

**WHAT EVERY FAMILY LAW ATTORNEY NEEDS TO KNOW ABOUT
QUALIFIED DOMESTIC RELATIONS ORDERS AND RETIREMENT
BENEFITS**

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Introduction

Divorce negotiations often do not take place under ideal conditions. Trial deadlines or mediation dates are approaching, and family law attorneys try to gather as much information as they can, often with limited time and resources. In many cases, especially lengthy negotiations over other difficult matters, it is easy to get a bit sloppy when it comes to retirement assets. One side proposes to “divide them in half,” the other side agrees, and something to that effect gets written into the Settlement Agreement. Retirement benefits, however, are different from many of the other issues addressed in divorce cases. If the parties’ vehicles are described vaguely or inaccurately in a Settlement Agreement, this rarely presents a problem. If the Agreement says that the Wife will retain the Toyota minivan that she is currently driving, but she actually drives a Ford Explorer, there is little chance that this error will lead to much confusion or require further negotiations. The parties know exactly what kinds of cars they are driving, and their intent is usually perfectly clear. Even if the Agreement just states that the Wife will retain the “car that she is currently driving,” there is very little risk that this will become the subject of later dispute.

Retirement plans are different. The parties rarely know exactly what kind of “car they are driving” – they often do not know whether they have a defined contribution plan, defined benefit plan, or cash balance plan – or several types of plans. They are almost never aware in advance when their retirement plans cannot be divided by QDRO. These distinctions make a huge difference in terms of what can be transferred in connection with a divorce, and how the transfer can be accomplished. And if the Agreement does not make it clear, for example, whether the non-employee spouse is

entitled to any surviving spouse benefits, this lack of specificity can lead to post-divorce litigation to determine the precise meaning of the language in the Settlement Agreement.

In many divorces, retirement plans are the parties' most significant asset. Divorce attorneys must understand the basics of retirement plans so that they can properly represent their clients throughout the divorce process. Further, they must take the time during the initial stages of the divorce to get the information that they need about the parties' benefits. When handling the division of retirement assets, keep in mind the following rule: "pay now, or pay more later." That is, it may take some time to sort out the retirement assets at the beginning of a divorce case, but it will always cost *more* if you wait until after the divorce is final to figure out the details of the parties' retirement assets. It is much easier to address these issues at the "front end" than to try to fix them post-divorce. This paper will highlight some of the basic concepts that divorce lawyers should understand, as well as some of the issues that need careful attention when retirement assets are involved in a divorce case.

1. UNDERSTAND THE BASICS

Most retirement plans are governed by federal statute, the Employee Retirement Income Security Act of 1974 ("ERISA"). Under ERISA, both employers and employees receive tax benefits when they establish and participate in retirement plans that comply with its terms. If a retirement plan meets the requirements set forth in ERISA, it is called a "qualified" retirement plan.

Originally, retirement benefits were not assignable under ERISA. The law was designed to protect employees from their own bad financial decisions, so retirement benefits were intended to be safe from creditors. However, the non-assignability of retirement benefits created many problems in the divorce context in the years after ERISA was enacted. In practice, it meant that non-employee spouses were not able to receive a share of the retirement benefits accumulated during the marriage. Again, since many parties' most significant asset was a retirement plan, courts were faced with difficulties when trying to divide up marital assets in divorce cases.

In 1984, the Retirement Equity Act amended ERISA to provide that, if a state court issues an order in a domestic relations matter relating to child support, alimony, or property division, which awards a non-employee spouse (or child or other dependent) an interest in a qualified retirement plan, the plan must follow the court's order. These orders are called Qualified Domestic Relations Orders ("QDROs"). If such an Order is properly entered by a court in connection with a domestic relations matter, and conforms to the rules of the specific retirement plan (that is, the Order does not require the plan to do anything that conflicts with the specific plan's rules), then the retirement plan is required to provide the benefits awarded directly to the non-employee spouse (or child or other dependent of the employee).

The QDRO requirements are set forth in Internal Revenue Code § 414(p) and ERISA § 206(d)(3). A copy of I.R.C. § 414(p) is attached as Appendix A for reference. In short, it defines a Domestic Relations Order as any "judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former

spouse, child, or other dependent of a participant,” and is made pursuant to a state domestic relations law. A *Qualified* Domestic Relations Order is a Domestic Relations Order “which creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan,” and which meets the specific requirements set forth in sections 414(p)(2)(3). Thus, although we commonly think of QDROs only in terms of final divorce actions and payments to former spouses, the statute actually provides for payment of retirement benefits in connection with many types of domestic relations actions, and encompasses payments to current spouses, children, and other dependents of the employee.

