



PENSION RIGHTS CENTER

Issue Spotting for Cases Involving Qualified Domestic Relations Orders (QDROs)

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What is a QDRO?





BACKGROUND

Retirement, Divorce, & Older Women

- Retirement and divorce affects spouses of every race and gender—but often these issues affect older women most.
- Women over 65 are nearly twice as likely as men to face poverty in old age—this gender disparity is even greater for African American and Latina women.
- Studies show that divorced women over 65 are three times as likely to live in poverty than their married counterparts.
- According to the Government Accountability Office, after a divorce, women had a 41% decline in income and assets compared to 23% decline in income and 39% decline in assets among men.
- Survivors of domestic violence face unique retirement security challenges

The Importance of Retirement Benefits in a Divorce

- Retirement benefits are often the largest marital asset.
- Women especially are more likely to be poor after a divorce.
- The right to a share of the former spouse's benefit is based on the understanding that labor in the home is valuable and most states consider retirement assets earned during the marriage to be marital property.
- Ensuring the non-employee spouse gets a portion of the former spouse's retirement benefits will help protect financial security in retirement.
- The division of retirement benefits must be addressed in the divorce decree. It can be costly and sometimes impossible to do so after the divorce is finalized.

Why are Retirement Benefits Not Being Addressed?

- Retirement seemed far off and isn't an immediate concern.
- The benefit-earning spouse failed to disclose the existence of some of the assets.
- Legal counsel for the non-employee spouse was unaware of existence of the benefit or was unfamiliar with how to divide it.
- Even when they are addressed, in order to receive their awarded benefit, the spouse needs to obtain a QDRO and have it approved by the plan.
- This process of getting a QDRO is not well understood by the general public or even by divorce attorneys and family law judges.

What is a Qualified Domestic Relations Order (QDRO)?

- **SHORT VERSION: Document that is required in order to divide retirement benefits in a divorce—namely, the court order to the plan that implements the divorce court's award of retirement benefits.**
- Domestic Relations Order: Judgment, decree or order, made pursuant to state domestic relations law that is related to child support, alimony, or **marital property rights**.
- Creates or recognizes the existence of an alternate payee's right to receive, or assigns to them the right to receive all or a portion of the benefits payable to a participant under the retirement plan.
- Must include specific information and meet certain requirements under federal private pension law
- Qualified by the Plan Administrator not the Court!

Why do QDROs exist?

- Employee Retirement Income Security Act of 1974 (ERISA)
 - Designed to protect participants in private employer tax-qualified retirement plans
 - State law is preempted by ERISA, thus ERISA protects private retirement plans from state regulation
 - Anti-alienation provision prevented retirement benefits from being divided in a divorce
 - Purpose is to prevent participant's benefit from being paid to anyone else in order to protect financial security in retirement

Why do QDROs exist?

- Retirement Equity Act of 1984 (REA)
 - Amends ERISA
 - Purpose was to resolve inequities in private retirement systems that harmed women
 - Created an exception to ERISA's anti-alienation provision and preemptive scope for Qualified Domestic Relations Orders dividing a retirement benefit in divorce
 - QDROs eliminate concerns that states would place conflicting or difficult-to-administer legal requirements on retirement plans



QDRO BASICS

Key Terms

- **DRO versus QDRO**

- Not a QDRO until it is QUALIFIED by the Plan Administrator.

- **Participant**

- The person who earned the retirement benefit (employee, former employee, retiree).

- **Alternate Payee**

- Spouse, former spouse, child, or dependent of the Participant.

When is a QDRO needed?

- **Any time a benefit in a private employer plan is being divided in a divorce.**
 - Time is of the essence—do not wait until retirement age to obtain a DRO and getting it qualified by the plan.
 - Failure to timely and accurately submit and receive approval from the plan can result in lost benefits.
- Child support (including arrearages).
- Spousal Maintenance (including arrearages).

What Makes a QDRO Special?

- Exception to ERISA's anti-alienation provision which prevents a participant's retirement benefit from being assigned to, attached, or paid to any person other than the participant.
- A typical divorce decree or property settlement agreement is not enough to obtain the awarded portion of the retirement benefit.
- To be a QDRO, special rules apply.

Requirements for a QDRO

- A QDRO must contain:
 - the name and last known mailing address of the Participant and each Alternate Payee;
 - the **exact** name of the plan to which the order applies;
 - the dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the Alternate Payee; and
 - the number of payments or time period to which the order applies.
- A QDRO must not require a plan to:
 - provide an alternate payee with any type or form of benefit, or any option, not otherwise provided under the plan;
 - provide for increased benefits (determined on the basis of actuarial value);
 - 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

Must follow the rules of the plan and of ERISA

Tips For Determining if Benefits Exist

- Collect the names of all the companies the other party worked for during the marriage, then you can check to see what retirement plans the companies offer.
- If they are older and have a skilled labor trader or union, odds are there may be a pension plan.
- Is the other party a government employee? They usually have mandatory pensions.
- If they have copies of any paystubs, check for deductions.
- Is any mail coming to the house from financial institutions, or documents that say something about benefits on the outside of the envelope?
- What sources of income (if they are retirement age) besides Social Security? They may know the spouse has a pension but not realize they may be entitled to a portion.

