongly worded letter needs to be sent; and best practice would be for the attorney to receive some sort of written acknowledgement from the client about the fact the QDRO will not be filed.
d. Failure to draft QDRO and participant leaves employment
    i. This can also be problematic.

ii. Many times the plan is rolled over into another plan, and now you are chasing down the former plan participant for information on the whereabouts of the money
iii. Sometimes the money stays put for a while, so check with the plan administrator.

e. Failure to draft QDRO and the participant retires
   i. Many challenges can occur in this case, especially if the participant starts drawing benefits from the account
   ii. In those cases, you can be left trying to make up for distributions taken out of which your client should have received an interest

f. What these examples highlight are as follows:
   i. The need to have proper checklists and reminders in place.
   ii. Use a master checklist for all divorce cases;
   iii. Communicate with the client at the end of the divorce to address what is left to be completed and who is responsible
   iv. Use the calendar; we all have devices; we all have some form of calendar that we look at daily for our work; us it effectively.

III. **Failure to Conduct Proper Discovery and Take the Necessary Precautions**

a. An attorney needs to obtain sufficient and accurate information to prepare a proper QDRO
   i. The key to being able to prepare and timely file the QDRO will largely depend on how much time and effort was spent while the case was pending; you need to know what information is required in order to properly prepare the QDRO
   ii. We will get into the different types of plans and how they can dictate what you might need later on, however in many cases the information you need to obtain is the same or similar in order to draft an effective QDRO.
   iii. Traditional discovery methods and obtaining authorizations from the opposing party or your client are often effective ways used in obtaining the information that you need in order to draft the QDRO; however you

need to be aware what information you need before you set out to make the request.

Failure to Conduct Proper Discovery and Take the Necessary Precautions

Submitted by Ryan C. Cari and Kevin M. Urbik

b. Use checklists

i. There are many, many useful books and resources out there when it comes to QDROs. Many of them have checklists that the practitioner can use in order to make certain they are asking for the right information. I have found a very useful resource authored by Gary A. Shulman entitled: *Qualified Domestic Relations Order Handbook 3rd Edition* (Aspen Publishers – 2008).

ii. Like many similar publications, it contains a number of checklists that are useful for the practitioner – in fact, an entire section is devoted to sample checklists.

iii. Best practice would be for the attorney to have these checklists in any file in which your client or your client' spouse has an interest in a retirement plan.

iv. Use of these checklists will help the attorney remember to ask for the right information before the case is settled and discovery has concluded. Failure to obtain the right information could compromise the rights of your client.

v. From these checklists, the attorney is reminded of key issues to address during the discovery phase of the case. For example, a checklist will remind counsel to :

1. Make certain that he or she has obtained information for all plans under which the participant is covered;
2. Make certain that you have sufficient information regarding any loans against a plan;
3. Make certain that responsibility for preparation of the QDRO is addressed with the client and opposing counsel;
4. Address survivorship rights;
5. Address early retirement issues with regard to the plan;

These are just a few of the things a good checklist will help you deal with.

vi. A proper checklist will also help an attorney deal with the plan administrator. And when it comes to dealing with plan administrators there are some key things to keep in mind. The following are excerpts from one of the checklists provided by *Qualified Domestic Relations Order Handbook 3rd Edition* (Aspen Publishers – 2008):

1. First and foremost, the key to working with the plan administrator is to remember that although the case you are working on is adversarial in nature, the plan administrator is not the enemy. Do not become adversarial with the plan administrator; although I am certain that those plan administrators listening out there would never do this, I am confident that a QDRO submitted by an attorney that has taken a rude and condescending tone might find its way to the bottom of the stack.
2. If you need to obtain information from the plan administrator (which I will get to in a moment), avoid short turnaround times and long interrogatories – make it straighforward.
3. Request a "summary plan description" or SPD. This is typically produced by the plan administrators, and can help speed up the process of exchanging information.
4. Request sample language from the plan administrator; common practice amongst many practitioners.
5. Seek out and obtain QDRO pre-approval;
6. Request all plans of coverage.

Again, these are just a few of the examples of a how a good checklist can help you remember the many different areas you need to cover when drafting a QDRO.

c. How to obtain the information needed?
    i. The way in which you set out to obtain the information you need in order to prepare a QDRO will depend on which party you represent; the participant or the alternate payee. Where I practice in Wisconsin, I can tell you that it is most common for the alternate payee's attorney to prepare the QDRO. That is one of the major factors that drives the discovery process as well as the request for information to complete the QDRO. I would be interested to hear if that is typical in other states.
    ii. Obtaining information relative to a plan governed under ERISA is necessary regardless of what side of the case you find yourself on. If you represent the plan participant, you are most likely going to be required to be involved in responding to discovery requests from the other side, and so you need to know how to get your hands on the right information.
    iii. On the other hand, if you are representing the alternate payee, you will certainly need to know how best to get the right information that will allow you to draft a QDRO when the time comes.
    iv. Although every state will be different to some degree, generally speaking you have two options available to you when attempting to obtain information regarding a plan;
        1. Traditional discovery methods available through the state court in which the case is venued; OR
        2. By obtaining information directly from the plan administrator.
d. Traditional discovery methods
    i. Assuming you are representing the non-plan participant, you will certainly want to obtain discovery responses from the plan participant; sworn testimony in the form of interrogatories or request for production of documents in order to make certain you have information in writing from the plan participant.
    ii. This helps as it is not only a starting point to determine what you are working with, but it also establishes a record in those cases where you have an asset that is discovered after the case has been litigated or settled

and not disclosed during discovery. Without the discovery responses from the plan participant, you may have a hard time building your case against the other party in an effort to reopen property division.

iii. It is also helpful to train your staff to be able to put the information gathered into a summary format for your use either at trial, or more commonly in the context of a settlement conference or mediation.

iv. Consider the scenario where you have a divorce action pending and both spouses have worked outside the home during the marriage, and each has accumulated assets in a qualified plan. And further assume that you are trying to prepare for a settlement conference, and you have 4-6 plans to divide. It will be far easier to engage in meaningful settlement discussions regarding property division if you have a one page summary of each qualified plan. It is preferable to simplify the information gathered into 10 numbered sections or less, so that you are not sifting through pages and pages of information.

v. A simple summary can include section headings like: Plan name, type of plan, vesting status, account balance as of a date certain, and survivor benefits.

    1. One observation I wanted to make at this point: often times what we set out to do in terms of best practice can become challenging to implement in our dealings with clients. What I am referring to is that as I lay out all of the things you should do in terms of discovery, drafting summaries, and speaking with plan administrators can be time consuming, and can therefore get expensive for your client. In my experience, there have been times where I start to describe the process we need to go through in order to properly consider how to divide the retirement assets equally, and the client's mind immediately goes to "how much is this going to cost?" In fact, I have had numerous instances where the client and their soon to be ex-spouse will have discussed the retirement plans either ahead of time or after they realize how much time and

effort might go into the process of dividing the retirements assets and they come up with their own solution. More power to them, however this is a time when it is absolutely vital that you confirm this with them in writing; CYA as we say.

2. I can offer a specific example; I had a divorce case pending and between the two parties they had 9 retirement plans. My client, the wife, when considering the retirement assets alone, would have been short about $150,000.00 in terms of property division. There were numerous different types of plans, and the marital estate was to be divided equally. The easiest way to make division equal as to the retirement plans was to divide each of them equally. However, that can be time consuming and costly. After walking through that with the client, she and her spouse got together and made an agreement on their own as to the retirement assets. Now that does not work with all clients, as many of the family cases we get involved with can be litigious and the parties are unable to be in the same room, let alone discuss ways in which they can make life easier. But it worked in this case. What was important here was that I made certain to write a letter detailing the agreement and that it may or may not be an equitable way to divide the assets. We were uncertain whether it was equitable because the client did not want to spend the time and money to find out.

vi. That example aside, this is also the time in which you would request the necessary authorizations to obtain information directly from the opposing party's employer and plan administrator. Obtaining these authorizations is just as important as issuing other forms of discovery. You often times will obtain more useful information through the use of your authorizations then you will from opposing counsel or his or her client.

vii. Practice Tip: utilize a stamp or other means of requiring the any authorization your client is signing only be valid if the information

obtained by opposing counsel via the authorization is also provided to your office.

e. Obtaining information directly from Plan Administrator
    i. If you represent the alternate payee, and have obtained a signed authorization from the plan participant allowing you as opposing counsel to obtain information regarding any retirement plan, you will be able to go to the plan administrator and get the details and information needed to prepare the QDRO.
    ii. Under ERISA, the plan participant is entitled to receive the following upon request:
        1. Review of Plan Documents (during regular work hours);
        2. Receive Copies of Plan Documents (usually not to exceed $.25 per page);
        3. Receive a Copy of the Plan's Annual Financial Report;
        4. Receive Accrued Benefit Statement; and
        5. Receipt of Summary Plan Description.
            a. Purpose is to provide description of the key features of the plan in a manner that is easy to understand
            b. Basic information included in SPD includes:
                i. Official Name of the plan
                ii. Name and address of employer
                iii. Type of plan
                iv. Name and address of plan administrator
                v. Eligibility requirements for participation in the plan including the plans normal retirement age
                vi. A description of joint and survivor benefits
            c. The SPD can provide you with a great deal of the information you need in order to complete your QDRO and is a very good, direct source of information.

iii. Along with the authorization, or perhaps in a combined format, it is common to submit questions to the plan administrator. This is also a very useful tool in obtaining information regarding the plan.

1. In any written requests for information from the plan administrator, remember these best practices:
    a. Short, concise questions that allow for short and easy replies;
    b. Allow for plenty of time for responses to be provided;
    c. Make certain that you inquire about all plans that are under administration. Do not assume you know about all plans that are under the control of the administrator;
    d. Inquire about fees so that you can fully inform your client about the costs of division; AND
    e. Ask for model QDRO language.

f. Benefits and Dangers to using the Plan's Model QDRO Language

i. Many large plan administrators will have model language to use when drafting QDROs for the plans they administer.

ii. As stated above, requesting this information is wise and a careful review of the information provided is certainly a must.

iii. In terms of the use of the model language, it is generally preferred by the plan administrator

1. Advantages to using the model language:
    a. Can expedite the approval process;
    b. In some cases, the plan administrator may refuse to look at the QDRO unless the fill-in-the-blank model is used;
    c. Using the non-substantive model language and general format can appease the plan administrators
2. Dangers in using model language:
    a. May not have your client's best interests in mind;
    b. May not address substantive portions of the agreement reached between the parties as to division;

c. May try to force the party to choose either a fixed dollar amount or percentage of the plan, rather than the coverture method of division, thereby depriving your client of inflation protection (NOTE: Coverture will be discussed more in depth later in presentation; however this method of division provides the non-participant spouse with a proportionate share of the participant's final accrued benefit calculated as of his or date of retirement.)

g. Tips for Dealing with Uncooperative Parties
   i. From time to time, you may come across the uncooperative opposing party. In my experience, this often times occurs when the other party is unrepresented.
   ii. In many cases, the lack of cooperation comes in the form of someone that simply will not respond to you if you are looking for information or is just being difficult.
   iii. Each state court has ways in which you can deal with uncooperative parties.
   iv. This lack of cooperation may take place in many forms. Take for example the party that during the time in which the divorce case is pending disappears for a time; they will not return calls, emails, fail to make court appearances. And perhaps we also are confronted with a client that is convinced the soon to be ex-spouse is about to empty all of the bank accounts, retirement accounts and investments, and disappear. Sounds drastic, but it happens.
   v. With regard to the retirement account, there is a way to protect your client. If you know about the account and perhaps other basic information, you can send to the plan administrator a "draft" QDRO that is submitted for approval. It is not necessarily in final form and is not being submitted to actually divide the plan; just your proposed order. Many plan administrators will place a hold on the plan after receiving a proposed order.

vi. Other plan administrators will have different requirements for placing holds on a plan. You should find out from the plan administrator what they require to have a hold placed on the account.

Failure to Recognize the Type of Plan Being Divided

Submitted by Corinne Kaplan and Elizabeth R. Wood

TOP QDRO MISTAKES ATTORNEYS MAKE:
FAILURE TO RECOGNIZE THE TYPE OF PLAN BEING DIVIDED

TOPIC SUMMARY

Defined Contribution Plans:

- Characteristics
- Terminology
- Examples
- Language Traps

Defined Benefit Plans:

- Characteristics
- Terminology
- Examples
- Language Traps

Interpreting Statements Appendix

- Sample Defined Benefit Plan Participant Statement
- Sample cash Balance Plan Participant Statement

Easy Tips to Distinguish between Plans

PREFACE

I wish to personally and publicly express my appreciation to Garrick G Zielinski, of Divorce Financial Solutions, LLC. He has not only been a trusted colleague and supportive friend, but also an invaluable resource throughout my decades of practice. He, and his firm, DFS, provide a wealth of information to the Bar, and also provide estate and retirement division services to clients, enabling them to make knowledgeable and best case scenario decisions, resulting in maximum tax savings, and win-win scenarios. His assistance in preparing this information will always be greatly appreciated.

I also wish to personally thank Paul D. Stang, J.D., CLU, ChFC, Managing Member of Alliance Benefit Group in Madison, Wisconsin, for generously providing us samples of a Defined Benefit Plan Participant Statement and sample cash Balance Plan Participant Statement for use in this presentation and associated materials. After an extensive search and many cold calls to obtain these samples, Paul provided these to us at no charge, and no request for recognition for his contribution.

INTRODUCTION

There are many reasons why it is crucial to understand the type of plan being divided but, in understanding what type of plan you have to work with, you must have the requisite knowledge to decipher the essential features of that plan, elements of the plan.[1] You must also be keenly aware of all laws applicable to the type of plan you are seeking to divide. Although all defined benefit and defined contribution plans are governed by Employee Retirement Income Security Act of 1974,[2] a retirement plan meeting the definitions of defined benefit and defined contribution plans under ERISA is not necessarily a qualified plan. A qualified retirement plan is an investment arrangement that qualifies for favorable tax treatment under the Internal Revenue

[1] "Frequently Asked Questions About Retirement Plans and ERISA." US Department of Labor, Employee Benefits Security Administration. http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html. Accessed 04/30/2015; "QDROs: The Division of Retirement Benefits Through Qualified Domestic Relations Orders" US Department of Labor, Employee Benefits Security Administration. http://www.dol.gov/ebsa/publications/qdros.html accessed 04/30/2015.
[2] Zielinski, Garrick G., CFP, CDFA. "Value or Divide? A Look At QDROs and Pension Valuations In Divorce;" Divorce Financial Solutions, LLC, p. 2

Code.[3] The tax benefits available to qualified retirement plans include "up front" deductions for contributions to the plan;[4] the plan and the trust used to hold the contributions and investments are not taxed[5]; the earnings of the plan are only included as taxable income for the participant when the funds are distributed; and distributions may even be eligible for favorable tax treatment, such as tax free rollover[6].

A qualified retirement plan, itself, limits how the QDRO may redistribute any value in the plan. Generally, the QDRO cannot be used to alter the plan's value or content, including payment options[7] or the procedures necessary to receive a distribution of the benefits.[8] Under 29 U.S.C. § 1056, a QDRO cannot require the plan to provide any benefit option, pay any type of benefit, or pay any form of benefit that is not otherwise provided by the plan[9]. Generally, the alternate payee is able to elect any option already available, under the plan, that is available to the participant. [10] The alternate payee many not elect a joint and survivor annuity option with a subsequent spouse.[11] Additionally, a QDRO cannot, based on the plan's actuarial value, require the plan to provide increased benefits.[12]

Firstly, to determine if you need a QDRO to divide a plan, it is important to research what laws govern how the plan, in general, may be treated at division, and whether or not the plan is a qualified retirement plan. To be a qualified plan, the plan **must,** in both form and function, satisfy Internal Revenue Code **requirements and** the specific plan's operation must continue to follow the Internal Revenue Code's requirements[13]. The plan must also satisfy the Internal Revenue Code's minimum

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[3] I.R.C. § 401(a); I.R.C. § 403(a)
[4] "up front" means that the deductions take effect at the time of contribution of funds into the plan.
[5] This allows for the earnings on the plan's investments to be income tax free until the benefits are distributed. I.R.C. § 401(a); I.R.C. § 403(a)
[6] I.R.C. § 403(b)
[7] Zielinski, Garrick G., CFP, CFDA, CDS; QDRO Creation in Wisconsin, Building a Future After A Split, I. QDROs – Taking a Closer Look; p. 5
[8] Zielinski, Garrick G., CFP, CFDA, CDS; Value or Divide? A Look At QDROs and Pension Valuations In Divorce, p. 2
[9] 29 U.S.C. § 1056(d)(3)(B)(i)(D)(i); "Retirement Equity Act of 1984"
[10] Zielinski, Garrick G., CFP, CFDA, CDS; QDRO Creation in Wisconsin, Building a Future After A Split, I. QDROs – Taking a Closer Look; p. 5
[11] *Id.*
[12] 29 U.S.C. § 1056(d)(3)(B)(i)(D)(ii)
[13] A Guide to Common Qualified Plan Requirements. IRS.gov. updated 10/23/2014; http://www.irs.gov/Retirement-Plans/A-Guide-to-Common-Qualified-Plan-Requirements 04/30/2015

vesting requirements.[14] Not all plans or variations of plans need to abide by the same laws. By law, QDROs can be limited, to varying degrees, in how the Order divides a plan by the actual terms of the plan.[15]

Practice Tip: The Complete QDRO Handbook

David Clayton's The Complete QDRO Handbook[16] is an essential resource all attorneys should have to better understand and prepare to work with Domestic Relations Orders, Qualified Domestic Relations Orders, and both qualified and non-qualified retirement plans.

Practice Tip: Divide With Caution!

Don't just agree to divide plans through the QDRO and then assume that, post-divorce, the division will go smoothly and as contemplated; get it right upfront! Taking extra care in the beginning, before negotiations even start, to understand the plan and how to divide it to maximize it's value will ensure a smoother result and reduce later conflict or client disappointment. **Also, don't prepare the QDRO yourself unless you are a qualified expert and can be as efficient and cost effective as a specialist is.**

Practice Tip: Summary Plan Description [SPD]

You need to always thoroughly understand the type of plan you are trying to divide. The SPD, by law, must be provided to participants at certain designated times. It must be "written in a manner calculated to be understood by the average plan participant."[17] Per the Department of Labor's regulations, the SPD must include basic plan administration information, a summary of the plan's most important provisions, and

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[14] I.R.C. § 411; A Guide to Common Qualified Plan Requirements. IRS.gov. updated 10/23/2014; http://www.irs.gov/Retirement-Plans/A-Guide-to-Common-Qualified-Plan-Requirements 04/30/2015

[15] *Id., c*iting ERISA §§ 206(d)(3)(B)(i)(I), 206(d)(3)(D), 206(d)(3)(E); IRC §§ 414(p)(1)(A)(i), 414(p)(3), 414(p)(4); Advisory Opinion 2000-09A; for example, under ERISA, generally, a QDRO cannot give any or all of a plan's payable benefits to an alternate payee but, generally, cannot change the level of benefits or the form of payment allocated under the plan. Some exceptions, by law, may apply to QDRO division limits as well; *see also* Zielinski, Garrick G., CFP, CDFA. "Value or Divide? A Look At QDROs and Pension Valutions In Divorce;" Divorce Financial Solutions, LLC, p. 3, citing IRC § 414(p)(3)(C) and ERISA § 206(d)(3)(iii).

[16] Carrad, David Clayton, The Complete QDRO Handbook: Dividing ERISA, Military, and Civil Service Pensions and Collecting Child Support from Employee Benefit Plans, 3rd ed.; American Bar Association

[17] 29 CFR 1022

a summary of the participant's ERISA rights.[18] The SPD will provide the plan's summary plan description, terms, conditions, essential elements, relevant account balance statements, other documents showing any other benefits available under the plan, the plan's benefit structure, the plan's day-today operations; the trust fund holding the participant's plan's assets; a description of the recordkeeping system tracking how the movement of money and investments into and out of the plan; and the documents providing the participant and the government information about the plan.[19]

The SPD is due to the participant before 90 days have passed since becoming a plan participant.[20] Participants must also be provided an updated SPD every 5 years and the plan, regardless of any updates or modifications, must be provided to participants every 10 years.[21] If there are modifications to the plan, the plan's participant must be provided a summary describing any material modifications within 210 days after the end of the year that the changes were made in.[22] Participants, every five years, must receive an updated SPD that incorporated all modifications during that five year period. [21]

[18] 29 CFR § 2520.102-3
[19] "Frequently Asked Questions About Retirement Plans and ERISA." United States Department of Labor, Employee Benefits Security Administration. http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html. Accessed 04/30/2015
[20] 29 CFR § 2520.102-3
[21] 29 U.S.C. § 1024(b)(1)
[22] 29 U.S.C. 1022; 29 U.S.C. § 1024(b)(1)

PLAN TYPES

I. Defined Contribution Plans

i. Characteristics and terminology

Generally, these are plans where the contributor, the person funding the plan, puts funding into a retirement account held under the plan and (usually) the plan's participant decides how and where to invest the contributions.[23] The contributor may be the employer, employee, or both, depending on the type of defined contribution plan and specific conditions and requirements for that specific plan.[23] Depending on the specific plan, a defined contribution plan may an individual account, an individual account that includes subaccounts, or subaccounts.[23]

The account's value is directly related to how well these investments perform.[23] The account value always depends on the amount of contributions, market strength, and specific investment decisions.[23] At distribution, the distributed fund's value is the sum of the plan's current investment value(s) after any fees for investment, investment administration, and account administration are deducted.[23] By law[23], individual account balances must be valued at least one time per year.[23]

Distribution Value of Defined Contribution Retirement Plan

Contribution Values	+	Investment Earnings	-	Investment Losses	-	Investment Fees[24]	=	Total Distribution Value

ii. Comparing Defined Contribution Plans to Defined Benefit Plans

Defined contribution plans, in general, are different from defined benefit plans because the value of the benefits payable from a defined contribution plan a not known, or defined, at the funding or investing points.[23] The contributions have the defined and definable value during plan creation and operation. [23] What is not defined, what is unknown, during plan creation and operation, is the final benefits payable.[23] For a

[23] *What You Should Know About Your Retirement Plan* United States Department of Labor, Employee Benefits Security Administration, 08/2013; http://www.dol.gov/ebsa/publications/wyskapr.html#DefinedBenefitPlan 04/30/2015
[24] Investment or Account Administration, for e.g.

defined contribution plan, unlike a defined benefit plan, may allow "single lump sum distribution to alternate payees."[25] For employers, defined benefit plans are generally most expensive and usually much more complicated to understand than defined contribution plans because the actuarial calculations used to determine the benefits payable can be very complicated.[26] Also, defined benefit plans must comply with I.R.C. § 410(a)(26) minimum participation requirements.[27] These requirements are, that "during each day of the plan year," the number of employees participating must be the lesser of 50 employees for that employer or greater that 40% of all of the employees (if there is one employee, that employee must be covered but if there are two than one of those employees must be covered.[27]

iii. Taxation

Generally, both the money contributed into the account and any investment earnings are tax-free until account funds or other benefits are distributed to the plan's recipient(s).[23] Taxes apply to the amount of investment earnings and original contributions. These plans can have pre-tax and after-tax contributions. [28]

iv. Examples of Defined Contribution Plans

Examples of defined contribution plans include 401(k) plans,[29] Profit sharing plans,[29] stock bonus plans, employee stock ownership plans [ESOP],[30] money purchase,[31] Keogh plans[32], thrift or savings plans[29], and simplified employee pension plans.[32] Some types of defined contribution plans are commonly known by their corresponding IRS tax codes; 401(k)[32] and 403(b), for example. These plans can also have many types of

[25] I.R.C. SS 414(p)(8); citation and quotation from Zielinski, Garrick G., CFP, CDFA. *Financial Divorce Settlements From Start To Finish* Divorce Financial Solutions, LLC..
[26] Choosing a Retirement Plan: Defined Benefit Plan; IRS.gov. 12/02/2014 www.irs.gov/Retirement-Plans/Defined-Benefit-Plan 04/30/2015
[27] A Guide to Common Qualified Plan Requirements. IRS.gov. updated 10/23/2014; http://www.irs.gov/Retirement-Plans/A-Guide-to-Common-Qualified-Plan-Requirements 04/30/2015
[28] Zielinski, Garrick G., CFP, CDFA, of Divorce Financial Solutions, LLC; Financial Divorce Settlements from Start to Finish page 3
[29] Zielinski, "Financial Divorce Settlements from Start to Finish," of Divorce Financial Solutions, LLC; pp. 2-3; *What You Should Know About Your Retirement Plan* US Department of Labor, Employee Benefits Security Administration http://www.dol.gov/ebsa/publications/wyskapr.html#DefinedBenefitPlan 04/30/2015;
[30] *Id.*; including leveraged tax credit plans; stock bonus plans are included here as well
[31] *Id.*; also called money purchase pension plans
[32] *Id.*; also considered to be a "hybrid plan"

subaccounts, including rollover contributions, employer matching contributions, employer and employee contributions.[29]