Qualified Retirement Plans

There are certain basic retirement benefit concepts that divorce attorneys should be familiar with in order to represent their clients properly. The first is the difference between a **defined contribution** plan and a **defined benefit** plan. There are significant differences between these two types of plans, although they are often lumped together in Settlement Agreements simply as “retirement plans.” To make matters more challenging, there are also plans which are a combination of the two.

Defined Contribution Plans:

The most common example of a **defined contribution plan** is a 401(k) Plan. In a defined contribution plan, the employee can make pre-tax contributions into an account maintained in his or her own name. The employer can also make contributions of a fixed percentage of the employee’s salary into the account. In a defined

contribution plan, there is no guarantee as to how much money will be in the account when the employee retires. That depends on the performance of the investments in the account over time. The only thing that is guaranteed, or “defined,” is the amount that the employer contributes periodically to the employee’s account.

Defined Benefit Plans:

By contrast, in a **defined benefit plan**, there is no specific account maintained separately for a particular employee. As employees accumulate years of service to an employer, they accumulate credits towards their retirement benefits. A traditional pension plan is the most common type of defined benefit plan, in which employees know that if they work for Titanic Corporation for thirty years, they will receive a monthly benefit of a certain dollar amount for the rest of their lives after retirement. Thus, the amount of **benefit** that they will receive is **defined** (unlike in a defined contribution plan). That is, an employee is guaranteed (after working long enough for the benefits to “vest”) a certain benefit based on the employee’s length of service at the time of retirement.

It is important to understand the difference between these two types of plans. Often, in divorce negotiations, attorneys and parties refer simply to the “retirement plan,” but they don’t investigate which type of plan the employee really has. Someone who participates in a defined contribution plan normally receives periodic statements showing the exact balance in the account. It is fairly simple to divide a defined contribution plan in a divorce, because the precise value of the account is usually easy to determine. It is often more complicated to divide a defined benefit plan, because the

value of the benefit at any given time can only be determined based on actuarial calculations and assumptions regarding when the employee will retire or leave the company.

Cash Balance Plans:

There is another type of retirement plan that often causes confusion in divorce cases. **Cash balance** plans are a hybrid of defined contribution and defined benefit plans. They have become increasingly popular with employers in recent years. This is because cash balance plans are technically defined benefit plans, with many features similar to defined contribution plans. The value of a cash balance plan is usually expressed in statements as a “cash balance” – that is, they look a lot like defined contribution plans, because they show a precise dollar amount in an “account” for a particular employee. Many divorce practitioners treat cash balance plans just like defined contribution plans for purposes of settlement, only to find that cash balance plans are not as easily divided as defined contribution plans. In fact, many employees do not realize that their cash balance benefits are not the same as those in a traditional 401(k) Plan. Cash balance plans seem to be the most common form of hybrid plan, but there are also other types of “hybrid” plans that have their own quirks.

Non-Qualified Retirement Plans

It would be much simpler for divorce attorneys if all retirement plans were “qualified” retirement plans, subject to ERISA and therefore able to be divided by QDRO. However, nothing is ever that simple. There are a lot of retirement assets out there that do not fall under ERISA. Many companies offer non-qualified retirement

benefits to highly paid employees, which allows them to provide these employees with additional retirement benefits beyond those which the tax provisions of ERISA will permit. Non-qualified retirement plans are common for high-ranking employees, and they can almost never be divided or assigned to anyone other than the employee.

Non-qualified plans usually have terms in their names such as:

Supplemental

SERP

Non-qualified

Excess Benefit

Plans with these terms in their titles are usually **not** qualified and will **NOT** accept a QDRO. These plans normally contain provisions which specifically prevent them from making payments to anyone other than the employee, and thus there is no way for the plan to make payments directly to a former spouse, regardless of what any court orders the plan to do. It is crucial for divorce attorneys to determine whether a plan cannot be divided **before** settlement negotiations are completed. One of the most difficult post-divorce situations to deal with is when the parties discover, after the final judgment (in some cases, several years after the final judgment), that one of the retirement assets they have agreed to divide is simply not divisible or assignable.