A QDRO is Needed – Now What?

- Assess where the person is during divorce process
- Contact the plan to put them on notice/let them know they have a marital interest in the benefit
- Review divorce decree/settlement agreements (sometimes this is sufficient, or a QDRO exists and the individual doesn't know)
- Request Model Orders and plan documents from the pension plan to gather necessary information for any necessary QDRO

Types of Retirement Plans Under ERISA

Defined Benefit Plan (DB Plan)

- Typically funded by employer
- Usually provides a set monthly benefit for life at retirement (annuity)
- Typically uses a formula to determine the benefit amount
- Examples: Pension Plan

Defined Contribution Plan (DC Plan)

- Contributions made by employee and/or employer
- Usually is paid as a lump sum
- Benefit is usually determined by market performance
- Examples: 401(k) Plan, Profit Sharing Plan, Employee Stock Ownership Plan (ESOP)

Special Features of Pension Plans

- All features need to be addressed in the divorce decree as a QDRO can't award anything not awarded by the court.
- Features unique to traditional pension plans:
 - Cost-of-living adjustments (COLAs)
 - Survivor Benefits
 - Qualified Pre-retirement Survivor Annuity (QPSA)
 - Qualified Joint and Survivor Annuity (QJSA)
 - Early Retirement Subsidies
- Special QDRO considerations for pension plans
 - Two Types of QDROS
 - Shared Interest
 - Separate Interest

Shared vs. Separate Interest QDRO

- Shared Interest
 - Required to be used if the participant is in pay status
 - Can also be used if the participant is not in pay status
 - Keeps the two parties tied together
- Separate Interest
 - Only allowed when not yet in pay status
 - Gives the alternate payee more freedom and control
- Considerations
 - Age
 - Health
 - Effect of death on benefits

Special Features of Defined Contribution Plans

- All features need to be addressed in the divorce decree as a QDRO can't award anything not awarded by the court.
- Features unique to retirement savings plans:
 - Gains and losses
 - Loans
 - Late Contributions
 - In-service distributions

QDRO for Child Support and Spousal Support

- A QDRO can't force the plan to pay in a different form or at a different time
 - Lump sum (arrearages) typically have to come from a defined contribution plan.
 - Monthly payments (ongoing support) typically must come from a defined benefit plan.
- Taxes for child support QDRO are the responsibility of the participant
 - Child must be the alternate payee.
 - Factor in attorney fees and taxes when requesting the amount to be awarded.
- Beware when drafting QDROs for alternate payees who receive government benefits
 - May require a special needs trust.



NON-ERISA PLANS & SPECIAL PLANS

What About Non-ERISA Plans?

- ERISA does not cover:
 - Governmental plans (local, state, and federal)
 - “Church” plans and church/religious-sponsored hospital plans (except for those that have agreed to be subject to ERISA)
 - Military plans
 - Individual Retirement Accounts (IRAs)
 - Non-Qualified Deferred Compensation Plans
- These non-ERISA plans still may be divided by a special domestic relations order, but they are not always called QDROs and may have different requirements. For example:
 - FERS/CSRS – Court Order Acceptable for Processing
 - Thrift Savings Plan – Retirement Benefits Court Order

Non-ERISA Plan Practice Tips

- Do not refer to ERISA when drafting an order for a non-ERISA plan
- Some of the non-ERISA plans have special features that need to be addressed
- Plan requirements can be different
- Many governmental plans will release information about the participation upon request.

Non-ERISA Plans – Things to Look Out For

- Survivor benefits
 - May be a separate plan or component.
 - Sometimes can be changed even if already in pay status.
- Timing of benefit payments may be different.
- Shared interest may be the only possible method of division.
- Deadlines to submit the division order.

QDROs for Plans Where PBGC Becomes the Trustee

- For QDROs approved prior to PBGC takeover:
 - PBGC guarantee limitations apply.
 - PBGC benefit form limitations, options and benefit start date provisions apply if the benefit election is made after PBGC trusteeship.
 - Reduction rules are applied in the same manner as they are applied to orders qualified after the PBGC becomes trustee – UNLESS the QDRO specifies otherwise.