For a profit sharing plan, an employer can make discretionary contributions. To distribute the funds, a "comp-to-comp" method can be used to determine to determine each participant's portion of profits. **These are similar to 401(k)s** in that you can control how complicated these plans are. It is also possible to utilize an IRS pre-approved profit-sharing plan to prevent admin problems.[33]

A money purchase plan has a stated required contribution level by the employer, often a percentage of the employee's pay. An excise tax will apply if the required contribution is not made. Employees may also contribute. Under these plans, the business can be any size and an employer can utilize other plans. There are IRS pre-approved plans that can be used to prevent administrative confusion or problems.[34]

II. Defined Benefit Plan

Put simply by the IRS, a defined benefit plan uses a fixed formula[35] to provide "a fixed, pre-established benefit for employees at retirement."[35] Defined Benefit Plans are designed to pay a monthly benefit to the plan's participant when the participant reaches a retirement age.[36] "In essence, the retiree's 'benefit' in a defined benefit plan is 'defined' or known in advance," but the contributions necessary to fund the benefit are not yet known.[36] The necessary amounts of money to fund the future benefit are determined using actuarial calculations. Based on the knowledge of what the benefits will be and how long the benefits will be paid, the contributor to the plan, usually the only participant's employer, pays contributions in an amount determined by the actuarial formulas. The formula used to calculate contributions that will fund the benefit are

[33] Choosing a Retirement Plan: Profit-Sharing Plan, IRS.gov, 04/13/2015 http://www.irs.gov/Retirement-Plans/Choosing-a-Retirement-Plan-Profit-Sharing-Plan. 04/30/2015
[34] Choosing a Retirement Plan; IRS.gov; 04/13/2015 http://www.irs.gov/Retirement-Plans/Choosing-a-Retirement-Plan-Money-Purchase-Plan 04/30/2015.
[35] Choosing a Retirement Plan: Defined Benefit Plan; IRS.gov. 12/02/2014 www.irs.gov/Retirement-Plans/Defined-Benefit-Plan 04/30/2015
[36] Zielinski, Garrick G., CFP, CDFA "Financial Divorce Settlements from Start to Finish," Divorce Financial Solutions, LLC

usually based on the participant's salary, the amount of time spent working with the company involved in funding their plan, or both.[37]

Commonly, Defined Benefit Plans are referred to as pension plans,[38] retirement plans,[39] or welfare benefits.[39] However, these common references may create confusion; these are not necessarily qualified retirement plans. Welfare benefits plans are not qualified benefit plans. **For example, ERISA's definition of a pension plan, often what people call or consider to be the same as a qualified defined benefit plan,[36] is broader than what is actually a qualified benefit plan.[39] It includes retirement plans that do not fit the I.R.C. definition of a qualified plan.**

Like defined Contribution Plans, defined benefit plan funds are payable, without penalty, at the targeted retirement age. That age may differ based on the plan provider. Benefits paid out before the plan's set retirement age are subject to a reduction in benefits. This is related to how the benefit payments are determined at the time of contribution. Because the benefits are intended to be paid out for a certain number of months, taking benefits before retirement age causes the monthly payments to be reduced because the payments must cover a longer time-frame.[40] Similarly, an alternate payee may not receive the benefits until the plan's participant's age allows the alternate payee to be eligible to receive the benefits, the alternate payee's age may affect the amount of payment received.[40]

Cash Balance Plans

One type of defined benefit plan, which is becoming increasingly popular, is called a "Cash Balance Pension Plan.[41]" For these cash balance plans, the defined benefit, the "promised benefit," is expressed as an account balance rather than

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[37] Zielinski, Grant G., CDFA 2 "Value or Divide? A Look At QDROs and Pension Valuations in Divorce," of Divorce Financial Solutions, LLC

[38] Winnie Sun "Defined Benefit Plans: The Overlooked Retirement Vehicle For Successful Entrepreneurs" Forbes.com. 1/17/2014 http://www.forbes.com/sites/winniesun/2014/01/17/defined-benefit-plans-the-overlooked-retirement-vehicle-for-successful-entrepreneurs/ 04/30/2015

[39] Zielinski, Garrick G., CFP, CDFA "Financial Divorce Settlements from Start to Finish," of Divorce Financial Solutions, LLC

[40] Zielinski, Garrick G., CFP, CDFA. "The Shared Interest QDRO" Divorce Financial Solutions, LLC, p. 20

[41] Cash Balance Pension Plans" US Department of Labor, Employee Benefits Security Administration. January 2014; also at www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html. 04/30/2015

actuarial-formula predetermined monthly payments that begin at the specified retirement age and lasting throughout the participant's life.[41] The cash balance plan's account, where the benefit is defined, is a "hypothetical account."[41] For both the qualified pension plan and the cash balance plan, both pension benefits and hypothetical accounts do not "reflect actual contributions" in or account gains and losses.[41] It resembles a contribution plan in that promised benefit is shown as an account balance rather than a specific monthly payment plan for paying benefits to the participant.[41]

In recent times, traditional qualified "pension plans" are losing popularity while the cash balance plans are becoming more popular.[42] Traditional pension plans, not only losing popularity to the cash balance plans, are often being converted into cash balance plans.[42] Although there are restrictions covering the conversion process, it is legal and the plan retains status as a qualified benefit plan.[41] The private pension system is not required but voluntary.[41] In fact, employers are not required to provide a qualified pension plan participant a choice of whether or not the pension is converted into a cash balance plan.[41] Employers may even discontinue offering the traditional pension plans to new hires and instead offer the cash balance plans.[41]

Although participation in the pension system is not required and employers have leeway to convert the plans into cash balance plans, there are several restrictions over what the employer can do to the converted plan. There are notice requirements to employees when the conversion and other changes are made.[41] Most importantly, by federal law, the employer cannot reduce benefits already earned under a pension plan or cause the employee to receive a lesser benefit that that accured through the actuarial formula at the date of conversion.[41] The following example is a summary with information and quotations taken from a published Department of Labor Illustration:

> The original pension retirement age is 65 and the monthly benefit formula is based on the monthly average of the highest three salary years of the employee

[42] "Data from the Bureau of Labor Statistics indicate that about 23 percent of private sector workers with defined benefit pension plans had a cash balance plan in 2000; in contrast, such plans were only available to 3 percent of defined benefit participants in 1991;" Green, L. Bernard *Questions and Answers on Cash Balance Pension Plans* US Bureau of Labor Statistics, Compensation and Working Conditions, 09/22/2003 http://www.bls.gov/opub/mlr/cwc/questions-and-answers-on-cash-balance-pension-plans.pdf 04/30/2015

multiplied by 1.5% of each year of service. The plan is converted into a cash benefit plan after 10 years of service. The participant retains the right to receive the that monthly pension at age 65 but I is equal to 15% of the monthly average of the three highest earnings years occurring during those years preceding the conversion.[41]

Cash balance plans are not without controversy, even being called "a wolf in sheep's clothing,"[43] it is worth noting the differences between the cash balance plans and 401(k) plans. According to the Department of Labor, there are for major differences. These include the following:

1. Workers, generally, do not have to contribute to the cash balance plan but the 401(k) plan depends on the employee choosing to contribute;
2. The employer, in the Cash balance plan, carries the risk of investment losses and manages the account; or hires an investment manager to manage it. 401(k) plans often provide that the participant can manage the investments and the participant bears the risk of investment losses;
3. Employers must allow for employees with cash balance plans to receive the benefits as a lifetime annuity but not for employees that have a 401(k);
4. Usually, cash balance plans, like all defined benefit plans, are insured. The insurer, usually a usually a federal agency; the Pension Benefit Guaranty Corporation (PBGC); has authority to pay the pension benefits up to the legal limits when insufficient funds cause the plan to terminate. 401(k) plans, like all defined contribution plans, are not insured by the PBGC.[44]

[43] Miller, Gerard. *Cash Balance Pension Plans A Wolf In Sheep's Clothing* Governing The States And Localities; 05/03/2012 http://www.governing.com/columns/public-money/col-cash-balance-pension-plans-wolf-sheeps-clothing.html 04/30/2015

[44] Cash Balance Pension Plans" United States Department of Labor Employee Benefits Security Administration. January 2014; also at www.dol.gov/ebsa/faqs/faq_consumer_cashbalanceplans.html. 04/30/2015

APPENDIX[45]

[45] Includes a Sample Defined Benefit Plan Statement and a Sample Cash Balance Plan Statement.
Both Statements generously provided by **Paul D. Stang of Alliance Benefit Group**, located in Madison Wisconsin.

Comparison of the General Features of Defined Benefit and Defined Contribution Plans

Aspects	**Defined Contribution Plan**	**Defined Benefit Plan**
Contributors	May be both employer and employee Creation usually requires employee contribution	Employer Funded Plan, completely Employer is usually the only contributor Employer contribution required for SIMPLE and safe harbor 401(k)
Account Management	The employee controls the account's investments	Employer but not employee; employ may hire an account or investment manager
Early Withdraw of benefits	Tax penalties usually apply to early withdrawal	Usually cannot receive early
Payment of Benefits at Retirement	Performance of investments	Pre-set amount based on an actuarial formula
Retirement Payment Options	Monthly or lump sum Can transfer to an IRA	Lifetime monthly annuity
Benefits	No guarantee	Guaranteed by employer, generally

Ace Financial Services, Inc.
Cash Balance Plan
Benefit Statement as of 12/31/2014

Patrick Ace

Birth Date	1/20/61		
Hire Date	6/12/00	Compensation	$255,000.00
Entry Date	1/01/11	Years Service for Vesting	4
Normal Retirement Date	2/01/23	Vested Percent	100%

Cash Balance Account Value as of	1/1/2014	$261,278.23
Contribution Credit for	12/31/2014	$145,350.00
Earnings Credit for	12/31/2014	$13,063.91
Cash Balance Account Value as of	12/31/2014	$419,692.14
Vested Balance:		$419,692.14

When you reach retirement, you may choose to receive your benefit in the form of either an annuity or a lump sum distribution.

This statement is prepared based on the data provided to the plan administrator. Please refer any questions that you may have regarding this statement to the plan administrator.

Hometown State Bank Defined Benefit Pension

Plan Valuation as of 01/01/2015

HOLLY A. HENDERSON

Birth date:	12/18/1980	Hours of service:	1993
Hire date:	12/02/2010	Years of service:	
Entry date:	01/01/2012	for vesting:	4
Retirement date:	01/01/2046	for benefit accrual:	4

Projected Monthly Benefit:	$723.92
Accrued Monthly Benefit as of 01/01/2015:	$111.00
Vesting Percentage is:	40%
Vested Accrued Benefit is:	$44.40

The Projected Benefit is the estimated monthly benefit you will receive if you continue employment through your retirement date. The Vested Accrued Benefit is the monthly amount you've earned as of January 1, 2015.

This statement was prepared on the basis of information supplied by you and your employer. If any information is missing or incorrect, please notify your employer.

Thank you to Attorney Carol V. Calhoun for providing the following charts, free of charge, for use in these materials. Attorney Carol V. Calhoun is president of Calhoun Law Group, P.C., in Bethesda, MD. She has practiced employee benefits law for over 30 years, and is the author of two books, two chapters of a third book, and numerous articles concerning employee benefits. She maintains an education site relating to employee benefits at http://benefitsattorney.com.

Comparison of 457(b) Plans, 401(k) Plans, 403(b) Plans, and Deemed IRAs (Posted on November 23, 2014 by)

Carol V.
Calhoun

The attractiveness of a 457(b) plan as compared with a 403(b) plan or a 401(k) plan may vary greatly depending on the circumstances. For example, a state or local governmental entity other than a public school or university may need to have a 457(b) plan, because it cannot normally have either of the other types of plans. A private university that is tax-exempt under Internal Revenue Code ("I.R.C.") § 501(c)(3) but maintains a health maintenance organization that is tax-exempt under I.R.C. § 501(c)(4) and/or taxable research subsidiaries may prefer a 401(k) plan, so that it can cover all employees under the same plan. A private school that does not have affiliates, and wants to provide only for salary reduction contributions, may find that a 403(b) plan gives it the greatest ability to cover rank-and-file employees while minimizing administrative requirements. A public or private nonprofit school or university that maintains a qualified defined contribution plan may want to have a separate 403(b) plan as well, since it need not combine 403(b) contributions with contributions to the school or university's qualified plans in applying the I.R.C. § 415(c) limits.

With the passage of the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"), under which 457(b) plan deferrals no longer have to be coordinated with 401(k) or 403(b) deferrals, more employers may want to consider maintaining more than one type of plan to maximize total permitted deferrals. This is particularly true given that EGTRRA permits 457(b) and 403(b) plan money, as well as 401(k) plan money, to be used to purchase service credit under a defined benefit plan.

The following chart sets forth some primary differences among the different types of plans:

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
May state or local governmental employer maintain this type of plan?	**Yes.**	**No, unless it has a grandfathered 401(k) plan.**	**Only if it is a public school or university, or a portion of another agency that is treated as an educational institution (*e.g.,* an educational program for convicts that is part of a state prison system).**	**Yes.**

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
Can a church employer that has not made an election under I.R.C. § 410(d) to be subject to ERISA ("nonelecting church") maintain?	A nonelecting church is exempt from I.R.C. § 457(b). Thus, it can maintain an unfunded deferred compensation plan, but is not subject to the I.R.C. § 457(b) requirements. To avoid unfavorable tax consequences, such a plan must not be funded and must meet the requirements of I.R.C. § 409A.	Yes.	Yes.	Yes.
Can a tax-exempt employer, other than a government or nonelecting church, maintain?	Only for highly compensated and management employees.	Yes.	Only if it is a § 501(c)(3) organization.	Yes.
Can the plan cover employees of related taxable entities?	No, although an unfunded deferred compensation plan can be maintained for highly compensated and management employees of taxable affiliates.	Yes.	No.	Yes. However, because a deemed IRA can be part of another kind of plan (*e.g.,* 401(a) or 403(b)), a related taxable entity that also wishes to maintain a deemed IRA may have to use a different plan for the deemed IRA, if it is not eligible to maintain the plan of which the deemed IRA is a part.
Are there limits on elective deferrals?	Lesser of a dollar limit or 100% of pre-plan compensation. The dollar limit is $18,000 in 2015, and is indexed for cost-of-living changes in future years. Special catch-up elections are available for certain long-service employees or for the last three years of employment prior to normal retirement date. 457(b) plans need no longer be combined with other plans in applying limits.	Lesser of a dollar limit or 100% of pre-plan compensation. The dollar limit is $18,000 in 2015, and is adjusted for cost of living changes in future years. 401(k) plans need to be combined only with other 401(k) plans or 403(b) plans (not 457(b) plans) in applying limits.	Lesser of a dollar limit or 100% of pre-plan compensation. The dollar limit is $18,000 in 2015, and is indexed for cost-of-living changes in future years. 403(b) plans need only be combined with other 403(b) plans or 401(k) plans (not 457(b) plans) in applying limits.	$5,500 in any one year. (This limit will be subject to cost-of-living adjustments for years after 2015.) To the extent that an employee covered by a deemed IRA has income in excess of certain specified levels, and also participates in an employer plan, the deductability of contributions may be limited. However, contributions are not offset against other types of employer plans, but only against other IRAs or deemed IRAs.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
Are catch-up provisions available to increase the maximum elective deferrals?	Catch-up available under 457(b)(3) for one or more of the participant's last 3 taxable years ending before he attains normal retirement age under the plan. Catch-up available under 457(e)(18) and 414(v) for governmental plans only, for participants age 50 or over. If both catch-ups apply, only the higher of the two, not both of the two, may be taken.	Catch-up available under 402(g) and 414(v), for participants age 50 or over.	Catch-up available under 402(g) and 414(v), for participants age 50 or over. Catch-up available under 402(g)(7) for employees who have at least 15 years of service with certain organizations. If both catch-ups apply, the individual can take the sum of the two.	No.
Are there limits on total contributions?	Same as the limit on elective deferrals.	Lesser of $53,000 (for 2015; as indexed in later years) or 100% of pre-plan compensation. Other qualified plans are combined in determining the limit. 403(b) and 457(b) plans do not count in determining the limit for a governmental 401(k) plan.	Lesser of $53,000 (for 2015; as indexed in later years) or 100% of pre-plan compensation. Qualified plans, other than a plan maintained by a business the employee controls, do not count in determining the limit for 403(b) plans. 457(b) plans do not count in determining the limit for a governmental 403(b) plan. Other 403(b) plans are combined in determining the limit.	Same as the limit on elective contributions.
Is there an excise tax on excess contributions?	No.	Governmental plans are exempt.	Only if the 403(b) contract is a custodial account described in Code Section 403(b)(7), as opposed to an annuity contract.	Yes.
Can the plan provide for participant loans?	Yes, in the case of a governmental 457(b) plan, subject to maximum limits under 72(p) to avoid taxation of the participant; loans from other 457(b) plans will give rise to participant taxation.	Yes, subject to maximum limits under 72(p) to avoid taxation of the participant.	Yes, subject to maximum limits under 72(p) to avoid taxation of the participant.	No. A loan is always taxed as if it were a distribution.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
What are other effects of violating limits on total contributions?	In the case of a governmental plan that includes the limits in the plan but violates them administratively, the plan continues to be considered a 457(b) plan until the first day of the first plan year that begins more than 180 days after the date the IRS notifies the employer of the problem and will continue to be a 457(b) plan then if the employer has fixed the problem.	Disqualification of the plan.	Only amount in excess of the limits is taxable.	If the deemed IRA is a free-standing plan, only the amount in excess of the limits is taxable. However, if the deemed IRA is part of another plan (*e.g.,* a 401(a) plan), a violation on the part of the deemed IRA can jeopardize the qualification of the entire 401(a) plan.
What is the effect of the vesting schedule on contribution limits?	No effect.	No effect.	Contributions count for Section 415(c) purposes only when they vest.	N/A. Contributions must be fully vested.
Can money be rolled in from a 401(k) or other qualified plan, or from a 403(b) plan?	Yes, for a governmental 457(b) plan; no for nongovernmental plans.	Yes.	Yes.	Yes.
Can money be rolled in from a 457(b) plan?	Yes, if both the transferring and receiving plans are governmental 457(b) plans. Otherwise, similar results may in some instances be available through a plan-to-plan transfer.	Yes, if the transferring plan is a governmental 457(b) plan. No if the transferring plan is a nongovernmental 457(b) plan.	Yes, if the transferring plan is a governmental 457(b) plan. No if the transferring plan is a nongovernmental 457(b) plan.	Yes, if the transferring plan is a governmental 457(b) plan. No if the transferring plan is a nongovernmental 457(b) plan.
Can tax on distributions be deferred by rolling them into another plan or an IRA?	No for nongovernmental plans; yes for governmental plans. For nongovernmental plans, can defer taxes only by direct transfer to another 457(b) plan.	Yes.	Yes.	Yes.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
Is there a trust requirement?	A governmental 457(b) plan must be funded by assets insulated from the claims of the employer's creditors, such as a trust or an insurance contract. A nongovernmental plan may not be funded, except by an investment that is subject to the claims of the employer's general creditors.	Yes, unless plan is fully insured.	No, but must have annuity contracts or custodial accounts.	No, but must have a custodial account. However, a governmental employer can itself be the custodian.
Are funds protected from creditors of employees?	Probably yes. See *Rousey v. Jacoway,* 544 U.S. 320 (2005), holding that an individual retirement account, although not subject to ERISA, was nevertheless exempt from the claims of creditors under 11 U. S. C. § 522(d)(10)(E). Similar reasoning should apply to a 457(b) plan.	Probably yes. See *Rousey v. Jacoway,* 544 U.S. 320 (2005), holding that an individual retirement account, although not subject to ERISA, was nevertheless exempt from the claims of creditors under 11 U. S. C. § 522(d)(10)(E). Similar reasoning should apply to a 401(k) plan.	Probably yes. See *Rousey v. Jacoway,* 544 U.S. 320 (2005), holding that an individual retirement account, although not subject to ERISA, was nevertheless exempt from the claims of creditors under 11 U. S. C. § 522(d)(10)(E). Similar reasoning should apply to a 403(b) plan.	Probably yes. See *Rousey v. Jacoway,* 544 U.S. 320 (2005), holding that an individual retirement account, although not subject to ERISA, was nevertheless exempt from the claims of creditors under 11 U. S. C. § 522(d)(10)(E). Similar reasoning should apply to a deemed IRA.
Is there a prohibition on discrimination in favor of highly compensated employees?	No. In fact, a nongovernmental 457(b) plan must be limited to a select group of management or highly compensated employees, in order to prevent the prohibition on funding under section 457(b) from conflicting with the normal ERISA requirement that a plan be funded.	Yes, except in the case of a governmental or church plan. These rules include restrictions on the actual level of contributions as well as on the opportunity to contribute. The rules do not apply, however, if no highly compensated employees participate in the plan.	In the case of salary reduction contributions, simplified rules measure only availability of the right to make contributions, not actual contribution levels. In the case of other contributions, governments and nonelecting church plans are not subject to nondiscrimination requirements, but other employers are. For this purpose, a church-controlled organization is not a church.	Yes, as to availability. However, no testing need be performed on the amounts actually deferred by employees.
Are there salary reduction distribution restrictions?	Yes.	Yes.	Apply to elective deferrals made after December 31, 1988, and to earnings accrued after December 31, 1988 on both pre-1989 and post-1988 deferrals.	There are penalties on early withdrawal, but not prohibitions.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
Is there an exception to salary reduction distribution restrictions for hardships?	Only if the hardship represents an "unforeseeable emergency."	Yes.	Yes, but the exception applies only to the salary reduction contributions themselves, not to income on them.	NA
Is there an exception to salary reduction distribution restrictions for plan terminations?	Yes.	Yes.	Yes. Treas. Reg 1.403(b)-10.	NA
Do the minimum distribution requirements of section 401(a)(9) apply?	Yes.	Yes.	Yes, for elective deferrals made after December 31, 1988, and to earnings accrued after December 31, 1988 on both pre-1989 and post-1988 deferrals. Pre-1987 account balances are subject to less stringent rules under which distributions need not commence until the later of termination of employment or the date on which the employee attains (or in the case of a deceased employee, would have attained) age 75.	Yes.
Does Title I of ERISA apply?	Governmental Section 457(b) plans are exempt from Title I of ERISA. Nongovernmental plans must limit coverage to a select group of management or highly compensated employees in order to avoid ERISA Title I coverage, which would require funding incompatible with a nongovernmental 457(b) plan.	Yes, except in the case of a governmental or church plan.	No, in the case of a salary-reduction-only plan that meets certain requirements, or a governmental or church plan; yes in other instances.	No.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
Do prohibited transaction rules apply?	Cross-reference to Code Section 401(a) in Code Section 457(g) may make Section 503(b) prohibited transaction rules applicable to governmental 457(b) plans. Nongovernmental 457(b) plans are not covered by prohibited transaction rules.	Strict prohibited transaction rules under I.R.C. § 4975 apply to plans other than governmental or nonelecting church plans. Looser prohibited transaction rules under I.R.C. § 503(b) apply to governmental plans. In addition, some states apply prohibited transaction rules to governmental plans.	No, unless imposed by state or local law.	Yes, under Code section 408.
Are IRS determination letters available?	Only possible through National Office private letter ruling; no prototype submissions.	Yes.	Prototype submissions possible. No determination letters possible on individually designed plans.	No.
Is there IRS audit activity?	IRS is targeting 457(b) plans for audit.	No specific focus on 401(k) plans.	IRS is targeting 403(b) plans for audit.	No specific focus on deemed IRAs.
Are correction programs available?	The IRS will accept submissions relating to governmental 457(b) plans on a provisional basis outside of EPCRS. No corrections program is available for nongovernmental 457(b) plans.	EPCRS.	EPCRS. While historically 403(b) plans could use EPCRS only to a very limited extent, Revenue Procedure 2013-12, [2013-4 I.R.B. 313], as modified by Revenue Procedure 2015-27 [2015-16 I.R.B. 914] greatly expanded the circumstances in which EPCRS was available. However, the more limited procedures (found in Revenue Procedure 2008-50 [2008-35 I.R.B. 464]) must still be followed for 403(b) plan failures occurring prior to January 1, 2009.	No.
What state income tax considerations apply?	A few states have not brought their rules regarding 457(b) plans into conformity with federal law, which may lead to more restrictive rules in those states.	Typically none.	Some states (*e.g.,* New Jersey and Pennsylvania) impose income taxes on all 403(b) contributions.	Typically none.