If attorneys investigate this issue during the divorce proceedings, then a provision can be included in the Settlement Agreement that recognizes that the funds cannot be divided until the employee spouse actually receives payment from the Plan. Payments from these plans are usually made after retirement, because they are intended to operate as “golden handcuffs” which provide incentives for key employees to remain

with the company until retirement. If the employee is many years from retirement age at the time of divorce, several very tricky issues arise with respect to how the payments to the non-employee spouse are to be calculated and taxed when they are received in the future. When this problem is identified during negotiations, a method for making such calculations can be set forth in the Agreement to avoid disputes in the future.

Alternatively, if a non-divisible plan is the parties' only major asset, you might consider having the employee spouse take out an insurance policy for the benefit of the other spouse, or increasing the alimony payments. Although these solutions have some drawbacks, they might be more appealing to the parties and less complicated than obligating the employee spouse to make payments to the other spouse every time the employee receives payments from the plan in the future.

If the parties have a variety of assets, the simplest solution is often to have the Participant keep the non-divisible plan assets and award the other party some other asset of comparable value. It is usually so complicated and difficult to "divide" a non-divisible non-qualified plan that it is often in the best interest of both parties to find a way to avoid the issue altogether.

If you absolutely must conclude the case before you can determine whether the Plan will accept a QDRO or any other method of division, you may want to include an alternate provision in the Settlement Agreement such as the following:

In the event that, following the execution of this Agreement, it is determined that Wife's Media Conglomerate Corporation Non-qualified Supplemental Executive Retirement Plan ("the Plan") cannot be divided by QDRO, or any other method of division, the parties agree that the Husband shall receive \$15,000 from the Wife's IRA in lieu of the funds awarded to him herein from the Plan.

Other Non-Divisible Retirement Plans

There are several other types of retirement plans that are also not divisible. State and local government plans CANNOT be divided by QDRO in Georgia. This includes the Georgia State Teachers Retirement Plan and the Employees' Retirement System. *See* O.C.G.A. § 47-2-332, Bryant v. Employees Retirement System of Georgia. The remedies in this situation are the same as described above. If there is another significant asset of comparable value, the non-employee spouse can be awarded that asset in lieu of any claim to the government retirement plan. Of course, the parties often simply do not have another asset of comparable value.

In many cases, the only feasible solution is for the Settlement Agreement to require the employee spouse to send a portion of each payment he receives to the non-employee spouse. Generally, to neutralize the tax consequences, it makes sense to structure such payments as alimony if possible. This is, of course, less than ideal for both parties. The employee spouse has the burden of writing checks every month to his ex-spouse for the rest of his or her life, and the non-employee spouse is dependent on the employee's good faith in notifying her of his retirement and of timely and properly sending payment in full.

Further, the issue of surviving spouse benefits complicates the matter. Under many circumstances, it is reasonable for the Agreement to require that the non-employee spouse be named as the sole surviving spouse and beneficiary of the retirement plan, but if this is not reasonable under the circumstances (for example, if the parties are young and/or have not been married for a long time), then the option of having the employee spouse maintain an insurance policy for the non-employee spouse

may be more desirable as a method of providing benefits to the non-employee spouse in the event of the employee spouse's death.

There are a few other types of Plans that do not fall under ERISA. Section 457(f) Plans (which usually only apply to employees in senior management) cannot be divided by QDRO, but they may have their own procedure for division incident to divorce. Plans sponsored by religious organizations do not have to accept QDROs, unless the terms of the particular plan permit them to do so. Section 403(b) and 457(b) (for employees of tax-exempt organizations) plans can now be divided by QDRO. This is a change in the law due to the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA"). *See* IRC § 414(p)(12).

Individual Retirement Accounts (IRAs) and Simplified Employee Plans (SEPs)

Contrary to popular belief, you do not need a QDRO to divide an IRA or a SEP. A letter of instruction and copy of the Final Judgment and/or Settlement Agreement should suffice. Many financial institutions that sponsor IRAs have simple forms to fill out that will effectuate the tax-free transfer of funds in connection with a divorce. This is known as a "trustee-to-trustee transfer," and it should not result in tax consequences to either party. One reason that there is a common misperception that a QDRO is necessary to divide an IRA is that this is often what telephone representatives tell people who call financial institutions and inquire as to how to divide their IRAs in connection with a divorce. These representatives often say that they need a "court order" or a "QDRO," but most of the time what they really need is a copy of the divorce decree

and/or Agreement, to prove that the division is truly related to a legitimate domestic relations action.