QDROs for Plans Where PBGC Becomes the Trustee

- For QDROs after PBGC takeover
 - PBGC has very detailed models and information.
 - Information and options may not be the same as a typical QDRO.
 - PBGC has a procedures for requesting information about the participant's benefit.
 - *Qualified Domestic Relations Orders and PBGC*
<https://www.pbgc.gov/sites/default/files/qdro.pdf>

Backlogs

- U.S. Merit Systems Protection Board (MSPB)
 - Backlog due to lack of quorum.
 - More than 3,000 matters are awaiting decisions – could take at least two years to get through the backlog.
 - Three new Board members have been nominated.
- U.S. Office of Personnel Management
 - Backlog of both COAP processing and retirement applications.
 - OPM said they received 7,589 new applications in September.
 - Total backlog of 28,810.



GREY DIVORCE

Concerns with Grey Divorce (1 of 2)

- Survivor Benefits
 - Most ERISA plans will not allow a participant, once retired, to change the form of payment elected at retirement.
 - Once an alternate payee waives rights to a survivor benefit, it is waived, even if the parties later divorce.
- Retirement Payments Prior to QDRO approval
 - QDRO reviews can take months
 - QDRO procedures—does the plan pay retroactively?
 - Court can order the participant to pay until former spouse's portion is withheld.

Concerns with Grey Divorce (2 of 2)

- Benefit commencement during the divorce
 - Freeze benefits if possible
 - Make sure the soon-to-be former spouse does not sign any forms
- Benefits that have been moved
 - Defined contribution plans may have been cashed out, rolled over to an IRA, or used to purchase an annuity
- Financial Security
 - Lump sum vs. annuity
 - Other assets



PITFALLS AND WORDS OF CAUTION

Pitfalls: Division of Retirement Benefits

- Not finding all the available benefits/plans
- Difficulty in obtaining benefit information/not know what information is needed
- Not properly valuing the benefit
- Not preserving the benefit
- Not dividing all plan features, especially survivor benefits
- Not being specific enough or providing enough details in the divorce decree

Pitfalls That Will Get Your QDRO Rejected

- Waiting to prepare and submit the QDRO
 - Death
 - Remarriage
 - Distributions
 - Plan / recordkeeper changes
- Failing to follow up to ensure the QDRO is approved
- Not amending and resubmitting the QDRO if it is rejected
- Not including all the benefits/features awarded
- Underestimating difficulty & complexity of QDROs

Pitfalls – Handling of QDROs

- Waiting to prepare and submit the QDRO
 - Death
 - Remarriage
 - Distributions
 - Plan / recordkeeper changes
- Failing to follow up to ensure the QDRO is approved
- Not amending and resubmitting the QDRO if it is rejected
- Not including all the benefits/features awarded
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Other Concerns

- Cost of QDRO Preparation
- Cost of QDRO Review
- Lack of understanding by parties, attorneys, and judges
- Limited availability of pro-bono or low-bono assistance for QDROs
- Need for easier to understand information on QDROs and the division of retirement benefits



QDROs AND THE PENSION COUNSELING PROJECTS

Western States Pension Assistance Project

- **Goal:** Help older adults stay out of poverty by protecting and defending retirement benefits of workers, retirees, and their beneficiaries. Employer-sponsored retirement benefits are an important piece of the patchwork of retirement savings/income and provides greater income security to older adults.
- **Any employer-sponsored retirement benefit issue**
 - Examples: overpayments, lost pensions, survivor/former spouse benefits, disability benefits, proving work histories, correcting benefit errors, claims/appeals, etc.

Western States Pension Assistance Project

- **Eligibility:** Live or worked in Arizona, California, Hawaii or Nevada.
Any age, any income level!
- **Recoveries:** Over \$31 million of earned retirement benefits recovered for participants, survivors, beneficiaries.
- **How to Refer:** Toll-free: (866) 413-4911 or [online](#)

South Central Pension Rights Project (“SCPRP”)

- The SCPRP is a project of Texas Legal Services Center in cooperation with the Missouri Association of Area Agencies on Aging. The SCPRP is funded by the U.S. Administration on Aging and the Texas Access to Justice Foundation.
- The SCPRP serves the state of Arkansas, Louisiana, Missouri, New Mexico, Oklahoma, and Texas, and provides assistance free of charge to anyone with a pension question or problem, regardless of age, income, or value of the claim who:
 - currently lives or works in the region the project serves, or
 - if you lived or worked in the region while earning the pension; or
 - if the company or pension plan is headquartered or has operations now in the region, or if it had operations in the region when the pension was earned.

PRC and SCPRP Collaboration on QDROs/DROs

- Services for Texas residents eligible for Basic Civil Legal Services (BCLS) include preparation of QDROs/DROs and qualification with the Plan, post-divorce decree proceedings in TX District & County Court, and determination of heirship and posthumous QDRO in Probate/County Court.
- BCLS Eligibility: 125% of Federal Poverty Guidelines, and \$10,000 in liquid assets and \$15,000 in non-liquid assets.

Questions?