	457(b) Plan	401(k) plan	403(b) Plan	Deemed IRA
What practical considerations apply?	• 457(b) plans are not really understood as a 401(k) equivalent. • Fewer entities provide services to 457(b) plans than to 401(k) or 403(b) plans. In many instances, the investment choices readily available are much less favorable. • 457(b) plans have become quite attractive as a supplement to 401(k) or 403(b) plans, if an employer wishes to provide for larger tax deferred contributions.	• Determination letters available; prototype submissions possible. • Overwhelming popularity makes 401(k) plans a recognizable commodity to most individuals. • Good software and support materials are available. • Better understanding in vendor community	• Prototype submissions possible; mo determination letters possible on individually designed plans. • 403(b) plans are not really understood as a 401(k) equivalent. • Good 403(b) software not as available. • Vendor understanding of 403(b) plans more limited.	• These plans do not provide a tax advantage over independently owned IRAs. Rather, they are designed to allow an employer to facilitate IRA ownership by employees.

See also: Maximum Benefits and Contributions Limits

Maximum Benefits and Contributions Limits for 2010 to 2015 (Posted on November 24, 2014 by)

Carol V.
Calhoun

See years from to

Type of Limitation	2015 1	2014 2	2013 3	2012 4	2011 5	2010 6
Elective Deferrals (401(k) and 403(b); not including adjustments and catch-ups)	**$18,000**	**$17,500**	**$17,500**	**$17,000**	**$16,500**	**$16,500**
457(b)(2) and 457(c)(1) Limits (not including catch-ups)	$18,000	$17,500	$17,500	$17,000	$16,500	$16,500
Section 414(v) Catch-Up Deferrals to 401(k), 403(b), 457(b), or SARSEP Plans 7	$6,000	$5,500	$5,500	$5,500	$5,500	$5,500
Defined Benefit Plans	$210,000	$210,000	$205,000	$200,000	$195,000	$195,000
Defined Contribution Plans (annual additions limit)	$53,000	$52,000	$51,000	$50,000	$49,000	$49,000
Annual Compensation Limit	$265,000	$260,000	$255,000	$250,000	$245,000	$245,000
Annual Compensation Limit for Grandfathered Participants in Governmental Plans Which Followed 401(a)(17) Limits (With Indexing) on July 1, 1993	$395,000	$385,000	$380,000	$375,000	$360,000	$360,000
Highly Compensated Employee (“HCEs”)	$120,000	$115,000	$115,000	$115,000	$110,000	$110,000
Individual Retirement Accounts (“IRAs”), for individuals 49 and below	$5,500	$5,500	$5,500	$5,000	$5,000	$5,000
Individual Retirement Accounts (“IRAs”), for individuals 50 and above	$6,500	$6,500	$6,500	$6,000	$6,000	$6,000
SIMPLE Retirement Accounts	$12,500	$12,000	$12,000	$11,500	$11,500	$11,500
SEP Coverage	$600	$550	$550	$550	$550	$550
SEP Compensation	$265,000	$260,000	$255,000	$250,000	$245,000	$245,000
Tax Credit ESOP Maximum Balance	$1,070,000	$1,050,000	$1,035,000	$1,015,000	$985,000	$985,000
Amount for Lengthening of 5-Year ESOP Period	$210,000	$210,000	$205,000	$200,000	$195,000	$195,000
Maximum Amount for Qualified Longevity Annuity Contract Purchases	$125,000	$125,000	N/A	N/A	N/A	N/A

Type of Limitation	2015 1	2014 2	2013 3	2012 4	2011 5	2010 6
Income Subject to Social Security Tax	$118,500	$117,000	$113,700	$110,100	$106,800	$106,800
FICA Tax for employers	7.65%	7.65%	7.65%	7.65%	7.65%	7.65%
FICA Tax for employees	7.65%	7.65%	7.65%	5.65%	5.65%	7.65%
Social Security Tax for employers	6.2%	6.2%	6.2%	6.2%	6.2%	6.2%
Social Security Tax for employees	6.2%	6.2%	6.2%	4.2%	4.2%	6.2%
Medicare Tax for employees and employers8	1.45%	1.45%	1.45%	1.45%	1.45%	1.45%
SECA Tax for self-employed workers	15.3%	15.3%	15.3%	13.3%	13.3%	15.3%
Social Security Tax for self-employed workers	12.4%	12.4%	12.4%	10.4%	10.4%	12.4%
Medicare Tax for self-employed workers	2.9%	2.9%	2.9%	2.9%	2.9%	2.9%

See also: Comparison of 457(b) Plans, 401(k) Plans, 403(b) Plans, and Deemed IRAs

Failure to Set a Date of Division and Other Timing Issues

Submitted by Ryan C. Cari and Kevin M. Urbik

VI. **Failure to set a date of division and other timing issues**

a. Before moving on to these other topics it is important to first talk about the standard division methods for these plans.

b. Separate Interest v. Shared Interest Approach.

   i. It is easiest to think about these two as either a division of what currently exists as a piece of property (Separate Interest Approach) or a division of the payment if and when received (Shared Interest Approach).

   ii. Separate Interest

      1. In every divorce the parties and the Court will be dividing marital property. Similar to a checking or savings account the parties may look at the retirement benefits the same way; i.e., your account/ benefit is currently worth X and my account is currently worth Y.
      2. Seen this way the parties will seek to draft an order that actually divides and segregates the participant's retirement benefit into two separate portions.
      3. Under this approach the participant's future payments, although they may be reduced because of the division, will not later be divided. Once separated the alternate payee will be entitled to a separate right to receive a portion of the retirement benefit to be paid at a time and in a form different from that chosen by the participant.

         a. Requirements:

i. The order must specify a percentage or actual dollar amount of the participant's current retirement benefit that is going to be assigned to the alternate payee. There are a number of ways to calculate the percentage; e.g. percentage as of the date of divorce, later date, or percentage of the marital portion.

ii. The order must also specify the number of payments or payment period. The alternate payee is often just given the right to elect the form of benefit and the time it will be paid similar to the right granted to the participant.

4. Since the participant's benefit is actually separated out to the alternate payee by the plan it will often create and hold the alternate payee's benefit in a separate account under the plan. This allows the alternate payee additional protections and rights in dealing with the plan similar to participant's rights.

iii. Shared Interest

1. By contrast, the shared interest approach only splits the actual benefit payments, not the underlying benefit. Although not entirely analogous, think of this as if the parties were going to continue to own a piece of commercial real estate following the divorce and split the rent payments received.
2. Once the order is approved and established the alternate payee will receive a part of each of the payments made to the participant, whether they are being made now or in the future.
3. The alternate payee is entirely dependent on the participant actually receiving a payment. This method is often used when the participant is already receiving payments from the plan and a different payment method cannot be elected.
    a. Requirements:

i. The order must specify a percentage or actual dollar amount of the participant's payment
ii. The order must also specify the number of payments or payment period.

c. Valuation Date Problems and Best Practices for Avoiding Them
   i. State Statutes:
      1. Always review your specific state statutes to determine the "general" date of division.
         a. Minnesota:
            i. The court shall value marital assets for purposes of division between the parties as of the day of the initially scheduled prehearing settlement conference, unless a different date is agreed upon by the parties, or unless the court makes specific findings that another date of valuation is fair and equitable. Minn. Stat. §518.58.
      2. I say general because you may need to use a different date depending on the other assets involved and the facts of your case.
         a. If the other party withdrew or even deposited significant amounts you may need to use a different date or division method.
   ii. Once you know which date will be used, either by statute, court rule, court order or agreement of the parties, it is generally best to include language similar to the following for the chance the plan will not have a valuation on that specific date:
      1. If records are not available as of a particular valuation date, the valuation date for which records are available which is closest to the date stated above shall be used.

d. Providing for Gains and Losses (Separate Interest Orders)
   i. Defined Contribution

1. It is assumed that your client, if they were to receive a separate interest under the QDRO, would not expect that money to just sit with the plan and not gain any interest. In addition to interest the plan documents may also provide for other additional benefits to the participants benefit. To what extent the alternate payee's separate interest will benefit from these items is a legitimate question when drafting the QDRO.
2. Your first step will always be to review the plan documents and how the participant's benefit is invested. From there you may be able to calculate a rate of return to provide your alternate payee client with some basic investment information about the plan or at least some information they will be able to share with their financial planner.
    a. After a review of this information the alternate payee may determine that it would be best to receive a lump sum payment, if available, and invest their portion of the benefit in another qualifies plan.
3. If, on the other hand, the alternate payee will be leaving the benefit with the plan you need to ensure the order provides for a division or equal treatment of the alternate payee's interest wit hthe participants.
    a. What assets or investment vehicles with the alternate payee's benefit be invested in?
    b. How will future contributions or forfeitures be allocated?
        i. Sample Language - In addition to the foregoing division, the assigned portion of benefits shall be proportionally credited with investment earnings and proportionately debited for investment losses and plan expenses until distributed.

ii. Defined Benefit

1. Although you should follow the same steps and consider the same issues as outlined above, in this type of benefit you also need to consider:
    a. Does the plan provide for any subsidies and how will those be treated?
    b. Future increases in benefit amount that are based upon:
        i. Increases in the participant's compensation,
        ii. Additional years of service, or
        iii. Changes in the plan or benefits provided thereunder. What if the plan changes to provide for additional or more favorable treatment to the participant's benefits?

e. Providing for Gains and Losses (Shared Interest Orders)
    i. If the "shared" interest amount to the alternate payee is a dollar amount you do not have to worry about this situation unless, for some reason, the amount which the participant is entitled is less than the dollar amount listed.
    ii. If the QDRO is structured so that the alternate payee is awarded a percentage of the participant's benefit payments, then, unless the QDRO provides otherwise, the alternate payee generally will automatically receive a share of any future increase in the participant's benefits.
        1. It is presumed that the participant's benefit will automatically receive the increases, subsidies, etc. that the participant is entitled to, and to the extent the participant's payment amount is increased the alternative payee will similarly see an increase if the percentage is based upon the participant's payment.

f. "Earliest Retirement Age"
    i. This timing issue ultimately decides when payments to the alternate payee can commence, unless the plan permits payments at an earlier date.
    ii. Earliest Retirement Age, as it relates to QDRO's depends on the terms of the plan and the participant's age. It is the earlier of :

1. The date on which the participant is entitled to receive a distribution under the plan, or
2. The later of either: (1) the date the participant reaches age 50, or (2) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service with the employer.

g. Commencement of Payments to the Alternate Payee
   i. Keep in mind that in regard to the form of the payment, federal law provides that the alternate payee cannot receive payments in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse.
   ii. Regardless of which of the following approaches is used, a QDRO cannot provide that an alternate payee will receive a benefit earlier than the date on which the participant reaches their "earliest retirement age," unless the plan specifically permits payments at an earlier date.
   iii. Other than these restrictions, see the plan documents to determine what is available, especially if your client will be expecting a lump sum payment as this may not be available.
   iv. Separate Interest Approach (Defined Contribution)
      1. As stated earlier, under this approach the alternate payee has additional options similar to what the participant would have under the plan. This will provide additional flexibility to the alternate payee in determining when to commence payments.
      2. The plan documents may contain provisions granting the alternate payee the right to receive separate interests awarded under a QDRO at an earlier time or under different circumstances than the participant could receive the benefit.
      3. The order itself will usually specify when the alternate payee is to receive their separate interest after it has been received and approved by the plan.

a. The plan may even allow for the alternate payee to receive the full benefit awarded to the alternate payee as a lump sum payment at a specified date.
    i. If the alternate payee informs you that they wish to receive a lump sum payment caution should be given and they should be informed to consult with their tax professional or accountant to ensure they fully understand any negative tax consequences and/or the applicable timelines for placing the assets into another qualified plan if that is their desire.

v. Shared Interest Approach
    1. The alternate payee receives payments under this approach only when the participant receives payments.
    2. A shared interest QDRO must specify the date on which the alternate payee will begin to receive their share of the payment.
    3. The earliest possible date for the alternate payee to receive benefits would be the time at which the plan receives the order, assuming payments have already started.
        a. Keep this in mind as you are drafting. If you are looking at a model order and it specifies a past date or date in the near future you should consider looking at another model.
    4. The plan may also require the alternate payee to fill out additional paperwork before benefits commence.
    5. This is why it is important to complete these orders in a timely manner as the alternate payee may miss out on a certain number of payments.

h. Time Is Money (Separate Interest Orders)
    i. Let's assume that as part of the divorce, in addition to receiving a protion of the parties marital property, including a portion of the participant's retirement benefit by QDRO, your client also received a temporary maintenance award (for approximately 5-10 years).

ii. Your client comes to you as the QDRO is being discussed and says they want to take the benefit in the form of a lump sum payment if available.
iii. You should be reminding the client of the temporary nature of the maintenance award and that if they elect to receive a lump sum payment, no further payments will be made by the plan. At the very least you should be advising them to consult with their financial planner.
iv. Often a client, if they are the alternate payee, will just want to split the assets, move on and not be tied to something that will remind them of the former spouse.
v. However, any choice they make regarding the form of benefits should take into account the period over which payments will be made and whether they actually need that money now rather than let it grow in the plan.
vi. Also, as discussed elsewhere herein, if fully withdrawn as a lump sum payment the alternate payee may lose out on any additional benefits or subsidies available under the plan at a later date, assuming those are covered in the order.

VII. **Failure to understand the implications of different valuation methods**

VIII. **Failure to address surviving spouse benefit issues (defined benefit)**

a. When you are preparing a QDRO, in addition to the retirement benefit to the participant you also must consider the survivor benefit - any benefit that is payable under the plan on behalf of the participant to someone else after the participant dies.
    i. Federal law requires all retirement plans to provide benefits in a way that includes a survivor benefit for the participant's "spouse." Spouse is highlighted here because obviously if you are dealing with a divorce the alternate payee will no longer be the participant's spouse. That being said, you can still provide this designation to the participant in the QDRO to ensure they are afforded certain additional benefits and protections.
    ii. This is an extremely important additional aspect you need to be certain is

not overlooked as it could have significant consequences on the benefit that is to be payable to the alternate payee.

iii. If the participant is on their second marriage, you will want to ensure you receive information from the plan regarding any previously filed QDRO's to determine if the previous order addressed survivor benefits and to what extent.

iv. If the participant is still relatively young and likely to remarry this may be a highly debated issue and/or an important reason to ensure your order covers survivor benefits. The reason being that if the a QDRO designates a former spouse as the participant's "surviving spouse" for the purposes of the survivor benefits, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse in regard to any part of the survivor benefits payable after the death of the participant.

b. Qualified Pre-Retirement Survivor Annuity v. Qualified Joint and Survivor Annuity Defined

   i. Pre-Retirement Survivor Annuity

      1. If a married participant with a non-forfeitable benefit under a plan dies before the start of receiving their payments this benefit must be paid to their surviving spouse.

   ii. Joint and Survivor Annuity

      1. Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the first day of the first period for which an amount is payable to the participant in a special form called a qualified joint and survivor annuity. This is done unless a different election is made and consented to by the alternate payee.
      2. When benefits are paid as a qualified joint and survivor annuity, the participant receives a periodic payment during his or her life, and the surviving spouse of the participant receives a periodic payment for the rest of the surviving spouse's life upon the participant's death.

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,	)	
		)
Petitioner,		)
		)
vs.		)
		)
,	)	
		)
Respondent.		)

TO:

REQUEST FOR PRODUCTION OF DOCUMENTS TO A NON PARTY

The requests production of the following documents for inspection and copying by his attorney, BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, within thirty (30) days after the receipt of this Request for Production.

1. Any and all pension records for employee , Social Security Number , as follows:

   a. Summary plan description;

   b. Latest summary annual report;

   c. Current statement of accrued vested benefits for I.R.S. form 5500, or it's equivalent;

   d. A current listing of any assets held by the employer on this employee's account.

2. Any and all records of employee savings and/or stock savings plans, including balances of employee's interest in same or any other funds held by the employer on this individual's behalf.

3. Statement reflecting all income, bonuses or other funds paid or stock distributions or other in kind distributions made to this employee from January 1, to the year-to-date including a listing of any deductions from income.

4. A statement reflecting this individual's date of hire, current status with the employer and date of termination if applicable and whether this individual does or has participated in any pension, defined benefit or deferred compensation plan and if so, the following:

a. Statement reflecting whether the individual was vested or the extent to which hewas vested on the date of and the present date and if vested;

b. The amount of any lump sum payment that said individual would have been entitled to receive had he terminated or otherwise separated from his employment on the date of and the present date;

c. The amount of any future benefit that said individual would be entitled to receive had he terminated or otherwise separated from his employment on the date of and the current date including the date that said benefit would begin being paid, the amount of the benefit, whether the benefit would be monthly, annually, or any other period of payment, the length that the benefit would continue to be paid, and the condition on which it would be terminated, and, if available, the present value of said benefit.

d. In addition to the information requested in paragraph 4c, state if said individual is or would be entitled to receive any early retirement benefit, or early retirement supplement, including information requested in paragraphs 4b and 4c as it would relate to any early retirement benefit of early retirement supplement.

The foregoing Request for Production is made pursuant to Trial Rule 34(c) of the Indiana Rules of Civil Procedure:

1. You are entitled to payment for damages resulting from your response to this Request for Production of Documents and Records.

2. You may respond to this Request for Production by submitting to its terms, or by objection specifically or generally to the Request for Production by serving written response to , BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, thirty (30) days from the receipt of the Request for Production or by moving to quash this Request for Production as permitted by Trial Rule 45(b) of the Indiana Rules of Procedure.

3. Failure to respond to this Request for Production or to object to it, or to move to quash it, as provided by the applicable Indiana Rules of Civil Procedure within thirty (30) days from its receipt, will subject you to a Motion for Sanctions pursuant to Trial Rule 37 of the Indiana Rules of Procedure.

Respectfully submitted,

BARROWS LEGAL GROUP, LLC

_____

Attorney for

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by first-class U.S. mail, postage prepaid, on the _____ day of , 20 .

_____

Attorney for

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,)
)
Petitioner,)
)
vs.)
)
,)
)
Respondent.)

TO:

NON-PARTY SUBPOENA

You are hereby commanded to produce the documents and records referred to in 's "Request for Production of Documents and Records to a Non-Party" attached hereto, to the law office of , BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, within thirty (30) days from receipt hereof.

DATED: _____

_____
, Attorney of Record
(Pursuant to T.R. 45 Amendment)

Christopher J. Barrows (21541-29)
BARROWS LEGAL GROUP LLC
9302 N. Meridian Street, Suite 235
Indianapolis, IN 46260

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,	)	
		)
Petitioner,		)
		)
vs.		)
		)
,	)	
		)
Respondent.		)

AFFIDAVIT OF BUSINESS RECORDS CUSTODIAN PURSUANT TO RULES OF EVIDENCE 803(6)

I, _____, being duly sworn state as follows:

1. I am over the age of 18 years and have personal knowledge of the matters set out herein.

2. I am _____ (title) of _____ (business name) and custodian of the records of _____ (business name).

3. I am the custodian and/or I supervise all record keeping and am familiar with the record keeping practices of this entity.

4. I have examined the attached documents numbering _____ pages.

5. There are either exact copies or originals retrieved from the permanent records of _____ (business name).

6. The record was made in the routine course of business, at or near the time of the event recorded, and not prepared in anticipation of litigation.

7. The record was made by or on information transmitted by an employee of _____ (business name) who had personal knowledge of the facts recorded.

8. The record is in the standard form used by _____ (business name) and it is the regular practice of _____ (business name) to make such a record.

I affirm, under the penalties for perjury, that the foregoing representations are true.

_____
Signature

_____
Printed Name

STATE OF _____)
) SS:
COUNTY OF _____)

Comes now _____, before me, a Notary Public, in and for the State and County above mentioned, and affixed his/her signature thereto on the _____ day of _____, 20___.

County of Residence:_____ _____
Notary Public (signature)

My Commission Expires:_____ _____
Notary Public (printed)

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,)
)
Petitioner,)
)
vs.)
)
,)
)
Respondent.)

TO: Thrift Savings Plan Legal Processing Unit

REQUEST FOR PRODUCTION OF DOCUMENTS TO A NON PARTY

The requests production of the following documents for inspection and copying by his attorney, BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, within thirty (30) days after the receipt of this Request for Production.

1. Any and all pension records for employee , Social Security Number , as follows:

   a. Summary plan description;

   b. Latest summary annual report;

   c. Current statement of accrued vested benefits for I.R.S. form 5500, or it's equivalent;

   d. A current listing of any assets held by the employer on this employee's account.

2. Any and all records of employee savings and/or stock savings plans, including balances of employee's interest in same or any other funds held by the employer on this individual's behalf.

3. Statement reflecting all income, bonuses or other funds paid or stock distributions or other in kind distributions made to this employee from January 1, to the year-to-date including a listing of any deductions from income.

4. A statement reflecting this individual's date of hire, current status with the employer and date of termination if applicable and whether this individual does or has participated in any pension, defined benefit or deferred compensation plan and if so, the following:

a. Statement reflecting whether the individual was vested or the extent to which he was vested on the date of and the present date and if vested;

b. The amount of any lump sum payment that said individual would have been entitled to receive had he terminated or otherwise separated from his employment on the date of and the present date;

c. The amount of any future benefit that said individual would be entitled to receive had he terminated or otherwise separated from his employment on the date of and the current date including the date that said benefit would begin being paid, the amount of the benefit, whether the benefit would be monthly, annually, or any other period of payment, the length that the benefit would continue to be paid, and the condition on which it would be terminated, and, if available, the present value of said benefit.

d. In addition to the information requested in paragraph 4c, state if said individual is or would be entitled to receive any early retirement benefit, or early retirement supplement, including information requested in paragraphs 4b and 4c as it would relate to any early retirement benefit of early retirement supplement.

The foregoing Request for Production is made pursuant to Trial Rule 34(c) of the Indiana Rules of Civil Procedure:

1. You are entitled to payment for damages resulting from your response to this Request for Production of Documents and Records.

2. You may respond to this Request for Production by submitting to its terms, or by objection specifically or generally to the Request for Production by serving written response to , BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, thirty (30) days from the receipt of the Request for Production or by moving to quash this Request for Production as permitted by Trial Rule 45(b) of the Indiana Rules of Procedure.

3. Failure to respond to this Request for Production or to object to it, or to move to quash it, as provided by the applicable Indiana Rules of Civil Procedure within thirty (30) days from its receipt, will subject you to a Motion for Sanctions pursuant to Trial Rule 37 of the Indiana Rules of Procedure.

Respectfully submitted,

BARROWS LEGAL GROUP LLC

_____

Attorney for

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by first-class U.S. mail, postage prepaid, on the _____ day of , 20 .

_____

Attorney for

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,)
)
Petitioner,)
)
vs.)
)
,)
)
Respondent.)

TO: Thrift Savings Plan Legal Processing Unit
Fairfax Post Office
CODIS - PO Box 4390
Fairfax, VA 22038-9998

NON-PARTY SUBPOENA

You are hereby commanded to produce the documents and records referred to in 's "Request for Production of Documents and Records to a Non-Party" attached hereto, to the law office of , BARROWS LEGAL GROUP, LLC, 9302 N. Meridian Street, Suite 235, Indianapolis, IN 46260, within thirty (30) days from receipt hereof.

DATED: _____

_____
, Attorney of Record
(Pursuant to T.R. 45 Amendment)

Christopher J. Barrows (21541-29)
BARROWS LEGAL GROUP, LLC
9302 N. Meridian Street, Suite 235
Indianapolis, IN 46260

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.

IN RE: THE MARRIAGE OF

,)
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Petitioner,)
)
vs.)
)
,)
)
Respondent.)

AFFIDAVIT OF BUSINESS RECORDS CUSTODIAN
PURSUANT TO RULES OF EVIDENCE 803(6)

I, _____, being duly sworn state as follows:

1. I am over the age of 18 years and have personal knowledge of the matters set out herein.

2. I am _____ (title) of _____ (business name) and custodian of the records of _____ (business name).

3. I am the custodian and/or I supervise all record keeping and am familiar with the record keeping practices of this entity.

4. I have examined the attached documents numbering _____ pages.

5. There are either exact copies or originals retrieved from the permanent records of _____ (business name).

6. The record was made in the routine course of business, at or near the time of the event recorded, and not prepared in anticipation of litigation.