2. DO YOUR HOMEWORK

In theory, it seems, all divorce lawyers agree with the general idea that it is best to get as much information as possible about the parties' retirement benefits at the beginning of a divorce case. In practice, however, most people seem to end up flying by the seat of their pants – often with costly consequences. There are a lot of reasons for this, and sometimes it is truly unavoidable. Each case presents a kaleidoscope of issues, all competing for the lawyer's time and attention. However, it seems that many attorneys do not dig into the retirement benefits sufficiently at the front end of the divorce case, possibly because they assume that their clients will be unwilling to pay for the additional discovery. In these circumstances, consider the following: a client who resists incurring the fees involved in doing proper discovery about the retirement benefits will almost certainly be far less willing to pay you even *more* money to fix mistakes after the fact. If you end up needing to untangle a complicated mess caused by the fact that you had inadequate information or understanding about the retirement benefits when you negotiated the divorce agreement, you can be sure that your client will be even less inclined to pay your fees at that point. Remember the rule: pay now, or pay more later. To assist in the information-gathering process, below is a checklist of retirement plan information that attorneys should be sure to obtain before proceeding to finalize a divorce matter.

Homework Hints/Retirement Benefits Checklist

(1) Find out the precise name of the Plan. Insist that the parties provide you with a recent account statement and the exact name of each retirement plan. This will help you determine whether the Plan is qualified, and whether it is a defined contribution, defined benefit, or some other type of plan. Do not simply refer to “Husband’s retirement plan.” If you take the time to determine the full name of the Plan and set it out fully in the Agreement (“Husband’s Atlantic Corporation Salaried Employees’ Retirement Savings Plan”), you will learn valuable information and avoid confusion later.

(2) Get a list of all employment-related benefits. Even if you do not have reason to believe that the opposing party is being dishonest in listing her retirement assets, it is best to get this information directly from the employer. Some people “forget” about or are truly unaware of all of their benefits. Even if they are being forthright, they often do not understand the nature of their benefits, and thus cannot accurately list them. If the case is not contentious, you may not need to send a subpoena to get this information. The employee spouse can request a complete benefit statement from their employer and provide it to you.

(3) Do not forget benefits related to prior employment. Keep in mind that vested benefits from prior employment can be substantial and should be investigated. A middle-aged worker may have accumulated a sizable pension benefit at a previous job, and this benefit should still be payable when that worker reaches retirement age. Parties sometimes forget about benefits previously earned because they are focused on the present employment situation.

(4) Determine which benefits are subject to division. As explained above, many types of retirement benefits are simply **not** divisible, no matter what the court orders or how willing the parties are to divide the benefit. If a party has supplemental, non-qualified, government, church, or any other type of benefit that is often not transferable, investigate this issue -- to the very top of the employer's benefits or legal department if necessary. This is something that you must determine before you make a property settlement.

(5) Find out the balance and look into loans. Again, get an account statement for each defined contribution plan. Make sure you understand how much money is available in each account. The statement should show whether there are any outstanding loans or other types of withdrawals. Confirm that your client is aware of any funds that have been removed from the account. Be aware that loans are generally not transferable, and most plans will require funds at least equal to the loan amount to remain in the account, even if a QDRO is entered which provides for more than that to be transferred to a divorcing spouse.

(6) Ask about QDRO processing fees. Guidelines issued by the Department of Labor now permit plans to charge fees, deducted directly from the employee's account, for processing QDROs. Plans can charge more if you don't use their QDRO form, and even more if you submit a QDRO that is rejected for any reason. These fees currently range from about \$300 to \$1800 per QDRO. Obtain this information in advance so that you can (1) draft the Agreement in a way that will permit you to use the Plan's QDRO form and avoid additional fees, and (2) take these fees into account under the terms of the Agreement.