7. The record was made by or on information transmitted by an employee of _____ (business name) who had personal knowledge of the facts recorded.

8. The record is in the standard form used by _____ (business name) and it is the regular practice of _____ (business name) to make such a record.

I affirm, under the penalties for perjury, that the foregoing representations are true.

_____
Signature

_____
Printed Name

STATE OF _____)
) SS:
COUNTY OF _____)

Comes now _____, before me, a Notary Public, in and for the State and County above mentioned, and affixed his/her signature thereto on the _____ day of _____, 20___.

County of Residence:_____ _____
Notary Public (signature)

My Commission Expires:_____ _____
Notary Public (printed)

December 6, 2016

RE:

Dear :

Enclosed please find a Qualified Domestic Relations Order that has been approved by the Court indicated thereon. Please proceed with the transfer of benefits to the Alternate Payee, , from the Participant, s plan pursuant to the terms of this Order.

The Participant's Social Security Number is .
The Alternate Payee's Social Security Number is .

I would appreciate receiving written confirmation that you have received this Order. Please provide confirmation that you have received this. If you have any questions or concerns, please feel free to contact me.

Sincerely,

BARROWS LEGAL GROUP LLC

Enclosure
cc:

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.
,	)	
		)
Petitioner,		)
		)
vs.		)
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		)
Respondent.		)

DETERMINATION AS TO QUALIFICATION OF DOMESTIC RELATIONS ORDER, NOTICE TO PARTICIPANT AND ALTERNATE PAYEE, AGREEMENT TO COMPLY WITH ORDER AND OTHER RELIEF

Pursuant to the applicable sections of the Retirement Equity Act of 1984 and the Employment Retirement Income Security Act of 1974 and the Internal Revenue Code, the Plan Administrator, and any successor, and any successor plan of the same employer or any plan of a successor employer, hereby states and agrees as follows:

1. This Order is a qualified domestic relations order under the Retirement Act and the participant and alternate payee are hereby so notified; and

2. The participant and alternate payee will be notified sixty (60) days before payment of the first retirement benefits under this order and of any future material changes with respect to said plan, benefits, and/or account balances; and

3. Said plan administrator will comply with all of the terms and conditions of said order, pursuant to the appropriate sections of ERISA, and in accordance with fiduciary standards set forth in said retirement act and ERISA.

Dated this ___ day of _____, 20 , and effective _____.

_____
Plan Administrator

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by first-class U.S. mail, postage prepaid, on the _____ day of , 20 .

_____

Attorney for

Forms\Finalization\QDRO Determination of Qualification-Defined Benefit

STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	) SS:	CIVIL DIVISION, ROOM NO.
COUNTY OF MARION	)	CAUSE NO.
,	)	
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Petitioner,		)
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vs.		)
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Respondent.		)

DETERMINATION AS TO QUALIFICATION OF DOMESTIC RELATIONS ORDER, NOTICE TO PARTICIPANT AND ALTERNATE PAYEE, AGREEMENT TO COMPLY WITH ORDER AND OTHER RELIEF

Pursuant to the applicable sections of the Retirement Equity Act of 1984 and the Employment Retirement Income Security Act of 1974 and the Internal Revenue Code, the Plan Administrator, and any successor, and any successor plan of the same employer or any plan of a successor employer, hereby states and agrees as follows:

1. This Order is a qualified domestic relations order under the Retirement Act and the participant and alternate payee are hereby so notified; and

2. The participant and alternate payee will be notified of this determination, and of the options for payment or division of the plan; and

3. Said plan administrator will comply with all of the terms and conditions of said order, pursuant to the appropriate sections of ERISA, and in accordance with fiduciary standards set forth in said retirement act and ERISA.

Dated this ___ day of _____, 20 , and effective _____.

_____
Plan Administrator

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon the following by first-class U.S. mail, postage prepaid, on the _____ day of , 20 .

_____

Attorney for

Forms\Finalization\QDRO Determination of Qualification-Defined Contribution

December 6, 2016

RE:

Dear :

I represent the _____ in the above captioned cause. This is a divorce under Indiana law. Among the assets subject to division are retirement accounts including the one of which you are an administrator. Please consider putting a hold on transfers of funds from the Participant's account, and on any changes in beneficiaries pending final resolution of the above captioned cause.

The Participant's Social Security Number is .
The Alternate Payee's Social Security Number is .

Regardless of the Administrator's policy on placing holds on the accounts during the pending dissolution of marriage, please let this letter serve as notice that you have a fiduciary duty under ERISA to both the Participant and Alternate Payee, and that any changes in the Participants beneficiaries and or transfers of funds during this time are subject to that fiduciary duty.

Please provide confirmation that you have received this. If you have any questions or concerns, please feel free to contact me.

Sincerely,

BARROWS LEGAL GROUP LLC

Enclosure

December 6, 2016

RE:

Dear :

Enclosed please find a Draft Domestic Relations Order that I have prepared based upon the terms required by you, the administrator. Please review the document and provide me with any feedback on what is needed to ensure that it qualifies but for Court signature. In the meantime, please consider putting a hold on any transfers of the funds in the account pending final approval of the order by you and the Court.

I would appreciate complete the enclosed Determination as to Qualification and return to me in the SASE.. I will then file that with the Court to speed up the process of court approval. Please provide confirmation that you have received this. If you have any questions or concerns, please feel free to contact me.

Sincerely,

BARROWS LEGAL GROUP LLC

Enclosure
cc:

Failure to Address Surviving Spouse Benefit Issues (Defined Benefit)

Submitted by Marshal S. Willick

I. The Basics to Watch For

In dealing with any retirement program, the practitioner should pay attention to the following essential elements:

- What will be available (and the form B whether a monthly annuity, or with a lump sum option), and whether there might be more than one plan associated with a particular wage-earner.
- The amount of the benefit that is divisible community or marital property, under the time rule, direct tracing, or some other analysis.
- When that sum is to be first available for distribution, and what steps might be taken by either party to accelerate or delay that availability.
- What, if any, survivor benefits might be accorded to a former spouse in addition to or in place of the retirement benefits, and who will pay for them.
- Whether any ancillary benefits are available (usually most importantly, medical benefits).

After these basics come a few other matters that should be consciously addressed in every divorce case involving pension benefits before the case is over:

- What notices are required to be given, within what time limits, to which authorities, in order to make sums payable to the spouse or permit the transfer of other interests.
- What effect a present or future disability claim by the retiree or the former spouse could have on payment of benefits (and what, if anything, you can do about it in advance).
- Whether and what post-divorce actions of either of the parties (such as nomination by the wage-earner of a second spouse as beneficiary, or remarriage of the former spouse) could affect the distribution of benefits provided by the Decree, and what can or should be done about those possibilities.

Failure to deal with all of these matters in litigation or negotiations, and especially in the court orders, could lead to unforeseen and unfortunate results for parties, counsel, or both.

Practitioners should distinguish the Abenefits@ expected to be provided by a plan from the Avalue@ of that plan, and distinguish both of those terms from Acontributions.@ ***Benefits*** are what the retiree will actually receive upon retirement, usually phrased as a right to receive certain sums on a certain schedule. The ***value*** of a pension interest, on the other hand, is generally considered to be equal to the cost, at any given time, of acquiring an annuity that would pay equivalent benefits. ***Contributions***, whether from the employee, the employer, or both, do not necessarily have any correspondence to either the benefits of a plan or its value at any given time. Failure to perceive these distinctions can lead to gross over- or under-valuation of the assets at issue, and corresponding errors in agreed or litigated distributions.

It is important to note that pension interests are property and not alimony. The Nevada Supreme Court, for instance, has stressed that distinction based upon the non-modifiability of pension awards (whereas alimony is generally modifiable), and generally prohibits classifying one kind of payment as the other.

The materials below are primarily concerned with private employers, for which retirement benefits are governed by ERISA.[1] Civil Service, Military, and State Government retirement plans are ***not*** governed by ERISA; in some areas, where the contrasts between the retirement systems are relevant to the discussion, the below materials highlight distinctions between and among the kinds of plans.

II. Separate Interest v. Shared Interest

ERISA and the Internal Revenue Code allow payment to a nonemployee spouse under a QDRO that provides for a separate interest for the nonemployee spouse in any form in which such benefits could have been paid under the plan to the participant (other than in the form of a joint and survivor annuity over the life of the nonemployee spouse and that person=s subsequent spouse). Consequently, for example, a former spouse should be able to elect a lump-sum payment, periodic payments, or a single life annuity, if otherwise offered under the plan.

In such cases, once the former spouse has elected to begin receipt of benefits, as a life annuity or otherwise, the participant=s death should not affect the continued stream of payments to the former spouse. If that is accomplished, no Asurviving spouse@ provisions are necessary B in fact, including such gives the former spouse a double-benefit windfall.

When a QDRO is not prepared until after the employee has retired without providing for the former spouse in the event of the employee=s death, options that will guarantee a continued benefit to the former spouse in the event of the participant=s death may be severely limited.

Under a Ashared interest@ QDRO, the participant and alternate payee Ashare@ each of the participant=s lifetime benefit payments; only the payment stream is divided. Therefore, payment to the alternate payee of a share of the participant=s lifetime payments stops when the participant dies.

A shared interest QDRO may also award the alternate payee an interest in any lump sum death benefits that become payable as a result of the participant=s death. Any remaining balance of the lump sum death benefit in excess of that which is payable to the alternate payee would be paid to the participant=s beneficiary.

[1] The Retirement Equity Act of 1984, Pub. L. No 98-397. See also Section 414(p) of the Internal Revenue Code of 1986, as amended.

III. Surviving Spouse Provisions

Steps should be taken to draft and obtain a retirement benefits order (if necessary) to protect against the loss of survivor benefits at the outset of divorce proceedings where either party is a participant in a qualified private plan. The nonemployee spouse=s attorney should not allow termination of marital status without protecting survivor benefits for the client.

Many pension plans will deny a former spouse any share of the qualified preretirement survivor benefit (QPSA) if a QDRO is not entered before the death of a participant. In some defined benefit plans, a QPSA for the current spouse (or deemed current spouse under a QDRO) is the only benefit available if a participant dies while still employed.

In addition, the attorney may find that the QPSA has been waived in favor of another beneficiary designation for the preretirement death benefits. In either event, unless the former spouse=s rights are preserved by an award of Asurviving spouse@ status in a QDRO upon divorce, it may be very difficult to assert the former spouse=s marital interest in the participant=s benefits.[2]

If the marital status termination is being obtained before the property division and a defined benefit plan QDRO must be prepared, the attorney should use an Ainterim@ QDRO to protect the nonemployee spouse=s eligibility for survivor benefits under the plan. The interim QDRO should be entered at the same time as the judgment terminating marital status, to avoid any gap in surviving spouse status while the permanent QDRO is being prepared and approved.

When dealing with plans other than qualified private plans, the attorney should find out from the plan what the effect would be if a party died after termination of the marriage but before entry of a proper order dividing the plan benefits. That inquiry should be made ***before*** agreeing to terminate marital status.

If a QDRO so provides, the surviving former spouse of a participant must be treated as the participant=s surviving spouse for purposes of any qualified preretirement survivor annuity or qualified joint and survivor annuity, and any spouse of the participant must ***not*** be treated as the participant=s surviving spouse for such purposes, to the extent of the deemed surviving spouse=s interest in those benefits.[3]

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[2] See *Hearn v. Western Conf of Teamsters Pension Fund*, 68 F.3d 301 (9th Cir. 1995); *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir. 1991). See also *Trustees of Directors Guild v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002), (nunc pro tunc QDRO entered as of date preceding employee=s death not preempted by ERISA when plan was a missed asset, plan proceeds not disbursed, and competing Aalternate payee@ not identified); *Hogan v. Raytheon*, 2001 US Dist LEXIS 10595 (ND Iowa, July 9, 2001, No. C00C0026) (QDRO allowed within 18 months of employee=s death even though survivor benefits not mentioned in judgment).

[3] On the importance of obtaining a timely QDRO, see *Hopkins v. AT&T Global Info. Solutions Co.* 105 F.3d 153 (4th Cir. 1997) (order directing that former spouse be designated as surviving spouse rejected because surviving spouse benefit had vested in subsequent spouse on employee=s retirement). See also *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999); *Rivers v. Central & S.W. Corp.*, 186 F.3d 681 (5th Cir. 1999)(former spouse who neglected to obtain QDRO before employee=s retirement Aforever barred@ from acquiring interest in his pension plan). But see *Trustees of Directors Guild v. Tise*, 234 F.3d 415, 421 n5, 422 n6) (9th Cir. 2000) (dicta

calling *Hopkins* and *Rivers* analysis into question). See also *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002) (Anunc pro tunc@ QDRO entered as of date preceding employee=s death not preempted by ERISA when plan was a missed asset, plan proceeds not disbursed, and competing Aalternate payee@ not identified); *Hogan v. Raytheon*, 2001 US Dist LEXIS 10595 (ND Iowa, July 9, 2001, No. C00C0026) (QDRO allowed within 18 months of employee=s death even though survivor benefits not mentioned in judgment).

To the extent that a ***former*** spouse is treated as a Asurviving (i.e., current) spouse@ under the terms of a QDRO, an ***actual*** current spouse will not share in survivor benefits. The QDRO may altogether exclude a current spouse from sharing in survivor benefits, or it may provide for a sharing of benefits between former spouses or between a former spouse and a current spouse. For example, a former spouse=s survivor benefits may be limited to those accrued during the employee=s marriage to that spouse. The plan may require, however, that any alternate payee must have been married to the participant for at least 1 year to be eligible for any of the qualified survivor benefits.[4]

A. Qualified Preretirement Survivor Annuity (QPSA)

ERISA and the Internal Revenue Code require that a Qualified Preretirement Survivor Annuity (QPSA) be provided to the surviving spouse of a married and vested participant who dies before that participant=s annuity starting date.[5]

This requirement applies to all defined benefit plans, all defined contribution plans that are pension plans (e.g., a money purchase pension plan), and some profit-sharing, employee stock ownership (ESOPs), and 401(k) plans.[6] The annuity continues for the life of the surviving spouse.[7]

If applicable to a plan, the QPSA requirement will be specified in the plan document and in the Summary Plan Description. This form of benefit may be waived by the participant (with the consent of the current spouse) so that a nonspouse beneficiary may be named. In addition, a plan may permit the surviving spouse to elect payment of the benefit in some form other than an annuity. If applicable, such waivers and any alternative forms of benefit will be detailed in the plan document.

A former spouse may be treated as a Asurviving spouse,@ but only if a QDRO so provides.[8] Consequently, it is essential that the attorney ascertain the manner in which the plan recognizes the rights of a former spouse if the employee dies before retirement and specify those rights in the QDRO. This is particularly important for defined benefit plans that offer no preretirement death benefit other than the QPSA. In such plans, the participant=s entire benefit reverts to the plan and be lost if the participant is not married and dies before entering pay status.[9]

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[4] 29 U.S.C. ' '1056(d)(3)(F).

[5] 29 USC '1055(a)(2); IRC '~401(a)(11)(A)(ii), 417.

[6] 29 USC '1055(b)(1); IRC '401(a)(11)(B).

[7] 29 USC ' 1055(e).

[8] 29 USC ' 1 056(d)(3)(F).

[9] See, e.g., *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999).

In *Samaroo*, after the employee=s preretirement death, his ex-spouse obtained a *nunc pro tunc* amendment to the state divorce decree providing for benefits under the employee=s QPSA. The Third Circuit held that the amended decree was not a QDRO because, by conferring survivor=s benefits after they had lapsed, it impermissibly increased the plan=s liability. Although there may be a way to distinguish the facts on this issue,[10] the case stands as a warning for why the spouse=s attorney should not agree to a termination of marital status until appropriate provision has been made to protect the survivor benefit. If necessary, an Ainterim QDRO@ may be used for this purpose before information is available to accurately determine the parties= respective interests.

In a defined contribution plan, there is no danger of the benefit being lost on the participant=s death in the absence of a surviving spouse. The plan will pay out the full vested account balance, reduced by any security interest held by the plan for an outstanding loan to the participant, to one or more persons in the form of a QPSA (if offered by the plan), a death benefit, or both. If, for example, the plan provides for a QPSA with a 50-percent survivor benefit and a former spouse is the only Aspouse@ eligible for it, the former spouse will receive half of the account balance as of the date of death and the participant=s designated beneficiary will receive the other half.

Most often, a former spouse=s benefit is stated in the plan as a specified fraction of whatever is payable under the plan. Consequently, if the employee dies during the preretirement period under a defined benefit plan that offers only a 50-percent QPSA, the former spouse=s fraction may be applied, unless the QDRO specifies otherwise, against a survivor benefit that is only half of the benefit that would have been payable had the employee lived. One approach to this problem is for the QDRO to provide that in the event of the death of either spouse before the commencement of benefits, that portion of the lifetime community share of the decedent is waived in favor of the survivor.

Some public plans do not adequately (or at all) protect the rights of the nonemployee spouse during the preretirement period. In cases involving such plans, particularly when the employee is too young to be permitted to make a preretirement option selection, the attorney may wish to consider obtaining private life insurance as a backup.

B. Qualified Joint and Survivor Annuity (QJSA)

ERISA and the Internal Revenue Code require that the accrued benefit be provided in the form of a Qualified Joint and Survivor Annuity (QJSA) for every vested participant who reaches the annuity starting date.[11]

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[10] *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002) (in which the post-death QDRO was for a missed asset).

[11] 29 U.S.C. ' '1055(a)(1); IRC '40l(a)(l1)(A)(i), 417.

This requirement applies to all defined benefit plans, all defined contribution plans that are pension plans (e.g., a money purchase pension plan), and some profit-sharing, employee stock ownership (ESOPs), and 401(k) plans.[12] A QJSA provides an annuity for the life of the participant, with a survivor annuity for the life of a spouse that is at least 50 percent of the amount payable during the joint lives of the participant and the spouse.[13] A former spouse is treated as a current spouse as of the annuity starting date if a QDRO so provides.[14]

Plans that allow for the QJSA form of benefit to be waived with the consent of the current spouse (or deemed current spouse under a QDRO)[15] allow election of an alternate form of benefit. No waiver or consent is necessary when an alternate form of benefit is specified in the QDRO.

ERISA and the Internal Revenue Code allow payment to a nonemployee spouse, under a QDRO that provides for a separate interest for the nonemployee spouse, in any form in which such benefits could have been paid under the plan to the participant, other than in the form of a joint and survivor annuity over the life of the nonemployee spouse and that person=s current spouse.[16]

Consequently, for example, a former spouse should be able to elect a lump-sum payment, periodic payments, or a single life annuity, if otherwise offered under the plan. In such cases, once the former spouse has elected to begin receipt of benefits, as a life annuity or otherwise, the participant=s death should not affect the continued stream of payments to the former spouse. A few defined benefit plans have historically refused to pay a single life annuity based on the former spouse=s lifetime, thereby forcing election of a joint and survivor annuity with the participant (i.e., a Ashared interest@ QDRO) as the only device by which the former spouse=s benefit would continue under the plan if the employee dies first.

When a QDRO is not prepared until after the employee has retired without providing for the former spouse in the event of the employee=s death, options that will guarantee a continued benefit to the former spouse in the event of the participant=s death may be severely limited. The former spouse can request that the plan convert the alternate payee=s share of the employee=s benefit into a single life annuity for the alternate payee, but the plan may not make that accommodation, particularly if the retirement has been in place for a significant period of time.

If the employee selected a single life annuity at retirement, the former spouse might request that

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[12] 29 U.S.C. ' '1055(b)(1); IRC '40l(a)(l1)(B).

[13] 29 U.S.C. ' ' 1055(d).

[14] 29 U.S.C. ' ' 1056(d)(3)(F).

[15] 29 U.S.C. ' ' 1055(c).

[16] 29 U.S.C. ' ' 1056(d)(3)(E)(i)(III).

the plan change the form of benefit to a joint and survivor annuity by court order.[17] However, the *Allison* holding was not subjected to ERISA preemption arguments within the federal court system.[18]

The current case law indicates that the election of a surviving spouse for a QJSA Avests@ in the spouse of the moment at the time of retirement, no matter what the parties (or divorce court) intend. Such vesting can favor a prior spouse over a later spouse, or a later spouse over a former spouse.

[17] See *Marriage of Allison*, 189 CA3d 849, 234 CR 671 (1987).

[18] 29 U.S.C. ' ' 1144.

If the employee retired while married to a former spouse, that spouse becomes the irrevocable, vested, recipient of the QJSA benefits under the plan even if the spouse purports to give up those benefits in a later divorce from the participant, and the participant marries someone else and attempts to name that spouse as the beneficiary.[19]

If no QDRO was entered upon divorce from the former spouse, and the employee remarries and selects a joint and survivor annuity with a subsequent spouse, it may be too late for the former spouse to be named even a partial beneficiary of that survivor option.[20] Under these circumstances, the former spouse may be limited to a resulting trust interest in the survivor benefit received by the subsequent spouse.[21] It is not clear that even a resulting trust will be effective.[22]

If the QDRO is not prepared until after the participant has died, the options may be even ***more*** limited, or nonexistent. The attorney faced with this situation might consider the following steps:

$ Request a copy of the plan retirement election forms to ascertain whether the plan inquired under penalty of perjury regarding the interests of a former spouse and, if not, explore possible actions against the plan;

$ If no other form of survivor coverage is available for the former spouse, have an actuary calculate how much will need to be paid to the former spouse to result in an actuarially equal division of the community interest, given the different life expectancies of the parties, and seek court orders accordingly; and

$ Seek a *nunc pro tunc* order.[23]

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[19] See *Carmona v. Carmona*, 544 F.3d 988 (9th Cir. 2008). For a discussion and explanation of the last *Carmona* holding, *see In re Marriage of Padgett*, 172 Cal. App. 4th 830, 91 Cal. Rptr. 3d 475 (Ct. App. 2009); *see also Kennedy v. Plan Adm'r for DuPont Sav. and Inv.* ___ *U.S.* ___, 129 S. Ct. 865, 172 L. Ed.2d 662 (2009) (explicitly refusing to express any view as to whether an action could have been brought in state or federal court against the beneficiary who waived the benefits after they were distributed, noting (at footnote 10) that various courts have distinguished the Court=s prior holding in *Boggs v. Boggs*, 520 U.S. 833, 853 (1997)).

[20] See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997) (order directing that former spouse be designated as surviving spouse rejected because surviving spouse benefit had vested in subsequent spouse on employee=s retirement); *Rivers v. Central & S.W. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) (following *Hopkins*).

[21] See *Marriage of Becker*, 161 CA3d 65, 207 CR 392 (1984).

[22] See *Boggs v. Boggs*, 520 US 833, 138 L. Ed. 2d 45, 117 S. Ct. 1754 (1997); see also *Barnett v. Barnett*, 62 SW3d 107 (Tex. 2001).

[23] See *Trustees of Directors Guild v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Hogan v. Raytheon*, 2001 US Dist LEXIS 10595) (ND Iowa, July 9, 2001, No. C00C0026).

VII. Beneficiary Designations

A retirement benefits order should address what happens if the nonemployee spouse dies before receipt of full benefits under the plan. Most community property states require courts to make whatever orders are necessary or appropriate to ensure that each party receives half of the community share of any retirement plan, including all survivor and death benefits.

For example, the trial court order in *Shelstead* provided that the share payable to the nonemployee spouse would continue to be paid to her, or to her Adesignated successor in interest,@ should she predecease the employee spouse, until terminated by the employee spouse=s death. The court of appeal held that because this provision might require the pension plan to pay benefits to an individual who is not an Aalternate payee@[24] the order could not be a QDRO.[25]

The *Shelstead* court, however, expressly did not reach the issue of whether the order ***would have been*** valid if it had specifically identified the nonemployee spouse=s Asuccessor in interest@ to be an individual (e.g., the parties= child) who did come within the Aalternate payee@ definition. Likewise, the court did not reach the issue of whether the order would have been valid if it had provided the nonemployee spouse=s rights in a different form, e.g., using a Aseparate interest@ approach that divided the benefit between the parties rather than just the payments, which might have allowed the alternate payee to designate a beneficiary under the plan.

A retirement benefits order prepared to secure the nonemployee spouse=s interest in a pension should address what happens in the event of the death of either spouse:

$ If the nonemployee spouse predeceases the employee spouse before either party has begun receipt of retirement benefits;[26]

$ If the nonemployee spouse is sharing the benefit stream during the life of the employee spouse and predeceases the employee spouse;[27] and

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[24] 29 USC ' 1056(d)(3)(K)) limited to a spouse, former spouse, child, or other dependent of the participant.

[25] See *In Marriage of Shelstead*, 66 CA4th 893, 78 CR2d 365 (1998) (addressing federal preemption limits on a court=s ability in a dissolution action to provide the nonemployee spouse with the right to name a successor in interest to receive his or her share of undistributed community property pension benefits on the nonemployee spouse=s death). In some states, the mandate of full division is non-direct, including a general statute requiring equal division and some surrounding case law requiring courts to follow the statutes; *see*, *e.g.*, NRS 125.150(1(b) (requiring equal division of property); *Blanco v. Blanco*, 129 Nev. ___, 311 P.3d 1170 (Adv. Opn. No. 77, Oct. 31, 2013).

[26] See *Marriage of Powers*, 218 CA3d 626, 267 CR 350 (1990).

[27] See *Marriage of Rich*, 73 CA4th 419, 86 CR2d 452 (1999); *Branco v. UFCW-N. Cal. Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002) (ERISA preempted state community property law permitting former wife=s interest in husband=s pension benefits to pass to her heirs when she predeceased him; her pension benefit share payable to husband under plan when, after her death, divorce order not valid QDRO within exception to ERISA=s anti-alienation provision).

$ If the nonemployee spouse is to receive a single life annuity from the plan but dies before that benefit commences.

Especially in light of the issues *Shelstead* did not resolve, all of these questions should be taken up with the plan, to learn how it intends to administer the rights of the alternate payee with respect to beneficiaries pending further clarification by the courts of whether and under what circumstances an alternate payee can name a beneficiary. For example, a plan might require that the benefit Arevert@ to the employee if the former spouse predeceases the employee before either has begun receipt of benefits. Such a reversion would result in an unequal division of the community interest in the plan. Such a forfeiture may be compensated, e.g., through actuarial adjustments within the pension formula, or through the award of other property.

The *Shelstead* QDRO was a shared-interest order; the beneficiary problem typically does not arise under a separate-interest QDRO because the right to name a beneficiary is part of the benefit choices. Even when a plan implementing a shared-interest QDRO (as opposed to a separate-interest QDRO) ***will*** allow a former spouse to transfer his or her interest at death, it will probably limit the potential beneficiaries, most likely to the choices within the definition of an Aalternate payee.@ If the plan will reject a desired beneficiary provision, the client must decide whether the right to name a beneficiary is worth a court battle with the plan, or with other prospective benefit recipients.

A QDRO that allows the alternate payee to designate a beneficiary in the event of the alternate payee=s death should specify:

$ The beneficiary=s name and address, or a requirement that the plan provide forms for designating a beneficiary;

$ A direction or mechanism for determining an alternate beneficiary if the chosen beneficiary predeceases the alternate payee; and

$ That the burden is on the alternate payee, or the successor in interest, to keep the plan informed of status changes.

VIII. Other Issues Relating to Surviving Spouse Benefits

A. Military Cases

1. Survivor=s Benefits (SBP)

In a system like that of the military B in which the payments (but not the retirement itself) can be divided B the payment of all retirement benefits, *per se*, ends with the life of the person in whose name the benefits were earned. The structure of the plan determines what happens to the spousal portion of the payment stream if the spouse dies first B they automatically revert to the member.

What may happen if the member dies first is much more potentially variable, and complex. For a spouse B or former spouse B to continue receiving money after death of the member or participant, there must be specific provision made for payments after the death of the member, by way of a separate, survivorship interest payable to the former spouse upon the death of the member.

The Survivor=s Benefit Plan (SBP) pays a percentage of the member=s retirement to the surviving spouse or former spouse. In 1986, Congress amended the USFSPA so that State courts could order that former spouses be members= beneficiaries. If a member elects, or is Adeemed@ by a court to have elected, to provide the SBP to a former spouse, the member=s current spouse and children of that spouse cannot be beneficiaries. Generally, an election to make a former spouse an SBP beneficiary is not revocable; if the election was pursuant to court order, a superseding court order is necessary to change it. A survivor annuity payable to a widow, widower, or former spouse is Asuspended@ if the beneficiary remarries before age 55.

To initiate a Adeemed election,@ the former spouse must file a written request with the appropriate Service Secretary requesting that the election be deemed to have been made. The written request must be filed within one year of the date of the court order. There are various technical requirements.

It should be noted that the amount of the survivorship interest is variable, and provides planning opportunities for counsel. The maximum SBP is selected if the entire retired pay is selected as the Abase amount.@ The smaller the base amount selected, the smaller the survivor annuity B and the smaller the lifetime premium paid to supply it. Whatever the base amount selected, cost of living adjustments increase a base amount so as to keep it proportionally the same as the amount initially selected.

No matter what any court orders, the military pay center can only take the premium Aoff the top@ of the monthly payments of the regular retirement. Unfortunately, and counter-intuitively, that results in the parties each bearing a portion of the survivorship premium in exact proportion to their shares of the retirement itself. In other words, if the retirement is being split 50/50, then the parties share the cost of the SBP premium equally, but if the spouse is entitled to only 25% of the monthly retired pay, then the member effectively pays 75% of the SBP premium.

It is possible to effectively cause the member, or the spouse, to bear the full financial burden of the SBP premium, but doing so requires indirectly adjusting the percentage of the monthly lifetime benefits each party receives.

If the designation of a former spouse as beneficiary is made by a member, it technically is to be written, signed by the member, and received by the Defense Finance and Accounting Service within one year after the date of the decree of divorce, dissolution, or annulment. But, as a practical matter, this has not been nearly so much a bright line test as might be thought.

At the time of the election, the member must submit a written statement to the appropriate Service Secretary. The statement must be signed by both the former spouse and the member, and state whether the election is being made pursuant to the requirements of a court order or a written voluntary agreement previously entered into by the member as a part of or incident to a divorce, dissolution, or annulment proceeding. If pursuant to a written agreement, the statement must state whether such a voluntary agreement was incorporated in, ratified or approved by a court order.

Anecdotal accounts, however, suggest that, informally, DFAS has adopted the position that a member divorced prior to retiring actually is to be provided the opportunity to name a former spouse as the SBP beneficiary until the last day of military service within which to name his former spouse as the beneficiary, even if that last date of service is years after the date of divorce.

The Services, additionally, have been quite liberal in granting Aadministrative corrections@ at the requests of members, even years after a divorce, when spouse coverage was in effect rather than Aformer spouse@ coverage, but premiums were paid and the members claimed that they Amistakenly assumed that [the former spouse] remained the covered beneficiary following the divorce since SBP costs continued to be withheld.@

The situation is quite different when the former spouse sends in a Adeemed election@ after a court orders the beneficiary designation, but without the active cooperation of the member. In fact, the matter of Adeemed elections@ and former spouse eligibility for SBP payments presents the single biggest malpractice trap in this area, at least when it is attempted without the member=s cooperation.

For many years, it was widely believed that the one-year period in which a former spouse must request a deemed election ran concurrently with the one-year period in which a member must make the election after the divorce. It was therefore thought that the former spouse simply lost the SBP designation entirely if he or she waited until the member=s one-year election period ended.

Because the rules for members= designation of beneficiaries, and former spouse deemed elections are provided by different sections of law enacted at different times, however, the prior Acommon knowledge@ is not correct; the actual rules are slightly more flexible, much more complicated, and a bit illogical in application.

If the original divorce decree is silent as to the SBP (or perhaps just so unclear as to make the original order unworkable), the spouse might be able to extend the period within which he or she can request a deemed election by returning to court after the divorce and obtaining an order stating that the spouse is to be deemed the SBP beneficiary. This is because the member is obliged to make the election Awithin one year after the date of the decree of divorce, dissolution, or annulment,@ whereas the former spouse must make the request Awithin one year of the date of the court order or filing involved.@

Thus, if there was no previous order giving a right to the former spouse to be the SBP beneficiary, the one-year deemed election period runs from the date of a post-divorce order concerning the SBP. This is true for orders that issued prior to the effective date of the SBP deemed beneficiary law, as well as orders that inadequately attempted to provide for the SBP, or omitted all mention of the benefit.

However, once a valid court order is issued requiring coverage, the one year period begins to run, and any subsequent court order that merely reiterates, restates, or confirms the right of coverage as SBP beneficiary cannot be used to start a new one-year election period.

The SBP is an extremely important benefit, which practitioners ignore at their considerable peril in malpractice. While there are malpractice dangers in all retirement-related cases, they are most severe relating to survivorship matters. The potential losses to the client are catastrophic, and the resulting risks to counsel are enormous.

Federal law and regulations have very stringent service requirements for electing an SBP beneficiary which, if not precisely followed, cause the benefit to be lost regardless of the court order. Perhaps most unsettling, from a malpractice perspective, is the length of time such a claim can lay dormant. Several courts have adopted a Adiscovery rule@ for attorney malpractice cases. In other words, divorces involving pensions, but in which no provision was made for survivorship interests, are malpractice land mines, lying dormant for perhaps many years until the right combination of events sets them off.

2. Thrift Savings Plan (Uniformed Service)

As of October 8, 2001, military members were authorized to begin participating in the TSP, permitting members to invest in a variety of funds. Military members therefore now have both a defined benefit and a defined contribution type of retirement program, both of which should be addressed upon divorce. As of 2012, a ARoth@ (pre-tax contributions) option was added to the TSP.

At the outset, the military chose to call its plan AUNISERV@ accounts, but it is increasingly referred to simply as ATSP@ like its Civil Service equivalent. If the same person has simultaneous or consecutive military and Civil Service employment, the interplay between the two plans can be complex. It is usually possible to combine the accounts, but it takes a specific application to do so, and tax-exempt military contributions (i.e., those made as a result of a combat zone tax exclusion) in a military TSP account may not be transferred to a civilian TSP account.

The military plan was phased in by allowing ever greater percentages of basic pay to be contributed through 2005, where it reached 10%, after which only IRS regulations would govern contribution limits. If contributions are made to the TSP from basic pay, they may also be made from any incentive pay or special pay (including bonus pay) received, again subject to IRS limits.

The military service secretaries are permitted, but not required, to designate Acritical specialties.@ Members within those specialties serving on active duty for a minimum of six years would receive contributions by the government, matching some of the sums contributed from basic pay.

There are major changes coming to the military retirement system which are far too voluminous to cover in this CLE. Suffice it to say that the changes will affect both the defined benefit and defined contribution plans available to members of the uniformed services.

3. Ancillary Benefits

One thing to watch closely in military cases is the time restrictions for former spouse qualification for Aancillary@ benefits (medical, commissary, theater, etc.) For full benefits, the member must have served twenty years, the marriage must have lasted twenty years, and the service and marriage must have overlapped by twenty years (the A20/20/20@ rule). A20/20/15@ former spouses divorced before April 1, 1985, are also eligible for lifetime medical benefits. Lesser benefits are available for A20/20/15@ spouses divorced after that date.

A special insurance program is available for former military spouses married at least one year, but the terms and restrictions vary according to the same three factors. In an appropriate case, deferring the divorce could prove to be in the parties= mutual best interest (for example, where the spouse has to have a major medical procedure, covered under military insurance, but not otherwise, and there is no other insurance available post-divorce).

The medical benefits available to qualified spouses are for treatment at uniformed services medical facilities, and benefits under programs that have undergone a variety of name changes.

It is irrelevant whether the divorce decree specifies any such benefit, or whether the parties contemplated the benefit. Like Social Security, medical benefits for former spouses who fulfill the legislative criteria have a statutory entitlement separate from the rights and obligations accruing to the member. They cost the member nothing and never should be the subject of negotiations in a divorce action.

There are restrictions to the right of former spouses who are eligible for medical benefits as A20/20/20@ or A20/20/15@ former spouses:

$ The former spouse must not remarry. Eligibility for health benefits ceases upon remarriage and is not regained even if the subsequent marriage terminates.

$ The former spouse must not be covered by an employer-sponsored health care plan. If there is such a plan, however, and coverage thereunder is terminated (voluntarily or otherwise), eligibility for benefits is restored.

$ The former spouse must not yet be age 65. Upon eligibility for Medicare (Part A), CHAMPUS eligibility ends. Some continuing benefits for former spouses may be available under the ATRICARE-for-life@ program effective October 1, 2001.

Additionally, it now appears that it is possible to extend the Atemporary health benefits@ for a former spouse indefinitely under 10 U.S.C. ' 1078a, which states that Athe purpose of the CHCBP is to provide to military personnel and their dependents >temporary= health benefits comparable to what is provided to federal civilian employees.=@

Under 10 U.S.C. ' 1078a(g)(4), the Atemporary@ health benefits coverage becomes Aunlimited@ for former spouses who were enrolled in TRICARE at the time they divorced B if they meet certain criteria:

$ The former spouse must not be covered under any other health insurance plan.

$ The former spouse must not be remarried prior to the age of 55.

$ The former spouse must either receive a portion of the military retirement benefits, or be the beneficiary of the SBP as a former spouse.

The statute (10 U.S.C. ' 1078a(g)(4)) provides that the continued coverage can continue beyond the Atemporary@ periods set out at the beginning of the statute, upon the request of a former spouse who makes a request for such coverage. Apparently, the same premium cost as for temporary coverage continues to be assessed for as long as coverage is provided, and a full quarter of premium is required to be paid with the enrollment application. Application must also be made promptly B enrollment in CHCBP must be completed within 60 days of losing Anormal@ eligibility as either an active duty spouse or a retiree spouse B the date of entry of the divorce decree.

A. Civil Service

1. Survivor Benefits

Survivor=s benefits are different for Civil Service cases. If the former spouse predeceases the member: the former spouse=s share of the retirement benefits revert automatically to the retiree unless the court order provides otherwise. Instead of that automatic reversion, the court can provide that the money is paid: (1) into court (presumably for further distribution upon further court order); (2) to Aan officer of the court acting as a fiduciary@; (3) to the estate of the former spouse; or (4) to one or more of the retiree=s children. Thus, it is possible to create a heritable asset for the former spouse.

The Civil Service rules are rather rigidly set up to expect that all the divorcing, re-marrying, and adjustments to orders will go on while an employee is still in service, or that the first order entered after the retirement of the worker deals with all aspects of the retirement and survivorship benefits perfectly.

Amendments to orders are possible, but not if they are issued after the date of retirement or death of the employee and they modify or replace the first order dividing the marital property of the employee or retiree and the former spouse. In fact, any order that awards, increases, reduces, or eliminates a former spouse survivor annuity, or explains, interprets, or clarifies any such order, must be: (1) issued prior to retirement or death of an employee; or (2) the first order dividing the marital property of a retiree and former spouse.

In the lingo of the OPM, if a court order awards, increases, reduces, eliminates, explains, or clarifies an award to a former spouse, the court order must be issued before retirement or death of the employee, or it must be the first order dividing the marital property of the retiree and the former spouse.

In other words, an order may be amended, and a COAP may issue after a divorce decree, altering, explaining, or specifying its terms B as long as the employee is still working and alive. If the employee retires or dies, or is already retired or dead when the first order dividing property is submitted, it is generally too late to alter the terms of a Civil Service case; this is an enormous malpractice trap in all Civil Service cases.

How about if there was a first order, but it has been vacated or set aside? Well, the second order is then OK, unless: (1) it is issued after the date of retirement or death of the retiree; (2) changes any provision of a former spouse survivor annuity order that was vacated, etc., and (3) either it is effective prior to its date of issuance, or the retiree and former spouse do not compensate OPM for any uncollected costs relating to the vacated, etc., order.

The short version is that any practitioner drafting a COAP for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible.

2. The Thrift Savings Plan (TSP)

A AThrift Savings Plan@ (ATSP@) was created by the 1986 statute creating the AFederal Employees Retirement System,@ or FERS, which replaced the older Civil Service Retirement System,@ or CSRS. It first accepted contributions on April 1, 1987. 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. The TSP is a defined contribution type of plan for federal employees; like a private employer=s 401(k) plan, it is a mechanism for diverting pre-tax funds into retirement savings. As of 2012, a ARoth@ (pre-tax contributions) option was added to the TSP.

There are a variety of funds in which contributions may be invested, including the AGovernment Securities Investment@ or AG@ fund, the ACommon Stock Index Investment@ or AC@ fund, the AFixed Income Index Investment@ or AF@ fund, the ASmall Capitalization Stock Index Investment@ or AS@ fund, and the AInternational Stock Index Investment@ or AI@ fund. Funds are periodically added, changed, or removed.

The TSP is expressly excluded from the regulations governing the Civil Service defined benefit plans. It is administered by a Board (the Federal Retirement Thrift Investment Board), entirely separate from the OPM, and has its own governing statutory sections and regulations. The TSP Board has its own finance center.

There are no Asurvivorship@ benefits, per se, for a TSP account, as it is a cash plan like a 401(k). However, plan participants can and should designate beneficiaries to receive the account balance in the event of the participant=s death. In the absence of the form, regular intestate succession rules determine the distribution of the TSP account.

3. Health Benefits

Health Benefits are provided under the Federal Civil Service Retirement System, for both employees and their spouses. Post-divorce spousal coverage requires prompt application. Within 60 days of the divorce, the spouse must apply for continuation of AFEHB@ (AFederal Employees Health Benefits@) and to be eligible to receive those benefits, must receive a portion of the retiree=s annuity under a valid COAP.[28]

FEHB coverage is in effect if the spouse is awarded either a portion of the annuity upon retirement or a survivorship interest. The spouse loses eligibility to continue with the insurance if the spouse remarries prior to age 55.

If a spouse is ineligible for any of the benefits, there is a COBRA-like program of carry-over coverage available for 3 years.

4. Language Pitfalls, Do=s and Don=ts

One special peculiarity of Civil Service cases is the completely different lexicon used by the OPM, which any attorney crafting orders must know to effectively address those benefits. Essentially, the OPM re-invented many words. At the top of the terminology list is the caution to never use the term AQDRO@ or AQualified Domestic Relations Order@ in any Civil Service case. The OPM word is ACOAP@ (ACourt Order Acceptable for Processing@). For the same reason, do not use the ERISA term AAlternate Payee.@ Refer to the spouse of the wage-earner as AFormer Spouse.@

The OPM even assigned new meanings to words long used elsewhere to mean something else. For example, in OPM-ese, the Aaccrue@ does not refer to the accumulation of benefits; it means the commencement of payments under the retirement plan. AEmployee annuity@ means recurring payments to a retiree, not the account itself. In other words, it is a verb, not a noun. AGross@ does not mean Aall.@ ASelf-only@ means all. AGross@ means self-only less survivorship premium.

[28] This can be a nominal amount if the health care benefits are all that is to be awarded.

In other words, a practitioner=s use of words to mean what the practitioner always thought they meant (even if that is what they mean to everyone else) could invalidate an order submitted to OPM; great care is warranted.

The original regulations would have voided any order using that term even if otherwise perfect. The OPM reasoning is that use of the language indicates that the courts and attorneys drafting the order do not know that ERISA is inapplicable to federal retirement plans, and so the orders are presumed defective. Now, the order will still be enforced if technically sufficient (so long as all the correct terminology is present), but the better practice is to not use language found objectionable by OPM.

Every nook and cranny of the regulations must be examined to prevent error. There are too many to list, so only examples are provided here. Practitioners are urged to get the reference works and regulations, and review them carefully.

The COAP must specifically state that OPM is to pay the money directly to the former spouse. Any reference to a ASelf-only Annuity@ contradicts any attempt to insert a survivor annuity. It is apparently possible to have an Ainterim COAP@ provide for payments to a court while matters are being worked out, with an amended COAP submitted when the court issues its final order. The COAP may not specify that payments continue for the lifetime of the former spouse (since the benefits terminate at the death of the employee, and only survivor=s benefits would be available after that date). Which retirement system is at issue must appear in the COAP (but the order is probably enforceable even if an error is made in that regard).

Three separate orders should be in every COAP, addressing: the lifetime benefits (Aemployee annuity@); the potential refund of employee contributions; and death benefits (Aformer spouse survivor annuity@). A proper order will contain specific provisions dealing with each of the three types of benefits addressed in the regulations. If an order is submitted using the words Aretirement accounts@ or Aretirement fund@ as the thing to be divided, OPM will interpret the order as going to contributions only and will not divide the annuity. Attempts to stipulate to modifications without a formal order will be ignored.

One interesting conundrum is created by the OPM rule that an order purporting to provide for payments of a spousal share upon eligibility for retirement (Aearliest retirement date@ in the land of QDROs) will be rejected as Anon-complying.@ Since such a provision is essentially mandated by State law in many States, and forbidden by federal law, some clever draftsmanship is required; probably the best thing is to mandate direct payments from the employee until retirement (of course that is where the money would really have to come from anyway), and from OPM thereafter.

A COAP may be used as a resource for payment of accrued arrearages. The COAP must specify how much is to be paid, so as to obtain accrued arrears, interest on the arrears, and interest on the declining balance of arrears until paid. An amortization schedule must be done so that the order can reference how much will be due and when it will be due (OPM will not do

the calculations for you). Note that if payment of a lump sum is ordered, and there is no specific order to direct the entire monthly retirement payment to the former spouse, OPM will only make payments against that lump sum up to half of the gross payment, and will not allow modification for interest. Again, if such is the situation, run the amortization schedule ahead of time, and make the lump sum in an amount that contemplates interest.

As with ERISA-based private plans, but unlike the military and most State plans, a spouse can be awarded up to 100% of the retirement benefits. If the order does not specify, the OPM will presume that any percentage or fraction payable to the spouse is from what OPM defines as the Agross@ annuity (i.e., after deduction for the survivorship premium).

Amendments to court orders altering the payments due to a former spouse will be honored, prospectively, but specific instructions have to be given if OPM is asked to make up for a prior under- or over-payment.

Care should be taken in the definition of what is to be divided, with pains taken to note the subtle differences in OPM definitions of terms. For example, under the regulations, using the phrase Acreditable service@ tells OPM to calculate the spousal share to include accrued, unused sick leave in addition to actual time in service. Using the phrase Atotal service@ or Aservice performed,@ however, tells the OPM to not include unused sick leave in the calculation.

The regulations allow the spouse to be awarded a percentage, fraction, formula, fixed dollar sum certain, or Aprorata share@ of whatever benefits (self-only, gross, or net) are being divided.

Apparently, unlike with military orders, it is possible to issue a Adollars plus percentage of COLAs@ form of order as long as everything is clearly spelled out, but OPM will presume that an order for a percentage or fraction is supposed to include COLAs, while a dollar sum certain award is not.

Another direct contradiction to the military presumptions: an order including both a formula or percentage and a dollar sum certain will be presumed to have included the dollar sum only as an estimate of the initial payment, so that the formula or percentage controls.

The former spouse can be awarded a portion of any refund to be made of employee contributions, or (if the former spouse is awarded a portion of the annuity itself), any such refund may be barred.

The short version is that any practitioner drafting a COAP for a retired Civil Service worker pretty much has to get it right the first time, because the niceties of altering such an order are horribly complex, and often impossible to fix if incorrect.

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Failure to Deal with Loans and Delayed Contributions (Defined Contribution)

Submitted by Ryan C. Cari and Kevin M. Urbik

IX. **Failure to Deal with Loans and Delayed Contributions in Defined Contribution Plans**

a. Identifying Defined Contribution Plans

i. Often times attorneys and their clients have a difficult time distinguishing between a defined contribution plan (which is what we are going to be discussing here) and a defined benefit pension plan.

ii. Typically the easiest way to distinguish between these different types of plans is to determine whether the plan contains individual accounts for each plan participant. If they do, the plan is typically a defined contribution plan.

iii. Another way to distinguish between the two is to look at the name of the plan itself. Most defined contribution plans contain the language "savings plan", "401(k) plan", or "profit-sharing plan". These can easily help you distinguish between defined benefit plans that usually contain the words "pension plan".

b. Loans

i. Those of us that have handled divorce cases will all agree that parties can sometimes engage in "pre divorce planning", which comes in various forms.

ii. One such form of "pre-divorce planning" is taking out plan loans, often to diminish their account balance that might be eligible for division.

iii. Referring back to the discovery component that I covered, it is certainly wise to inquire about loans made before or during the time the divorce

case was filed as often times statements may not reflect the loan balances outstanding.

iv. It is very important to fully understand whether or not a loan exists, and if there is a loan, the QDRO language should be drafted such that the account balance due to the alternate payee is calculated without regard to any previous loans or withdrawals made by the participant.

c. Delayed Contributions

i. In the context of a defined contribution plan, what do we mean by delayed contributions?