3. DRAFT WITH CARE

If you have done your homework, you will have laid the groundwork for drafting trouble-free QDRO provisions for the Agreement. Here are some common trouble spots that can easily be avoided with careful drafting:

(1) **Defined contribution vs. defined benefit.** It is surprisingly common to see language in an Agreement that states, “The Wife shall receive 50% of the Husband’s Widget Corp. Pension Plan, as of May 25, 2007. Wife shall be entitled to receive investment gains and losses on her share from that date until the date the funds are distributed to her.” This is a classic **mistake**: language applicable to a defined contribution plan does not belong into an agreement regarding a defined benefit plan. The concept of “earnings and losses” does not apply to defined benefit plans. Keep in mind that if you include this inapplicable language instead of proper defined benefit language (addressing defined benefit plan issues such as surviving spouse benefits, early retirement subsidies, and cost of living increases), you may have lost your client the right to important benefits – or at least left the door wide open to further litigation over whether the non-employee spouse is entitled to such benefit components not specifically mentioned in the language of the Agreement.

(2) **Earnings and losses in defined contribution plans.** Specify whether the amount awarded in a defined contribution plan is supposed to be adjusted for earnings and losses between the date of division and the date that the money is actually distributed. Remember that QDROs sometimes take many months or even years to be

completed, and the account balance may increase or decrease dramatically during this time. You must make it clear whether the non-employee spouse's portion is supposed to be frozen as of the date of division, or should rise and fall with the market.

“Wife shall receive 50% of Husband's Enron 401(k) Plan as of May 25, 2007, including earnings and losses on that amount from that date until the date the funds are completely distributed to Wife.”

OR: “Wife shall receive 50% of Husband's Enron 401(k) Plan as of May 25, 2007, which amount shall not be adjusted for earnings and losses from that date until the date the funds are completely distributed to Wife.”

NOT: “Wife shall receive 50% of Husband's Enron 401(k) Plan as of May 25, 2007.”

(3) **Date of division.** Divorce attorneys often fail to specify the effective date of division. Will the account be divided as of the date of the Agreement, the date of divorce, or some other date? Simply stating that “the Wife shall be entitled to one half of Husband's Itsy-Bitsy, Inc. 401(k)” will get you into trouble. Do not assume that this language means that the parties intend to divide the funds as of the date of the Final Judgment and Decree. If there is a significant change in the value of a defined contribution account before it is divided, the parties will have very different interpretations of this sentence. In the context of a defined benefit plan, there can be a tremendous difference in the value of the benefit calculated as of the date of the divorce instead of as of the date of retirement. Be sure to make it clear exactly when the non-employee spouse's right to future benefit accruals is to stop. Note that this does not have to be a date that is known with precision at the time of the Agreement. “As of the date the QDRO is determined to be qualified by the Plan” and “as of the earlier of the Husband's date of retirement or the Wife's commencement of benefits” are just as

acceptable as “as of May 25, 2007.” *Failing to include* a cut-off date or time limitation is what creates problems.

(4) **“Equalizing” Multiple Plans**: Often, the parties have several defined contribution plans. In many cases, is unnecessarily complicated and expensive to prepare a separate QDRO for each such plan. Knowledgeable attorneys will try to save their clients money by combining the values of all of the defined contribution plans and simply transferring an equalizing amount from one account. Sometimes, the equalizing transfer can even be made from one IRA to another, so no QDRO is needed. This is usually a great idea, **but** it is often implemented incorrectly so that it ends up costing the parties more to untangle than it would have to just do separate QDROs. There are several pitfalls that need to be avoided in order for the equalizing transfer to work correctly.

Assume that the Wife has an IRA with a balance of \$500 and a 401(k) in her name with a balance of \$100. The Husband has an IRA with a balance of \$200 and two 401(k) accounts, one with \$400 and one with \$200. Assume further that the parties have agreed to divide their retirement plans equally. Rather than divide each of the five retirement plans, it is more efficient to add up the total value of the accounts and transfer funds from one account by QDRO.

The Agreement should provide that the parties will exchange account statements for each account **as of a specific date**. This is the critical piece that is most often missed by attorneys. If you do not provide a specific date, then you create a situation with a “moving target” in which the parties can never complete the calculation and will

argue forever about the values in each account. As a practical matter, it is best to select a month-end date of division. It is often difficult (or impossible) to obtain account statements for other dates, and this can lead to further conflict between the parties.