1. These are typically company contributions made to the plan on a periodic basis, and generally can be made quarterly, semi-annually, or even annually.
2. In that case, consider language in a QDRO that merely assigns to the non-participant spouse "50% of the plan participant's account balance as of the date of divorce". Without additional language, and if the company makes contributions to the employee's plan only one time at year end, the alternate payee will not receive the portion of the contribution attributable to the time prior to the divorce.
3. It is therefore necessary to include language that accounts for these delayed contributions:

a. "Further, the alternate payee's account balance shall include all amounts contributed to the plan on behalf of the participant after the date of divorce that are attributable to periods prior to such date."

Failure to Consider Future Vesting Potential (Defined Benefit)

Submitted by Marshal S. Willick

I. Can You Say Malpractice?

Pensions as a rule are a minefield for the unwary practitioner. One of the most dangerous pitfalls is not knowing if and when a pension benefit will Avest.@ Failure to address this issue can result in lost benefits to the client, to the extreme unhappiness of the practitioner and the dismay of the liability carrier.

A Avested@ pension is one in which the employee has met certain conditions (usually, length of service) which stop an employer from arbitrarily preventing the employee=s enjoyment of benefits. A Amatured@ pension is one in which a particular employee is eligible for present payments from a plan.

In some jurisdictions (the number of which continues to decline), lack of vestedness or maturity causes pensions to be considered Amere expectancies@ or otherwise non-divisible. It is therefore most important to consider these factors when involved in multi-jurisdictional cases. In any event, vestedness or maturity may have an impact on valuation of pension benefits.

Several States have adopted, or echoed, the law of California commonly referenced as the A*Gillmore*@ rule.[1] Those cases made it clear that in California a spouse has to make an Airrevocable election@ at the time of divorce whether to begin receiving the spousal share of the retirement benefits upon maturity, or wait until the wage-earner actually retires, thus enjoying a Asmaller piece of a larger pie@ by getting a shrinking percentage of a retirement based upon post-divorce increases in the wage-earner=s salary and years in service.

> The core holding of the California courts:
>
> > The employee spouse cannot by election defeat the nonemployee spouse=s interest in the community property by relying on a condition within the employee spouse=s control.[2]

In practice, this has required the use of a spousal share to be paid based upon a hypothetical sum payable to the worker at the moment of ***eligibility for retirement***, and a reservation of jurisdiction to recast that spousal share as a percentage of the retirement benefit ultimately received upon ***actual*** retirement. The precise language necessary to accomplish this task varies depending on the type of retirement at issue.

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[1] As set out in *In re Marriage of Gillmore*, 629 P.2d 1 (Cal. 1981), and *In re Marriage of Luciano*, 164 Cal. Rptr. 93 (Ct. App. 1980).

[2] *Gemma, supra*, 105 Nev. at 463-64, *quoting Luciano, supra*, 164 Cal. Rptr. at 95.

This section will deal with some of the things the practitioner must address to avoid being subject to a possible malpractice action.

Most pensions require members to achieve a number of years of creditable employment before being irrevocably entitled to pension benefits under the plan. Vesting occurs when the employee completes the number of years of service required to receive benefits under the plan at some point in the future.

Pensions which have not vested, though not entirely Aearned,@ represent a form of deferred compensation for service performed that is potentially payable.

Although vesting occurs on one day, it is not logical to assume that the pension benefit for all years of employment up to that day was entirely earned on that one day. For example, an employee=s benefit may vest after completion of 5 years of service, however, the employee could not achieve vested status without all of the time worked before the day of vesting. Therefore, part of the value of the vested pension after 5 years is attributable to each and every day of employment leading up to the day of vesting.

Pension rights, to the extent that such rights accrued during the period of marriage, are considered marital property. A not-yet-vested pension is treated by most courts as a potential property interest subject to defeasance, with the portion of the benefits which are attributable to service performed during the marriage included in the marital estate.

Determining the value of the marital portion of a pension that is yet to be vested can be difficult. Consider the following in determining value:

- The time left before the benefits become vested
- The length of the parties= marriage
- The contributions of both parties (primarily and secondarily) to the pension

The difficulty of determining the exact value of the plan can be avoided by deferring payment of the other spouse=s share until the time pension benefits begin. This is exactly what is done in a number of States, including Nevada.[3]

Pension rights which have not vested but which accrued during the marriage constitute marital property and may be divided using either the immediate offset method or the deferred distribution method.

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[3] See *Fondi v. Fondi*, 106 Nev. 856, 802 P.2d 1264 (1990); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

Most courts consider the most appropriate method of distributing a pension which has not yet vested between divorcing parties to be the deferred distribution method. If, as, and when the pension becomes payable, the appropriate portion of the benefits are distributed to each party. Using the deferred distribution method eliminates any uncertainty about the vesting status and/or maturity of the benefits which would play a role in determining value for an immediate offset. But it also leaves the divorce Aunfinished@ and the parties to some degree connected, waiting for future events.

When using the immediate offset method of distribution it is necessary to establish a value for the unvested benefits and award another asset in exchange for those benefits. However, inherent in this approach is the uncertainty that any benefits will ever be paid. If another asset is awarded to the spouse in lieu of the unvested benefits, and the benefits never reach vested status, the employee is short changed. If the employee is willing to assume the risk that the benefits will never vest, it is possible to determine a value for immediate offset. Such value should reflect a calculation based upon the contingency of the benefit.

It should be noted that delaying distribution of pension benefits is not the same thing as delaying a decision about each spouse=s share of a retirement plan. Some courts have found that a possible solution to the problem of distributing unvested benefits is to wait until such benefits vest to make a decision about how to divide the property. This is dangerous as some benefits may be lost by waiting.[4]

V. Stock Options

Stock options can be awarded as part of a retirement plan or separate from the retirement.

The difficult issue with stock options is not determining whether they constitute property, but rather determining the extent to which they constitute property acquired during the marriage. There is general agreement that stock options, like retirement benefits, are acquired when they are earned, and not at the time of receipt, vesting, or exercise.

In *Ranney*,[5] the employer awarded unvested stock options as consideration for a period of future service. AWith the exception of the first month, the entire term of husband=s employment with Network Solutions occurred during the parties= marriage.@ The trial court nevertheless held that the options were separate property. The appellate court reversed. ABecause the condition necessary for the vesting of husband=s right to exercise the stock options (i.e., his continued employment) was not fulfilled until after the parties= marriage,
husband Aearned@ the right to exercise the stock options >during the marriage.=@

[4] The military SBP is such a benefit that can be lost.

[5] *Ranney v. Ranney*, 45 Va. App. 17, 608 S.E.2d 485 (2005).

Stock options, like retirement benefits, are deferred compensation for an entire period of service to the employer, and a marital share fraction must be used to measure the marital interest. Because one month of the vesting period in *Ranney* occurred before the date of marriage, the court should have recognized a small separate interest in the options, equal to one month divided by the total months in the vesting period.

The appellate court=s error was trivial in amount and harmless on the facts, as was the much greater error committed by the trial court, because the separate interest in the stock options, regardless of size, was lost during the marriage by failure of tracing. It is also possible that the husband might not have proved the length of the vesting period, in which case the small separate interest was properly disregarded. Substantial unfairness could result, however, if stock options are simplistically classified according to whether the parties were or were not married on the date of vesting. Most courts classify stock options used the same time-based coverture fraction applied to retirement benefits. But determining when any given set of stock options was earned can be difficult.

In *Newman*[6] the wife argued by express analogy to *Ranney* that stock options are acquired on the date of vesting. The trial court agreed, but the Georgia Supreme Court reversed. Expressly rejecting *Ranney*, the court held that to determine whether stock options are earned during the marriage, the court must look at many factors other than the date of vesting:

> The court was required to look at the evidence and determine whether the vesting of the previously awarded stock options was the direct result of the parties= labors and investments during the marriage. If the previously awarded stock options vested because of efforts made by either party during the course of the marriage, then they are marital assets; otherwise, they are appellant=s separate property. Key to the trial court=s underlying factual inquiry and any decision it may make as to equitable distribution, if any, is consideration of a multitude of factors including, but not limited to: whether the marital or premarital funds were used to exercise the options; the employer=s purpose for granting the option (i.e., for past, present or future service); the best formula for apportioning the marital share of the options based on the purpose and timing of the options in relation to the time of the marriage; a method of distribution to appellee; and the parties= tax obligations resulting from distribution.

[6] *Newman v. Patton*, 692 S.E.2d 322 (Ga. 2010).

The fact that the previously awarded stock options vested during the marriage is not determinative in and of itself of whether the options constitute a marital asset. The holding in *Newman* is much more fact-sensitive than the holding in *Ranney*, and should produce a better result in most situations.

Most retirement plans offer a single set of benefits starting on a single retirement date, so they are generally subject to only a single coverture fraction. Stock option plans, by contrast, often involve many different groups of stock options. Many companies award a different set of stock options every year; some award additional options at various times as bonuses. Each individual set of options has its own vesting period, which can in some cases be different in duration from other sets, and which will almost always have a different starting date. Because stock option plans usually have multiple option sets, it is necessary to compute a
distinct coverture fraction for each set of options.

Classification is easiest when the options at issue vested at the time of receipt B that is, when they were subject to immediate exercise, with no vesting period or other conditions. Unconditional vested stock options are consideration for services rendered at the time of receipt, so they are normally marital property if received during the marriage.

In some situations, however, vested stock options may be awarded as a bonus for a period of prior service.

VI. Military Retirement

Unless a service member is offered and takes an early retirement option, the military retirement does not vest until the member has 20 years of creditable military service. For an active duty retirement, this is 20 years of active duty service. For a reservist, this is 20 Agood years@ (years of earning at least 50 points each year).

If a marriage takes place between years 5 and 13, the retirement will not yet be vested and there would be no actual benefit to divide at the moment of divorce.[7] Does this mean that the former spouse will ultimately get nothing? Not at all. Just like the stock options discussed above, the former spouse can be awarded her Atime rule@ share of the benefits that have yet to vest

[7] Of course, the member is a participant in the military service Thrift Savings Plan, the balance can be divided.

Several State courts have held that the interest of a former spouse in retired pay is realized at ***vesting***,[8] theoretically entitling the spouse to collect a portion of what the member ***could*** get at that time irrespective of whether the member actually retires.[9] As phrased by the California court in *Luciano*: AThe employee spouse cannot by election defeat the nonemployee spouse=s interest in the community property by relying on a condition within the employee spouse=s control.@[10]

Most of those who advocate the Afreeze at divorce@ approach to dividing military benefits (used in Texas and a handful of other States) either oppose or ignore the question of whether distribution of the spousal share should be mandated at the time of the participant=s first eligibility for retirement. It is not possible, however, to fully and fairly evaluate the impact of a Afreeze at divorce@ proposal ***without*** examining that question as well.[11]

Whether States follow a Apayment upon eligibility@ or Apayment upon retirement@ rule is another one of those doctrines which is not at all obvious from the label applied by the individual States, but again is usually hidden in their decisional law. Which way the State goes on this question can have a huge impact on the value of the retirement benefits to each spouse.

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[8] A Avested@ pension is one that, having been earned and accrued, is beyond the power of the issuing authority to withdraw from payment. *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969) (exploring definitions of Avestedness@ and Amaturity@ of retired pay).

[9] *See In re Marriage of Luciano*, 164 Cal. Rptr. 93, 104 Cal. App. 3d 956 (Ct. App. 1980); *In re Marriage of Gillmore*, 629 P.2d 1, 174 Cal. Rptr. 493 (Cal. 1981); *Maccarone v. Maccarone*, ___ A.3d ___ (R.I. Nos. 2013-369-Appeal, 2013-370-Appeal, Jan. 26, 2015); *Janson v. Janson*, 773 A.2d 901, 903 (R.I. 2001); *In re Marriage of Scott*, 202 Cal. Rptr. 716, 156 Cal. App. 3d 251 (Ct. App. 1984); *Gemma v. Gemma*, 105 Nev. 458, 778 P.2d 429 (1989); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz. 1986); *Ruggles v. Ruggles*, 860 P.2d 182 (N.M. 1993); *Balderson v. Balderson*, 896 P.2d 956 (Idaho 1994); *Blake v. Blake*, 807 P.2d 1211 (Colo. Ct. App. 1990); *Harris v. Harris*, 107 Wash. App. 597, 27 P.3d 656 (Wash. Ct. App. 2001); *Bailey v. Bailey*, 745 P.2d 830 (Utah 1987) (time of distribution of retirement benefits is when benefits are received Aor at least until the earner is eligible to retire@).

[10] *In re Marriage of Luciano*, *supra*, 164 Cal. Rptr. at 95.

[11] I have independently verified the mathematical effects of the various approaches taken by courts. Unless payments to spouses are required at each first eligibility for retirement, regardless of the date of actual retirement, a Arank at divorce@ proposal, at least in military cases, would result in a reduction in the value of the spousal share by at least 13%. A second spouse married to a member for the last couple years of service could actually receive more money after divorce than a first spouse who assisted the member for most of the military career. There does not appear to be any valid public policy that could be served by causing this result.

VII. ERISA Based Pensions

As with the discussion concerning military pensions, an ERISA based pension vests in accordance with the Plan rules. You can find out the specific plan requirements by looking at the Summary Plan Description available from the Plan Administrator.

As discussed above, even if the participant has not fully vested in the pension, the practitioner must ensure that the client=s share of the future interest in the pension is protected by filing a QDRO. Failure to do so may limit or entirely thwart the available options for the client. Specifically, the client could be limited to a shared interest instead of a separate interest, or could lose the ability to get survivor benefits.

The safe bet is to complete QDROs concurrently with the entry of the decree or the separation agreement. This will ensure that benefits that might be available are protected.

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Failure to Incorporate the Necessary Language into the Separation Agreement

Submitted by Marshal S. Willick

I. Introduction

The materials below are primarily concerned with private employers, for which retirement benefits are governed by ERISA.[1] Civil Service, Military, and State Government retirement plans are ***not*** governed by ERISA.

In some areas, where the contrasts between the retirement systems are relevant to the discussion, the below materials highlight distinctions between and among the kinds of plans, but the requirements for ERISA-based QDROs are the primary focus. The message of these materials, however, is that ***every*** kind of plan will have required terminology B and sometimes prohibited terminology B for that particular kind of plan.

In my work as a QDRO preparation specialist, I see hundreds of divorce decrees and separation agreements every year. Most of my work in this area is as a scrivener. In other words, I am just implementing the intent of the parties and the court through the drafting of a QDRO or other pension order.

Unfortunately, the majority of these documents are poorly written and many are contradictory. For example, I was recently presented with a decree issued two years earlier that divided a military retirement that said AWife is to receive $903 per month. This is 24.6% of the total pension benefit.@ That was the only provision in the entire decree concerning the military retirement benefits.

So what is wrong with this? Let me count the ways.

First, stating a fixed dollar amount instructs the Defense Finance and Accounting Service (DFAS) to pay the former spouse exactly $903 per month for the rest of her life. No cost of living increases will ever be applied to this amount even though the member will be receiving annual COLAs on the total gross pay.[2]

Second, there is no mention of the survivor benefit plan or the Thrift Savings Plan. Without clear direction, a QDRO preparer will not know whether to include any language in the military retirement benefit order concerning those extremely valuable assets.

Lastly, there is virtually no information concerning the other benefits B military identification card, health benefits, and exchange and commissary benefits. In other

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[1] The Retirement Equity Act of 1984, Pub. L. No 98-397. See also Section 414(p) of the Internal Revenue Code of 1986, as amended.

[2] The same order, provided to the Civil Service, would be construed the opposite way, ignoring the dollar sum in favor of the percentage and including COLAs in the spousal share. Private plan administrators in ERISA-based plans might have their own interpretive rules on such conflicts.

words, the lawyer who drafted this language either was purposefully trying to limit the former spouse=s benefits, or he was setting himself up for a major malpractice case.

II. Required Language

To understand what should be included in a separation agreement dealing with a pension, the best place to begin is with what is required in a QDRO. The following is a summary guide for what information is required in a QDRO and where to get it. A sufficiently detailed decree or separation agreement can serve as a QDRO, making no further separate order necessary.

Unfortunately, part of what a practitioner needs to know is the much harder task of being wary of what is ***not*** there. Some lawyers have taken the stance that if the term is not clearly and specifically discussed in the underlying decree or separation agreement, it can=t be in the QDRO.[3] Given the normal course of litigation and entry of orders in divorce cases, this position is absurd. ***Most*** decrees are lacking in the detail required for the division of a pension, and most judges want to spend no more time on the issue than to decide whether an asset should be divided, resolve any conflicts as to Ahow much,@ and direct the lawyers to Adraft an appropriate order to carry this decision into effect.@ It is the QDRO that should contain the necessary granularity for the actual division of the pension.

To be recognized as a QDRO, an order must first be a Adomestic relations order.@ A domestic relations order is any judgment, decree or order (including approval of a property settlement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of the plan participant.

A Adomestic relations order@ must be made pursuant to a State domestic relations law (including a community property law) under which a State authority (court) actually issued an order or formally approve a proposed property settlement. A property settlement signed by a participant and the participant=s former spouse or a draft order to which both parties consent is not a domestic relations order until the State authority has adopted it as an order or formally approved it and made it part of the domestic relations proceeding.

The language usually used in a separation agreement assumes that the QDRO applies to one qualified plan and one alternate payee. If a QDRO is intended to cover more than one qualified plan or alternate payee, the separation agreement should clearly state which qualified plan and which alternate payee each provision is intended to address.

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[3] *See Henson v. Henson,* 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, Oct. 2, 2014), which held that unless specifically set forth in the divorce decree, an allocation of a community property interest in the employee spouse=s pension plan does not also entitle the nonemployee spouse to survivor benefits.

A. Summary Plan Description

The terms of a qualified plan must be set forth in a written document. The plan must also establish written QDRO procedures to be used by the plan administrator in determining whether a domestic relations order is a QDRO and in administering QDROs. The plan administrator maintains copies of the plan document and the plan=s QDRO procedures. If the plan is required under Federal law to have a summary plan description, or ASPD,@ the plan administrator will have a copy. The information in these documents is helpful in drafting a QDRO. The drafter of a QDRO may wish to obtain copies of these documents before beginning the drafting process.

B. Name the Parties

A QDRO must clearly specify the name and last known mailing address (if any) of the participant and of each alternate payees covered by the QDRO. In the event that an alternate payee is a minor or legally incompetent, the QDRO should also include the name and address of the alternate payee=s legal representative. A QDRO can have more than one alternate payee, such as a former spouse and a child.

The Aparticipant@ is the individual whose benefits under the plan are being divided by the QDRO. The participant=s spouse (or former spouse, child, or other dependent) who receives some or all of the plan=s benefits with respect to the participant under the terms of the QDRO is the Aalternate payee.@

C. Identify the Plan

A QDRO must clearly identify each plan to which the QDRO applies. A QDRO can satisfy this requirement by stating the full name of the plan as provided in the plan document.

D. Alternate Payee=s Benefits

A QDRO must clearly specify the amount or percentage of the participant=s benefits in the plan that is assigned to each alternate payee, or the manner in which the amount or percentage is to be determined. Many factors should be taken into account in determining which benefits to assign to an alternate payee and how these benefits are to be assigned. The following discussion highlights some of these factors.

1. Types of Benefits

To divide benefits under a QDRO, the drafter first should determine the types of benefits the plan provides. Most benefits provided by qualified plans can be classified as retirement benefits that are paid during the participant=s life and survivor benefits that are paid to beneficiaries after the participant=s death. Generally, a QDRO can assign all or a portion of each of these types of benefits to an alternate payee. The drafters of a QDRO should coordinate the assignment of these types of benefits. QDRO drafters should also consider how the benefits divided under the QDRO may be affected, under the plan, by the death of either the participant or the alternate payee.

2. Types of Qualified Plans

An important factor to consider in the drafting of a QDRO is the type of plan to which the QDRO will apply. As discussed below, the type of plan may affect the types of benefits available for assignment, how the parties choose to assign the benefits, and other matters.

There are two basic types of qualified plans to which QDROs apply: defined benefit plans and defined contribution plans.

a. Defined Benefit Plans

A Adefined benefit plan@ promises to pay each participant a specific benefit at retirement. The basic retirement benefits are usually based on a formula that takes into account factors such as the number of years a participant has worked for the employer and the participant=s salary, and expressed in the form of periodic payments for the participant=s life beginning at the plan=s normal retirement age. This stream of periodic payments is generally known as an Aannuity.@ A plan may also provide that these retirement benefits may be paid in other forms, such as a lump sum payment.

b. Defined Contribution Plans

A Adefined contribution plan@ is a retirement plan that provides for an individual account for each participant. The participant=s benefits are based solely on the amount contributed to the participant=s account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant=s account. Examples of defined contribution plans include a profit sharing plan (including a A401(k)@ plan), an employee stock ownership plan (an AESOP@) and a money purchase pension plan. Defined contribution plans commonly permit retirement benefits to be paid in the form of a lump sum payment of the participant=s entire account balance.

E. Approaches to Dividing Retirement Benefits

There are two common approaches to dividing retirement benefits through a QDRO: one awards a Aseparate interest@ in the retirement benefits to the alternate payee, and the other allows the alternate payee to share in the payment stream of the retirement benefits. In drafting a QDRO using either of these approaches, consideration should be given to factors such as whether the plan is a defined benefit plan or defined contribution plan, and the purpose of the QDRO (such as whether the QDRO is meant to provide spousal support or child support, or to divide marital property).

1. Separate Interest Approach

A QDRO that creates a Aseparate interest@ divides the participant=s benefits into two separate parts: one for the participant and one for the alternate payee. Subject to the terms of the plan and as discussed in more detail below, a QDRO may provide that the alternate payee can determine the form in which his or her benefits are paid and when benefit payments commence. If benefits are allocated under the separate interest approach, the drafters of a QDRO should take into account certain issues depending on the type of plan.

a. Issues Relevant to Defined Benefit Plans

The treatment of subsidies provided by a plan and the treatment of future increases in benefits due to increases in the participant=s compensation, additional years of service, or changes in the plan=s provisions are among the matters that should be considered when drafting a QDRO that uses the separate interest approach to allocate benefits under a defined benefit plan.

Subsidies. Defined benefit plans may promise to pay benefits at various times and in alternative forms. Benefits paid at certain times or in certain forms may have a greater actuarial value than the basic retirement benefits payable at normal retirement age. When one form of benefit has a greater actuarial value than another form, the difference in value is often called a subsidy. Plans usually provide that a participant must meet specific eligibility requirements, such as working for a minimum number of years for the employer that maintains the plan, in order to receive the subsidy.

For example, a defined benefit plan may offer an Aearly retirement subsidy@ to employees who retire before the plan=s normal retirement age but after having worked for a specific number of years for the employer maintaining the plan. In some cases, this subsidized benefit provides payments in the form of an annuity that pays the same annual amount as would be paid if the payments commenced (later) at the normal retirement age. Because these benefits are not reduced for early commencement, they have a greater

actuarial value than benefits payable at normal retirement age. This subsidy may be available only for certain forms of benefit.

A QDRO may award to the alternate payee all or part of the participant=s basic retirement benefits. A QDRO can also address the disposition of any subsidy to which the participant might become entitled after the QDRO has been entered.
Future Increases in the Participant=s Benefits. A participant=s basic retirement benefits may increase due to circumstances that occur after a QDRO has been entered, such as increases in salary, crediting of additional years of service, or amendments to the plan=s provisions, including amendments to provide cost of living adjustments. The treatment of such benefit increases should be considered when drafting a QDRO using the separate interest approach.

b. Issues Relevant to Defined Contribution Plans

Investment of the amount assigned to the alternate payee when the account is invested in more than one investment vehicle and division of any future allocation of contributions or forfeitures to the participant=s account are among the matters that should be considered when drafting a QDRO that allocates the alternate payee a separate interest under a defined contribution plan.

Investment Choices. The participant=s account might be invested in more than one investment fund. If the plan provides for participant-directed investment of the participant=s account, consideration should be given to how the alternate payee=s interest will be invested.

Future Allocations. A participant=s account balance may later increase due to the allocation of contributions or forfeitures after the QDRO has been entered. A QDRO may provide that the amounts assigned to the alternate payee will include a portion of such future allocations.

2. Shared Payment Approach

A QDRO may use the Ashared payment@ approach, under which benefit payments from the plan are split between the participant and the alternate payee. The alternate payee receives payments under this approach only when the participant receives payments. A QDRO may provide that the alternate payee will commence receiving benefit payments when the participant begins receiving payments or at a later stated date, and that the alternate payee will cease to share in the benefit payments at a stated date (or upon a stated event, provided that adequate notice is given to the plan).

In splitting the benefit payments, the QDRO might award the alternate payee either a percentage or a dollar amount of each of the participant=s benefit payments; in either

case, the amount awarded cannot exceed the amount of each payment to which the participant is entitled under the plan. If a QDRO awards a percentage of the participant=s benefit payments (rather than a dollar amount), then, unless the QDRO provides otherwise, the alternate payee generally will automatically receive a share of any future subsidy or other increase in the participant=s benefits.

A QDRO either may specify a particular form in which payments are to be made to the alternate payee or may provide that the alternate payee may choose a form of benefit from among the options available to the participant. However, federal law provides that the alternate payee cannot receive payments in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse.

The choice of the form of benefits should take into account the period over which payments will be made. For example, if the alternate payee elects to receive a lump sum payment, no further payments will be made by the plan with respect to the alternate payee=s interest.

Any decision concerning the form of benefit should take into account the difference, if any, in the actuarial value of different benefit forms available under the plan. For example, as discussed above, a plan might provide an early retirement subsidy that is available only for payment in certain forms.

In addition, the forms of benefit available to the alternate payee may be limited by ' 401(a)(9) of the Internal Revenue Code, which specifies the date by which benefit payments from a qualified plan must commence and limits the period over which the benefit payments may be made. Section 1.401(a)(9)-1, Q&A H-4, of the Proposed Income Tax Regulations addresses the application of the required minimum distribution rules of ' 401(a)(9) to payments to an alternate payee.

The proposed regulation limits the period over which benefits may be paid with respect to the alternate payee=s interest. For example, the proposed regulation provides that distribution of the alternate payee=s separate interest will not satisfy ' 401(a)(9)(A)(ii) of the Code if the separate interest is distributed over the joint lives of the alternate payee and a designated beneficiary (other than the participant).

F. Commencement of Benefit Payments to Alternate Payee

Under the separate interest approach, the alternate payee may begin receiving benefits at a different time than the participant. A QDRO either may specify a time at which payments are to commence to the alternate payee or may provide that the alternate payee can elect a time when benefits will commence in accordance with the terms of the plan.

In two circumstances, an alternate payee who is given a separate interest may begin receiving his or her separate benefit before the participant is eligible to begin receiving payments.

First, Federal law provides that benefit payments to the alternate payee may begin as soon as the participant attains his or her earliest retirement age. Federal law defines Aearliest retirement age@ as the earlier of the date on which the participant is entitled to a distribution under the plan; or the later of the date the participant attains age 50, or the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

Second, the retirement plan may (but is not required to) allow payments to begin to an alternate payee at a date before the participant=s earliest retirement date.

G. Survivor Benefits and Treatment of Former Spouse as Participant=s Spouse

Survivor benefits include both benefits payable to surviving spouses and other benefits that are payable after the participant=s death. These benefits can be awarded to an alternate payee. In determining the assignment of survivor benefits, QDRO drafters should take into account that benefits awarded to the alternate payee under a QDRO will not be available to a subsequent spouse of the participant or to another beneficiary. QDRO drafters may consult with the plan administrator for information on the survivor benefits provided under the plan.

A QDRO may provide for treatment of a ***former*** spouse of a participant as the participant=s current spouse with respect to all or a portion of the spousal survivor benefits that must be provided to a Aspouse@ under federal law. The following discussion explains the spousal survivor benefits that must be offered under a plan, and identifies issues that should be considered in determining whether to treat the alternate payee as the participant=s spouse.

Only a spouse or former spouse of the participant can be treated as a spouse under a QDRO. A child or other dependent who is an alternate payee under a QDRO cannot be treated as the spouse of a participant.

Retirement plans generally need not provide survivor benefits to the participant=s surviving spouse unless the participant is married for at least one year. If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then the QDRO cannot require that the alternate payee be treated as the participant=s spouse if the marriage lasted for less than one year.

1. Qualified Joint and Survivor Annuity

Federal law generally requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant=s annuity starting date (this is the first day of the first period for which an amount is payable to the participant) in a special form called a qualified joint and survivor annuity, or QJSA.

Under a QJSA, retirement payments are made monthly (or at other regular intervals) to the participant for his or her lifetime; after the participant dies, the plan pays the participant=s surviving spouse an amount each month (or other regular interval) that is at least one half of the retirement benefit that was paid to the participant.

At any time that benefits are permitted to commence under the plan, a QJSA must be offered that commences at the same time and that has an actuarial value that is at least as great as any other form of benefit payable under the plan at the same time. A married participant can choose to receive retirement benefits in a form other than a QJSA if the participant=s spouse agrees in writing to that choice.

2. Qualified Preretirement Survivor Annuity

Federal law generally requires that defined benefit plans and certain defined contribution plans pay a monthly survivor benefit to a surviving spouse for the spouse=s life when a married participant dies prior to the participant=s annuity starting date, to the extent the participant=s benefit is nonforfeitable under the terms of the plan at the time of his or her death. This benefit is called a qualified preretirement survivor annuity, or QPSA.

As a general rule, an individual loses the right to the QPSA survivor benefits when he or she is divorced from the participant. However, if a former spouse is treated as the participant=s surviving spouse under a QDRO, the former spouse is eligible to receive the QPSA unless the former spouse consents to the waiver of the QPSA.

If a spouse does not waive the QPSA, the plan may allow the spouse to receive the value of the QPSA in a form other than an annuity.

H. Defined Contribution Plans Not Subject to the QJSA or QPSA Requirements

Those defined contribution plans that are not required to pay benefits to married participants in the form of a QJSA or a QPSA are required by federal law to pay the balance remaining in the participant=s account after the participant dies to the participant=s surviving spouse. If the spouse gives written consent, the participant can direct that upon his or her death the account will be paid to a beneficiary other than the spouse, for example, the couple=s children.

I. Alternate Payee Treated as Spouse

A QDRO may provide that an alternate payee who is a former spouse of the participant will be treated as the participant=s spouse for some or all of the benefits payable upon the participant=s death, so that the alternate payee will receive benefits provided to a spouse under the plan.

To the extent that a former spouse is to be treated under the plan as the participant=s spouse pursuant to a QDRO, any subsequent spouse of the participant cannot be treated as the participant=s surviving spouse. Thus, QDRO drafters should consider the potential impact of designating a former spouse as the participant=s spouse on the disposition of survivor benefits among the former spouse and any subsequent spouse of the participant, as well as the impact on children or any other beneficiaries designated by the participant in accordance with the terms of the plan.

In determining the portion of the participant=s benefits for which the alternate payee is treated as the spouse, the drafter should take into account the manner in which benefits are otherwise divided under the QDRO.

In particular, consideration should be given to whether the formula for dividing the participant=s benefits for this purpose should be coordinated with the formula otherwise used for dividing the benefits. In other words, if there is a divided interest, it normally makes no sense to also provide a surviving spouse benefit, because it provides a double benefit to the former spouse.

Under a defined benefit plan, or a defined contribution plan that is subject to the QJSA and QPSA requirements, to the extent the former spouse is treated as the current spouse, the former spouse must consent to payment of retirement benefits in a form other than a QJSA or to the participant=s waiver of the QPSA.

For example, in a defined benefit plan, the participant would not be able to elect to receive a lump sum payment of the retirement benefits for which the alternate payee is treated as the participant=s spouse unless the alternate payee consents. Similarly, the former spouse=s consent might be required for any loan to the participant from the plan that is secured by his or her retirement benefits.

In a defined contribution plan that is not subject to the QJSA and QPSA requirements, to the extent the QDRO treats the former spouse as the participant=s spouse under the plan, the survivor benefits under the plan must be paid to the former spouse unless he or she consents to have those benefits paid to someone else.

III. Conclusion

As can be seen by the above, drafting of a QDRO is a complex process and is affected by a number of variables. Practitioners are cautioned to not use boilerplate language themselves, and they should not hire drafters that just use the model QDRO provided by the plan.[4]

Failure to incorporate all of the terms and considerations discussed above may result in the QDRO being rejected by the plan or, worse still, may result in the client not receiving the benefits intended by the parties or the court.

Every plan is different. Make sure that you do your due diligence when preparing the QDRO or make sure you hire a competent drafter.

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[4] The model QDRO will divide the benefit but the terms are specifically designed to protect the Plan. A qualified drafter will ensure that the QDRO protects both parties, limits the need for further litigation, and provides results that might be considered malpractice and resulting liability for the practitioner.

Failure to Avoid Pitfalls When Performing an Equalization Transfer for Multiple Plans

Submitted by Ryan C. Cari and Kevin M. Urbik

XIII. **Failure to avoid pitfalls when attempting to equalize the marital estate using a qualified plan or equalization with multiple plans**

a. QDROs can also provide both challenges and opportunity when attempting to settle a property division case. Those of us out there that are family law practitioners know that often times the qualified plan or plans represents a substantial portion of the marital estate; consider a typical net worth statement of a couple in their mid-40's; perhaps the two biggest assets will be equity in the marital home and a retirement plan or two.

b. What parties often do not like to hear is that courts in most jurisdictions, if forced to decide cases involving property division, at least in our part of the world, are likely to keep decisions simple and straightforward; I can hear one particular judge that I find myself in front of often telling parties something to the effect that "if you can't decide how to divide the marital estate, I will do it for you, and then neither of you will be unhappy, at least on some level".

c. I find that to be very true in the context of parties that have substantial net worth tied up in qualified plans; a judge is not likely to be worried about what plan has what characteristics, and what plan has what value and how to make it equal given the values in other plans; especially if it would be far easier for a judge to simply order that all plans be divided equally. That isn't the case in all property division cases of course, and many of you may have some examples where a far more sophisticated decision has been handed down and multiple plans are divided in different ways.

d. However I would surmise that most of you that have tried a large number of family cases that deal with property division will tell clients that if you want to

have some control over the result, and perhaps have an idea about what you will end up with, you had better make a good faith effort to settle the case.

e. In those instances where you are headed into a settlement conference or mediation, much of what we went over earlier about best practices during discovery becomes critical. You need to know what you are dealing with in terms of the retirement assets if you are going to get creative with equalizing the estate using a QDRO, or if you are attempting to equalize numerous retirement plans using QDROs.

f. Chances are your client has no idea what his or her retirement plan says about division and what the difference is between a defined benefit plan and a defined contribution plan. And if you get them mixed up, and tell your client that they will be able to cash in their ½ of the ex-wife's defined benefit plan after the QDRO is accepted, you are going to have one unhappy client.

g. Settling property division cases involving QDROs

    i. Interest in qualified plan vs. cash. At the simplest level, most of us have learned along with way that all assets are not created equal. Take for example $100,000 in a qualified plan, and $100,000 in cash. I don't know many people that are educated in this area that would take the $100k in the qualified plan over the cash. And that is because, as we all know, the qualified plan has deferred tax consequences and potential penalties if liquidated before retirement age. Again, that is the simplest example we learn of early on.

        1. A common way to address this issue is through application of a discount to the qualified plan.
        2. Using our very simple example with a marital estate comprised of two assets; $100k qualified plan/$100k cash, we reduce the value of the qualified plan to take into consideration the tax consequences. Depending on the age of the parties, and other factors, we might see a 20-30% discount. Now the $100k qualified plan is worth between $70k and $80k when compared to the cash,

and we need an equalizer payment to be paid by the spouse receiving the cash.

3. In this example, after applying the discount, we are using the cash to equalize the marital estate.

ii. Qualified Plan as Equalizer. Consider another example where we need to use one of the parties' qualified plans to equalize the marital estate. If it is the only qualified plan the parties have between the two of them, then your focus needs to be on what type of plan you are dealing with.

1. Any loans?
2. Any delayed contributions to be paid?
3. Any distributions taken during the case or just prior to filing?
4. Are there any premarital contributions that need to be accounted for?
5. Then it is necessary to take the appropriate discounts to make certain the asset has been reduced in value to account for the deferred tax consequences, and determine the amount that needs to be transferred to equalize the marital estate.

iii. Equalization with Multiple Plans. I had referred earlier to a case I handled that involved multiple plans and a settlement agreement that was reached with an equalizer being made out of only one of the plans, and the rest remained in the hands of the plan participants. In the context of cases that have multiple plans and multi-year marriages, this can be challenging. The main challenge is getting your arms around what types of plans you are dealing with. Perhaps an example of the challenges this presents is when you have a pension plan in the mix. These can often times be far more difficult to value than your straightforward 401(k) plan. The stream of income can typically be out in the future, often several years down the road, and it is necessary to discount that future cash flow to present value.

1. Valuation is one of the challenges; does the plan administrator have sufficient information for you determine value? Do you hire

someone to value the pension? Best practice is to hire an expert to value the pension in today's dollars.

2. Even after you settle on a value, try telling your client at age 40 that the soon to be ex-spouse only needs to give up 10% of their 401(k) because your client has a pension that will start paying $1,000 per month when they turn 62. That can be a hard sell.
3. Another common mistake when attempting to equalize retirement assets using one of the accounts is picking a date for valuation. Statements have different statement dates and cycles, and it can sometimes be difficult to value each plan as of a certain date; often times this can create problems for the spouses even though they agree in principle.
4. Yet another challenge in equalizing multiple plans is trying to adjust or account for earnings or losses. Attempting to equalize the accounts considering the earnings and losses from all accounts is a mistake. Stick with the valuation date for the value of all accounts EXCEPT the account out of which you have agreed to equalize the estate, and from that account, earnings and losses in that account only can be assigned.
5. Finally, never try and equalize property division out of defined benefit plans. Not all things are created equal and it can be next to impossible to make an assignment of one of these accounts to equalize the marital estate. Benefits that do not have accounts with specific dollar amounts in them cannot be "equalized".

Failure to Follow Through with the Plan Administrator

Submitted by Ryan C. Cari and Kevin M. Urbik

a. Timing

i. There is technically no "immediate" timeline to have the QDRO completed.

1. A domestic relations order issued after the participant's death, divorce, or annuity starting date, or subsequent to an existing QDRO, will not fail to be treated as a QDRO solely because of the timing of issuance.

ii. Regardless of the foregoing there are still "timelines" to consider.

1. Subsequent divorces/ orders

a. An order must not require a plan to pay benefits to an alternate payee that are required to be paid to another alternate payee under another order previously determined to be a QDRO.

b. I am sure some family law practitioners listening to this recording have had a client who's soon to be ex-spouse is in a new relationship and is merely waiting for the ink to dry on the divorce papers, or any applicable remarriage waiting period to run, before getting remarried.

c. If this is the case you have a huge red flag and need to ensure the QDRO is drafted as quickly as possible.

i. Odds are that this new relationship may not work out and now your client's ex-spouse is going through another divorce.

ii. You do not want to be racing the attorney's in that matter to complete a QDRO.

2. "Surviving Spouse" benefits

a. Although surviving spouse benefits are addressed elsewhere, it is important to reiterate that:

i. An order cannot require the payment of benefits to an alternate payee that are required to be paid to another alternate payee under another QDRO already recognized by the plan.

b. If a separate QDRO is drafted against the participant's plan, whether that is from a previous or later marriage, and that

order designates the former spouse as the "surviving spouse" you may have difficulty getting your order approved if you try to include similar language.

c. As emphasized elsewhere, these are extremely important benefits.

3. Distributions to Participant.
    a. During the period in which the status of a domestic relations order is being determined, the plan administrator must take steps to ensure that amounts that would have been payable to the alternate payee, if the order were a QDRO, are not distributed to the participant or any other person.
    b. Even if you cannot secure a final QDRO to submit to the plan administrator, you want to take steps to ensure the plan administrator knows there is an order in the works.
    c. Consider drafting a simple draft QDRO for the plan to review. This draft may later be changed, at which point in time the plan administrator will have to go through another review process, but you will be assured there are protections for the alternate payee in the meantime.
    d. You do not want the participant to start drawing on an account, electing certain benefit payment options or taking loans against the plan immediately after the divorce is finalized.
4. 18 month Benchmark
    a. Once you begin the process of submitting an order you should make sure there is a favorable determination within 18 months as the plan administrator's duty to separately account for and to preserve the segregated amounts to the alternate payee while the plan is waiting to be qualified is not indefinite.

i. ERISA provides that the plan administrator must preserve the segregated amounts for not longer than the end of an 18-month period beginning on the first date that the order would require payment to the alternate payee (after the plan receives the order).

5. Distributions to Alternate Payee
    a. The alternate payee is not going to receive any payments until the order is qualified. If your client is relying on this money you need to make sure this is completed in a timely manner. Any delays should not be on your end.
    b. Also, this is especially important when considering the 18 month benchmark and segregated amounts to the alternate payee while the plan administrator is determining whether the order is qualified.
        i. The plan administrator must pay any segregated amounts to the alternate payee in accordance with the terms of the QDRO if the administrator determines that the order is a QDRO within the 18-month period.
        ii. The plan administrator must pay any segregated amounts to the person or persons who would have been entitled to such amounts if there had been no order if the plan administrator determines within the 18-month period that the order is not a QDRO, or if the status of the order is not resolved by the end of the 18-month period.
            1. If this occurs and the order is later determined to be a QDRO, the order will apply only prospectively; that is, the alternate payee will be entitled only to

amounts payable under the order after the subsequent determination.

6. Potential SOL Issues:
    a. This may not be an issue in your state as some courts seem to treat these family case financial issues differently. Even if it does apply the time limits are usually very long.
        i. That being said, if a divorce decree states that the benefits are to be divided by way of a QDRO and that subsequent order is never prepared or filed, a court could take the position that this is an "action upon a judgment or decree of a court of record." See Wis. Stat. §893.40 with a 20 year timeline.

b. Contact with Plan Administrator.
    i. The "administrator" of an employee benefit plan is the individual or entity specifically designated in the plan documents as the administrator. Absent such a designation in the plan documents, the "administrator" is the employer maintaining the plan.
    ii. The summary plan description, which must be furnished by the administrator to the participant and any beneficiaries receiving benefits, must contain the contact information for the plan administrator.
        1. This is one of the documents you should be getting through your discovery process.
    iii. The plan administrator is ultimately responsible for determining whether a domestic relations order is a QDRO, and administrators have specific responsibilities and duties with respect to determining whether a domestic relations order is a QDRO.
    iv. Not only do administrators have to have a number of procedures in place to carry out these duties and responsibilities, they must carry out these duties in a prudent and timely manner.
    v. Most importantly, a state court issuing a domestic relations order, i.e. the court you will be in front of during this divorce, does not have jurisdiction

to determine whether an issued domestic relations order constitutes a "qualified domestic relations order." That jurisdiction is exclusively held by the federal courts. In other words, if the plan administrator is not responsive to your requests and/or you are encountering difficulty getting your order qualified, you can't just schedule a hearing in the divorce matter to seek to approve the order.

vi. If you represent the alternate payee what information are you allowed to receive from the plan administrator?
    1. Enough information to allow you to prepare an order.
        a. Presumably this not only includes the initial information but also follow up information about issues with the order you have submitted.
    2. Regardless of the foregoing it is always a good idea to get an authorization to ensure you can speak with the administrator about all aspects of the plan.

vii. Send reminder letters to the plan administrator requesting status updates
    1. You are entitled to receive a response and determination within a reasonable time.
    2. Don't expect reasonable time to mean a month but it is good practice to send monthly reminder letters.

viii. Keep in mind that the plan administrators almost always refer these issues out to specialty firms to review the order against the specific plan and to ensure it meets the requirements of a qualified order.

c. <u>Contact with the plan administrator's counsel</u>

i. Often times these attorneys can be extremely helpful but don't always expect this.

ii. Don't expect to have any considerable contact with the plan administrator's counsel. Most contact is done by letter but they are definitely not going to be your pen pal. Expect that you are either going to receive a letter telling you the order meets the requirements or it does not.

iii. Mistakes in drafting the order

1. Expect that you may need to send in more than one draft of the order that will need to be revised and be happy when this does not occur. If the order comes back and it is not determined to be a QDRO, there is no need to get upset and take it out on the plan administrator or their counsel. These things will be worked out.
    a. The Department has issued statements outlining that : "where a reasonable good faith effort has been made to draft a QDRO, prudent plan administration requires the plan administrator to furnish to the parties the information, advice, and guidance that is reasonably required to understand the reasons for a rejection, either as part of the notification process or otherwise, if such information, advice, and guidance could serve to reduce multiple submissions of deficient orders and therefore the burdens and costs to plans attendant on review of such orders.
    b. Regardless of the foregoing, in my experience if you make a mistake in drafting the order they are more than likely not going to give you specific advice or direction. They are not going to tell you exactly what to do.
2. They will more than likely send a general letter telling you something is wrong and then point you in the direction of one of the plan administrator's sample forms.
    a. Why do they do this?
        i. My assumption is that they shy away from telling you what specifically needs to be changed because they don't want to bind themselves to any pre-approval and only want to review what is in front of them in the form of a proposed order.
        ii. They are used to seeing the plan administrators sample and it is much easier for them to review if that is what you send to them

1. This does not make it easier for your practice if you are looking to create a general form to use with a number of different plans, if and when you have to draft a QDRO
2. You are left with deciding whether you use your form and make your job easier or whether you constantly draft off of the plan administrator's samples and make it easier on them, potentially getting a quicker turnaround time.

iv. Also consider potential costs in making mistakes.
    1. ERISA contains no provisions specifically addressing how plan expenses may be allocated among participants and beneficiaries.
    2. Plan administrators also request guidance on charging administrative fees related to QDRO's. See DOL Advisory Opinion No. 94-32A;
        a. The reason often being being that: "It is not unusual for a domestic relations order to go through several modifications before it meets the requirements necessary to be a QDRO and each time the Plan Administrator may need to seek the advice of an attorney concerning whether or not the order is a QDRO."
    3. In DOL Advisory Opinion No. 94-32A, it was determined that such expenses fell on the plan as a whole and not solely on the individuals involved in the QDRO.
        a. Reasoning: "It is the view of the Department that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination of the status of a domestic relations order or administration of a QDRO would

constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under Title I of ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, because Title I of ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participants and beneficiaries affected by the QDRO

4. This was the old rule wherein this expense was not a significant concern. Since that time see Field Assistance Bulletin 2003-3 which supersedes AO 94-32A.
5. "ERISA does not, in our view, preclude the allocation of reasonable expenses attendant to QDRO…… determinations to the account of the participant or beneficiary seeking the determination."
6. Now you need to ensure your review all plan documents to determine how these expenses are charged and/or allocated.
    a. Plans are required to include in the Summary Plan Description a summary of any provisions that may result in the imposition of a fee or charge on a participant or beneficiary, or the individual account thereof, the payment of which is a condition to the receipt of benefits under the plan.

d. <u>"Last" Resort</u>
    i. You cant go to the state Court to interpret and push an order through.
    ii. I assume most attorneys don't want to start a separate proceeding in the federal court system to get a QDRO approved.
    iii. Instead, file a Motion to Compel in the jurisdiction where the divorce matter was pending naming the plan administrator and the participant.

1. This is not frivolous as they are the gatekeepers here and supposed to be providing you with guidance.
2. If this issue actually makes it to court just explain the situation to the judge.
3. More than likely you will get a call from the plan administrator or their counsel prior to the hearing and they will provide you with additional information and you can withdraw your motion. You are definitely going to get their attention.

iv. I am in no way suggesting that this be your standard practice. You should always review the plan administrators documents and rules and regulations and this should definitely be your last resort after everything else has been exhausted.

v. If there is an emergency situation also consider filing a restraining order or interim QDRO on the Plan. If granted you may be able to protect the Alternate Payee's benefits during divorce or while you are waiting for the plan to approve an order.

e. <u>What should you be receiving and what should your client be receiving?</u>

i. The administrator is required to permit an alternate payee to designate a representative for receipt of copies of notices and plan information that are sent to the alternate payee with respect to a domestic relations order.

ii. It is important early on in the process to have the alternate payee designate to ensure you are receiving all of the paperwork needed to complete the QDRO and any follow up information. That being said, it must be understood with your client that at some point this designation will be revoked.

1. The alternate payee will continue to receive information and you as their attorney do not want to be responsible for all issues involving the plan going forward. If they later determine to take the money out or start receiving payments your involvement should stop unless you have a separate retainer.

a. You do not want to be responsible should your client fail to follow the guidelines for moving the money and suffer a significant tax consequence. You should make it very clear in writing with your client if you are preparing the QDRO that you are not responsible for providing any tax guidance in regard to subsequent withdrawals from the plan and they should talk with their tax professional.
b. If you are going to continue representation until this time and provide guidance regarding the transfer of the money that is fine but this should not be the expectation.

Best Practice Tips for Other Mistakes Attorneys Make - Beneficiary Designations and More

Submitted by Ryan C. Cari and Kevin M. Urbik

XV. **Best practice tips for other mistakes attorneys make – beneficiary designations and more**

a. Plan Administrator Forms
    iv. Keep in mind that a plan administrator's sample form is just that, a sample.
    v. More than likely going to be a bare bones form to get the order to qualify
    vi. Always look at it but don't always use it.
b. If you practice family law and there is any uncertainty in your responsibility to see that the client's assets are properly divided following a divorce, assume that you are on the hook to make sure this gets done.
    vii. Property division is part of a divorce and there are steps after the judgment is entered that need to be completed to accomplish this overall step.
    viii. Many states have statutes specifically/ rules requiring that a notice to this effect be included in the divorce judgment.
        1. See Wisconsin's Notice: A judgment must include: "Notification that it may be necessary for the parties to take additional actions in order to transfer interests in their property in accordance with the division of property set forth in the judgment, including such

interests as interests in real property, interests in retirement benefits, and contractual interests." Wis. Stat. §767.61.

ix. Most states have a Supreme Court Rule/ Rule of Professional Responsibility similar to the following: "A lawyer shall act with reasonable diligence and promptness in representing a client."

c. Deeds. The process we have been describing here is very analogous to the disposition of real estate following a divorce. The divorce decree is going to say one party gets the real estate and if nothing else is done the issue is not resolved. Similar to a QDRO there are follow up documents that need to be prepared such as a deed or summary real estate disposition judgment, or at least filing the divorce decree with the county recorder to provide notice.

d. Beneficiary Designations

x. Similar to the notice regarding additional steps that may be necessary to complete property division after a judgment is entered, many states include a notice in the judgment related to beneficiary designations.

1. See Wisconsin's Notice: A judgment must include: "Notification that an instrument executed by a party before the judgment naming the other party as a beneficiary is not necessarily affected by the judgment and it may be necessary to revise the instrument if a change in beneficiary is desired. Wis. Stat. §767.61.

xi. Depending upon which state you practice in this may not be an issue regarding the ex-spouse.

1. Some states have statutes specific to beneficiary designations following a divorce that either voids any provision in favor of the ex-spouse or their relatives, or treats this individual as predeceasing the owner of the asset to which the designation applies.

a. These are automatic changes and an additional step may not be necessary, but it is always good to update.

2. Other states, on the other hand, specifically note that the individual must take additional steps to make the changes to the designations.

3. Most statutes have an intent element, i.e, X happens unless it can be shown the person intended otherwise.
4. You don't want your client falling on the wrong side of the intent argument or even leaving this issue open. Just advise them to make the change.

xii. Always have a CYA letter you send to divorce clients regarding beneficiary designations.

1. This is something a client should be handling; you should not be filling out their beneficiary designations.

Ethical Issues Regarding the Division of Retirement Benefits in Divorce

Submitted by Marshal S. Willick

I. Ethical Issues Regarding the Division of Retirement Benefits in Divorce

A. Most Relevant Ethical Rules/Guidelines

If you find yourself in an ethical dilemma, there are numerous resources you can look to. Even if you don=t know that an ethical dilemma exists but have a gut feeling that something isn=t right, it is good practice to follow your gut when it comes to potential ethical issues. The following is a non-exhaustive list of ethical rules/guidelines and where you can go to ask questions as they arise.

- The American Bar Association Model Rules of Professional Conduct.[1]
- Your State=s Rules of Professional Conduct.[2]
- Your State=s Supreme Court Rules.
- Your State or local bar website. This is useful for obtaining informal or formal opinions on ethical questions.[3]
- The ABA Ethics Hotline (AETHICSearch@).[4]
- The American Academy of Matrimonial Lawyers Ethics Information Center.[5]

A. Attorney-Client Confidentiality

All lawyers should know the basics of attorney/client confidentiality. Knowing what you can and can=t disclose is part and parcel of the practice of law. Of course, just because the lawyer understands, does not mean the client understands.

A client must be instructed that talking about attorney client/privilege information to third parties basically waives the privilege and subjects the third party to potentially be required to testify about the content of the communications. Spending a little time with your client discussing what can and can=t be discussed outside of your office tends to go a long way.

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[1] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

[2] http://www.americanbar.org/groups/professional_responsibility/resources/links_of_interest.html

[3] http://shop.americanbar.org/ebus/ABAGroups/DivisionforBarServices/BarAssociationDirectories/StateLocalBarAssociations.aspx

[4] Phone 1-800-285-2221; fax 1-312-988-5491; email ethicsearch@staff.abanet.org.

[5] http://www.aaml.org/category/practice-areas/other-matters/ethics

This of course goes to email and text messaging as well. Anything that is sent to an email address that is accessed by more than just the client waives the privilege.

We include the following in our retainer agreements:

> Client understands that for the purpose of preserving attorney/client confidentiality, and other reasons, all contacts between Client and any member of Attorney=s staff are to be conducted ***at the office***, whether in person or by phone, and not at the home of a member of Attorney=s staff, or a cell phone, etc., except where strictly necessary and where advance arrangements for such contacts have been made at the office. It is understood that any meetings outside of normal office hours (i.e., 8:00 a.m. to 5:00 p.m.) or phone calls to a member of Attorney=s staff at home or by cell phone are extraordinary events, and are discouraged.

Following these simple rules helps protect both the attorney and the client. While there is a current debate about the need for encryption in all communications, that subject is beyond the subject matter of this presentation.

B. Establishing Reasonable Attorney=s Fees

The ABA Model Rule of Professional Conduct 1.5 states, in part:

> (a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:
>
> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee customarily charged in the locality for similar legal services;
>
> (4) the amount involved and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

The MRPC directs an attorney to set fees based on an individualized, case-by-case basis. My firm=s website has a sample retainer agreement with specific fee schedules and what the client can expect to be charged based on who is doing the work. Some attorneys refuse to disclose their fees until the Apen is to paper,@ but I have always felt that a large part of setting Areasonable@ attorney fees was disclosing them in advance so there are no surprises and the client can focus on the issues for which the attorney is being hired.[6]

Every law firm is entitled to set its own policies regarding payment arrangements for divorce clients. Often these arrangements are tailored to the specific client. Most attorneys require a substantial retainer to be paid at the outset of the case. Some attorneys accept monthly payments in lieu of the retainer. Others require monthly payments, or request additional retainers as the case progresses. Whatever the specific terms, attorneys have a duty to have frank discussions with clients and ensure that there is clarity about the payment of legal fees.

As for the specific issue of billing for drafting QDROs, we have seen some preparers actually look at the ability of the client to pay or the total sum in the retirement account before setting their fees, and tailor what is charged to what they think the market will bear. Others charge their billable rate for the drafting. We find that both of these methods would be hard to justify under the model rule or before a fee dispute panel or judge when requesting fees. We therefore set a flat fee for all retirement division orders no matter the plan, the client, or the sum being distributed. This makes it easy to justify our charges.

Assigning work to associate attorneys and support staff can mitigate costs. A partner or supervising attorney charging $500 or more an hour and drafting from scratch or doing basic editing should consider revising internal procedures to train and then leverage the work of support staff, with proper supervision and review, to accomplish the same work at substantial savings to the client.

C. Conflicts of Interest and Other Ethical Scenarios

1. Competency

MRPC 1.1 states that:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

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[6] You can view our sample retainer agreement at http://willicklawgroup.com/wp-content/uploads/2012/04/11161.pdf.

A lawyer has a duty to decline drafting a QDRO if that lawyer lacks the legal knowledge, skill, thoroughness and preparation reasonably necessary to draft a QDRO. It is of utmost importance that a lawyer be able to recognize what the lawyer can and cannot competently perform.[7]

There is little excuse today for divorce lawyers failing to deal with pension benefits. Pensions were recognized as community property over 20 years ago, and recognition was extended to unvested and unmatured pensions shortly thereafter. Statutory and case law throughout the country now recognizes pension benefits as marital property. Rationales for that recognition usually include that benefits accrued during marriage, present income was deferred during marriage in exchange for the pension benefits, and that the choice was made to forego possible alternative employment which would have paid more in current wages, in order to have the pension.

It is better practice to deal with pensions during the divorce itself, instead of deferring the matter to be dealt with Alater.@ In too many cases, attorneys withdraw from divorce cases knowing that a pension exists, but before a Qualified Domestic Relations Order (QDRO) is actually entered. Doing so leaves counsel susceptible to suit if anyone who might have received money from that pension (during life or upon the death of the other party) does not get it, even many years later.

[7] Or as famously expressed by Clint Eastwood, AA man=s ***got*** to know his limitations.@ (*Magnum Force*, 1973).

Some states do not clearly permit a spouse who does not receive a portion of pension benefits to bring a partition action at a later date to divide those benefits.[8] While partition might be available to a shortchanged former spouse after divorce, that expectation is not much to rely upon. If the law of the relevant state (which may not be the state of divorce) does not provide a way to correct the omission of assets from the decree, the only mechanism for recovery for a divested spouse be a malpractice suit against her attorney. The non-uniform and uncertain state of the law governing partition of omitted assets therefore makes it imperative for counsel to seek out pension benefits during the pendency of a divorce as a matter of defensive practice.

Awards against attorneys in these cases can be significant. It has been made clear that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist.[9]

The potential liability is the value of the benefit lost to the shortchanged spouse. An increased degree of attention to ferreting out possible concealed assets, including retirement benefits, is not only advisable, but necessary.

2. Know It When You See It

Making the issue more problematic for attorneys is that there are lots of different pensions, and they are all governed by different rules; a single person can have multiple pension interests. For example, an employee of a defense contractor may have two or three different retirement accounts, plus a private Individual Retirement Account (IRA).

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[8] *See*, *e.g.*, *Taylor v. Taylor*, 105 Nev. 384, 775 P.2d 703 (1989) (no right at common law to divide an unadjudicated pension), rev=d by Nev. Rev. Stat. 125.150(3) in 2015.

[9] *See Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000.00 malpractice award against trial attorney for not knowing that he could seek division of military retirement after change in the law).

A federal employee may have a pension through the Civil Service Retirement System (CSRS) or the Federal Employee Retirement System (FERS), plus a Thrift Savings Plan (TSP) which is the Federal Governments defined contribution plan with matching contributions.[10]

An active duty or reserve military member may also be working with this government team. This member will be earning a military pension and will also have the opportunity to contribute to either a Roth or traditional TSP.[11]

If all of this is not enough to scare the average attorney out of domestic relations and into a practice centering on probate, every one of these plans has a different survivor benefit plan or scheme with completely different rules. The quickest way to a malpractice claim is to screw-up a survivor beneficiary interest which B in some cases B is unfixable.

3. Loyalty to a client

Loyalty to a client prohibits undertaking representation adverse to a client without first obtaining that client=s consent. In certain circumstances, an impermissible conflict of interest may exist which entirely prohibits representation. This general proposition is codified in the MRPC 1.7:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer=s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
>
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;

[10] The TSP comes in both a traditional and Roth varient.

[11] The active duty/reserve TSP does not have matching contributions.

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

When representation of multiple clients in a single matter is undertaken, the consultation should include explanation of the implications of the common representation and the advantages and risks involved.

4. Liability of an Attorney

A brochure provided by a leading malpractice carrier, entitled Avoiding Malpractice Traps, stated one of the two main issues raised in malpractice cases for domestic relations attorneys is AFailing to investigate and/or protect retirement and other benefits.@

The carrier is right. Courts hearing such cases have stated that any attorney practicing divorce law is charged with knowing about the existence, value, and mechanics of dividing any retirement benefits that might exist. And the potential liability is the value of the benefit lost by the shortchanged spouse. Since the pension is often the single most valuable asset of the marriage, that is the measure of counsel=s risk.[12]

It happens a lot. About half my work as an expert witness in recent years involved liability claims against attorneys accused of not properly securing retirement or survivorship benefits for a spouse.

5. Timing

All retirement orders should be completed and submitted for signature before or B at latest B when the Decree is submitted. Why?

[12] *See Smith v. Lewis*, 530 P.2d 589 (Cal. 1975) ($100,000 malpractice award for failing to list and divide a military reservist retirement), overruled on other grounds, *Marriage of Brown*, 544 P.2d 561 (Cal. 1976); *Cline v. Watkins*, 66 Cal. App. 3d 174, 135 Cal. Rptr. 838 (Ct. App. 1977) (first attorney=s liability for negligence not cut off by substitution out of case and assumption of representation by second attorney who was negligent in failing to assert community interest in federal pension benefit); *Medrano v. Miller*, 608 S.W.2d 781 (Tex. Civ. App. 1980); *Aloy v. Mash*, 696 P.2d 656 (Cal. 1985); *Martin v. Northwest Washington Legal Services*, 43 Wash. App. 405, 717 P.2d 779 (Wash. Ct. App. 1986) (lawyer and firm found to liable for failure to inquire about, discuss, or seek division of client=s husband=s military pension in a dissolution case where the attorney was on notice that one of the parties was a member of the Armed Services); *Bross v. Denny*, 791 S.W.2d 416 (Mo. Ct. App. 1990) ($108,000 malpractice award where attorney did not know that he could seek division of military retirement after change in the law).

Every day that ticks by between the Decree and the QDRO increases the risk that a party could die, or the employee could retire, locking out benefits to the other party and B again B making counsel liable if parties happen to die in an inconvenient order. For detail, see Legal Note Vol. 16 C When QDROs Should Be Drafted (May 11, 2010).[13]

The solution is simple. If a retirement is in issue, obtain expert assistance to draft the orders before negotiating or litigating the rest of the case. There is a very practical reason for doing so: the non-employee loses all leverage to negotiate terms once the MSA or decree is completed. Also, discovery is often only available prior to the completion of the divorce.

6. The Minimum Duty Required

Multiple courts have held all divorce counsel to the duty of finding out what retirement benefits exist, and ensuring B directly or through others B that their clients= interests are protected.

If potential liability was not a sufficient motivator, there is also the fact of a general ethical duty of competence and diligence.[14]

As the cases noted above indicate, an attorney can be found negligent just for failing to Acheck@ to see if there are any retirement accounts in the name of either party. Simply asking the client if there are any such accounts will not satisfy the requirement of due diligence. At a minimum, a limited investigation as to the employment of each spouse during the marriage and then a review of possible pension plans afforded employees at those places of employment is necessary.[15]

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[13] Posted at http://www.willicklawgroup.com/vol-16-when-qdros-should-be-drafted/.

[14] Posted at http://www.willicklawgroup.com/vol-16-when-qdros-should-be-drafted/.

[15] NRPC 1.1 and 1.3. The Nevada Rules of Professional Conduct Rule 1.16(b) states that: AExcept as stated in paragraph (c), a lawyer may withdraw from representing a client if: (1) Withdrawal can be accomplished without material adverse effect on the interests of the client.@

A low wage housekeeper from one of the Las Vegas casinos was recently divorced and the client intake form asked if she had a pension. Her negative response was not unexpected as she lived from paycheck to paycheck and had no clue. However, being a hotel housekeeper meant automatic membership in a union, and that meant that she was building up a defined benefit pension and had the ability to contribute to a defined contribution plan, whether she knew it or not.[16]

An attorney who ascertains the existence of a pension or retirement plan has the duty of ensuring that the client actually receives that client=s share of that pension. This includes the responsibility of ensuring that the order recites that the client will receive the proper survivorship interest, since current case law in some places indicates that if the right is not recited, it is forfeited.[17]

Again, referring to the cases noted above, even an attorney who is substituted out or fired has the duty B ignored at the lawyer=s peril B to inform the former client of the need for the QDRO if the pension is to be divided. A matter of defensive practice, that notice should be in writing with a description of the potential consequences of not obtaining the required order.

The work is not finished when the QDRO or other retirement order is drafted, either, as illustrated by the *Kennedy* case.[18] In 1974, Bill designated his then-spouse Liv as beneficiary of his ERISA-based account balance (savings) plan. In 1994, the parties divorced, and their Decree included a provision stating that Liv waived all interests in the plan.

In 2001, Bill died, having never sent the Abeneficiary change@ form to the pension plan. His heir made a claim, but the plan paid the ex-wife, Liv, anyway, notwithstanding her explicit waiver of the benefits in the Decree. And after eight years of litigation, the United States Supreme Court said the plan was right in doing so, because plan administrators should be able to rely on the documents in their files, without having to look at Aextraneous@ documents B like divorce decrees.

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[16] For a guide of what to do and how to do it, see Marshal Willick, RETIREMENT PLAN DIVISION: WHAT EVERY NEVADA DIVORCE LAWYER NEEDS TO KNOW (State Bar of Nevada CLE, Ely, Nevada, 2013), posted at http://www.willicklawgroup.com/published-works/.

[17] *See*, *e.g.*, *Henson v. Henson*, 130 Nev. ___, 334 P.3d 933 (Adv. Opn. No. 79, Oct. 2, 2014); analyzed in detail in Marshal Willick, PARTITION ACTIONS: WHAT EVERY NEVADA DIVORCE LAWYER NEEDS TO KNOW (in Advanced Family Law CLE, State Bar of Nevada, Las Vegas, Nevada, 2015), posted at http://www.willicklawgroup.com/published-works/.

[18] Edwin Schilling, Esq., of Aurora, Colorado, estimated that 90% of his malpractice consultations involved failure to address survivor beneficiary issues. Lawyer=s Weekly USA, Oct. 18, 1999, at 22 (99 LWUSA 956). My experience is similar B I have been hired as an expert witness for plaintiff or defense in several cases involving practitioners accused of not securing survivorship benefits.

In other words, the highest court in the U.S. has said that the administrative convenience of plan administrators is more important than obeying divorce court orders, or following the intent of parties.

The divorce lawyer, who probably thought he had finished his job when he got the waiver put in the Decree, faced a possible malpractice suit from the intended beneficiary for not ensuring that the right form was sent to the plan at the conclusion of the divorce.

The lesson is that it=s not enough to just draft the order, and its not enough to just file the order with the court. The QDRO must be served on, and approved by, the plan, and it is a very good idea to get verification that it was served on the plan. Anecdotal reports continue to appear of pension plans that pay benefits out contrary to court orders, and when challenged, simply deny having received the orders in the first place.

A little paranoia on the part of divorce lawyers is justified B to get verification of service, and to make sure the client gets a copy of that verification. Filing the proof of service with the court entering the decree and QDRO may also be a good idea.

7. Retainer Agreements/Engagement Letters

As the model rules note, it is good practice to have a written agreement as to the service to be provided and the fees to be paid.

In our QDRO-drafting service (QDRO Masters), our standard engagement letter details the service to be provided, the flat fee charged, and the hourly fee to be charged if additional work is requested for additional drafting services or related work. It also includes a disclaimer:

> This office is providing this service and is not advising you as to the merits, one way or the other, on the choices that you will make or the options you will select. QDRO MASTERS is providing legal drafting to effectuate the completion of the distributions agreed to by your local attorney. QDRO MASTERS has not conducted any independent investigation into the facts of your case and relies entirely on the information provided by you or your local attorney. We are not responsible for the way the case is or was decided by your local Court of Law.

To make sure the point is clear, our standard engagement letter includes a short list of services that are ***not*** included in QDRO-drafting work:

- $ Legal representation as to the merits of your case.
- $ Entry of the Order by the Court.
- $ Communication with the Opposing Party or their Counsel.

$ Litigation of any issues concerning this Order.

If you are being hired as a neutral, then consider specifying in your retainer agreement or engagement letter the difference between providing Ainformation@ and Alegal advice,@ and the limits of your role B whether to provide no information, to answer everyone=s questions, to note legal or mathematical errors in the directions provided by the decree or client (or to not do so), etc.

8. What Should I Do?

The preparation of QDROs should always be accomplished by an attorney skilled and experienced in their construction. Never rely on a model QDRO provided by the plan as the only or best or even adequate method for the division of a pension. Specifically, the plan is looking out for its ***own*** interests and not that of the participant or the alternate payee. Additionally, the specific requirements laid out in the decree or other order requiring the QDRO be entered must be included in the provisions in a way that will be acceptable to the plan and comport with the court=s orders.

Remember the 6 APs@ of case preparation: Prior Planning Prevents Particularly Poor Performance. If you aren=t sure whether there is a pension to be divided in a divorce action, bring on a professional early to assist. Hiring a professional QDRO preparation service is the safest way to go. Ensuring that the QDRO preparation service includes an actual properly-educated attorney to review the plans and their requirements and to make sure the provisions in the QDRO comport with the decree is the best way to safeguard against a malpractice claim while making sure your client=s benefits are protected.

The bottom line is that you are liable for what happens to your client=s retirement benefits. This liability lies until that client retires B which may be decades in the future B and discovers that you made a simple mistake that cost them a large portion of their benefits or a total loss of their survivor benefits. The costs to you, or to your insurance carrier, could easily be in the hundreds of thousands of dollars. Don=t ignore this malpractice trap and don=t think you can avoid liability by claiming ignorance to your client.

Lastly, don=t bail out of a case until the QDROs are in place B meaning approved by the plan and entered by the court. Leaving the case may have a very large adverse effect on the interests of your client. This is the single best way to protect yourself and your liability insurance premiums from increasing.

If these steps are not taken, sooner or later, something will go wrong (for example, if survivorship interests are not secured, it tends to be discovered when people happen to die in an inconvenient order), and the lawyer will look like a target of opportunity.

It is possible, of course, that with adequate CYA letters, etc., lawyers could make it their clients= problems to figure out what to do after the divorce and try to get it done. But it is far better lawyering B in the client=s interest and that of the attorney seeking to avoid potential liability B to deal with the retirement benefits at the time of divorce. Doing so means making sure the proper orders are in place at the time of entry of the decree B and making sure the relevant retirement plans acknowledge getting them.

D. Educating your clients - How to Explain Complex QDRO Concepts

QDRO concepts are complex and difficult for most lawyers and judges, let alone clients. While the division of marital property generally is governed by state domestic relations law, any assignments of pension interests must also comply with federal law.

For private company pensions, the that means the Employee Retirement Income Security Act of 1974 (ERISA), and the Internal Revenue Code.

For federal government employee pensions, it means the Civil Service and Federal Employees Retirement Systems (CSRS & FERS) pursuant to Title 5 of the United States Code, and for military retirement benefits it means 10 U.S.C. ' 1408.

When State Public Employees Retirement benefits are involved, each state has statutes applicable to the division of those benefits. Each of these retirement systems has detailed rules, policies, and procedures.

My firm website acts as a library of information for potential clients. At consults, we give away a book I wrote, ADivorce in Nevada. The Legal Process, Your Rights, and What to Expect.@ Essentially, I have set up my practice to give away as much information as possible. This may seem counterintuitive; many lawyers set up their websites as non-substantive advertisements believing that people should pay for any information obtained. I have found, however, that giving the maximum possible information to potential clients in advance results in having clients who come in more prepared and able to have meaningful discussions about their issues.

In my experience, sticking to the basics is the best way to communicate with clients about a QDRO. Specifically, make sure the client understands what benefits are at issue, what they can expect to get under the laws of your jurisdiction and what benefits are available for negotiation. This usually requires explaining the following essential elements:

1. ***What*** will be available (and the form B whether a monthly annuity, or with a lump sum option), and whether there might be more than one plan associated with a particular wage-earner.
2. The ***amount*** of the benefit that is divisible community property, under the time rule, direct tracing, or some other analysis.

3. ***When*** that sum is to be ***first available*** for distribution, and what steps might be taken by either party to accelerate or delay that availability.
4. What, if any, ***survivor benefits*** might be accorded to a former spouse in addition to or in place of the retirement benefits, and who will pay for them.
5. Whether any ***ancillary*** benefits are available (most importantly, medical benefits).

After these basics come a few other matters that should be consciously addressed in every divorce case involving pension benefits before the case is over, and which should probably be at least mentioned to a client:

1. What ***notices*** are required to be given, within what time limits, to which authorities, in order to make sums payable to the spouse or permit the transfer of other interests.
2. What effect a present or future ***disability*** claim by the retiree or the former spouse could have on payment of benefits (and what, if anything, you can do about it in advance).
3. Whether and what post-divorce actions of either of the parties (such as nomination of the wage-earner of a second spouse as beneficiary, or remarriage of the former spouse) could affect the distribution of benefits provided by the Decree, and what can or should be done about those possibilities.

Failure to deal with ***all*** of those factors in litigation or negotiations, and especially in the court orders, could lead to unforeseen and unfortunate results for parties, or counsel, or both. Simply having a conversation where these multiple options and possibilities are discussed can go a long way toward making the client feel that there has been communication regarding the issues.

The client will also want to know how the terms of the QDRO will protect the client=s interests in the event things do not go as planned. For instance, knowing that the QDRO accounts for what happens if either of the parties dies before retirement.

Lastly, the client will want to know if the terms of the QDRO are binding on their former spouse or the Plan, or both.

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