Next, set forth how the calculation is to be completed. Normally, the parties exchange account statements and then determine the total value of all accounts on that date. Then they determine how much must be transferred from one account to the other spouse in order to equalize the total. It is often very helpful to include an example so that the calculation method is clear. If the parties have IRAs with sufficient funds, the transfer can be made as an IRA rollover without need for any QDRO. However, if the account with the equalizing funds is a qualified defined contribution plan, a QDRO will be necessary. Of course, you must make sure that the account that the equalizing funds will come out of will have enough money in it to cover the transfer.

Another common mistake is to try to adjust the equalizing amount for earnings and losses. This is another “moving target” problem. The parties need to understand that earnings and losses can only be calculated in **one** account, or else the amount to be transferred will never be calculable. The accounts need to be valued as of a certain date, and then the equalizing amount can be adjusted for earnings and losses from that date forward, **only** in the account from which it is to be transferred. Earnings and losses in the other accounts *cannot* enter the calculation after the date of division.

These issues are perhaps best illustrated by example. Using the numbers set forth above, the language of the Settlement Agreement would read as follows:

The parties have the following retirement accounts:

- (1) Wife's IRA, account number XXX234, with a current balance of \$500;
- (2) Wife's EWM Corporation 401(k), with a current balance of \$100;
- (3) Husband's IRA, account number XXX567, with a current balance of \$200;
- (4) Husband's DEF Corporation 401(k), with a current balance of \$400;
- (5) Husband's XYZ Corporation 401(k), with a current balance of \$200.

It is the intent of the parties to divide these retirement assets such that each party receives an amount equal to one half of the retirement assets as of May 31, 2007. Within 10 days of the date of the signing of this Agreement, each party shall provide the other with an account statement for May 31, 2007 for each of the accounts in his or her name. The total value of all five accounts as of May 31, 2007 shall be determined, and an equalizing amount shall be transferred by QDRO from Husband's DEF Corporation 401(k) to Wife. Using the numbers set forth above as an example only, the Wife would receive \$100 from Husband's DEF Corporation 401(k), as of May 31, 2007, so that each party would receive retirement assets valued at \$700 as of May 31, 2007. The amount awarded to Wife shall be adjusted for earnings and/or losses within the DEF Corporation 401(k) account from May 31, 2007 until the date the funds are transferred to Wife. Using the numbers set forth above as an example only, the QDRO would provide for Wife to receive \$100 from Husband's DEF Corporation 401(k) Plan account as of May 31, 2007, plus earnings and losses on that amount from that date until the date the benefit is completely distributed to Wife. Each party shall retain all of the remaining retirement funds currently in his or her name.

Language such as this should serve to avoid the need for multiple QDROs, without creating additional conflict over how to determine the "equalizing" amount to be transferred.

Important note: **NEVER** try to "equalize" defined benefit plans! Agreements that provide for the equalization of defined benefit plans in any fashion are a prescription for *disaster*. Benefits that are not set up as accounts with specific dollar values and payable as immediate lump sums cannot be "equalized." Each defined benefit plan to be divided will require its own separate QDRO.

(5) **Surviving spouse benefits.** Family law attorneys frequently fail to make sure that both pre- and post-retirement surviving spouse coverage are explicitly addressed in the Settlement Agreement. This is especially important for **defined benefit** plans. Surviving spouse benefits are probably the most complex area of QDRO practice, and there are far too many issues involved to fully address here. Attorneys should at least consider whether the non-employee spouse (“Alternate Payee”) is to be treated as the surviving spouse if the employee (“Participant”) dies before the QDRO is completed. For a **defined contribution** plan, this can be as simple as making it clear that the Alternate Payee is entitled to receive the funds awarded to her regardless of when the Participant dies (“Wife shall receive her portion of the Husband’s Google 401(k) Plan without regard to the death of the Husband”).

Many attorneys do not realize that, in **defined benefit** plans, the surviving spouse benefit is substantially affected by whether the employee spouse dies *before* or *after* the commencement of benefit payments. Both situations must be addressed in the QDRO. Special attention should be paid to what will happen if the Participant dies after the QDRO is entered but before the benefit payment has begun. Keep in mind that, since payments normally do not commence until the employee reaches retirement age, this period can last many years. In many defined benefit plans, the Alternate Payee will receive no benefits if the Participant dies before payments commence, unless the Alternate Payee has been specifically designated as the surviving spouse for purposes of the Qualified Pre-Retirement Survivor Benefit (“QPSA”). Further, the Agreement should clarify whether the Alternate Payee is supposed to be the surviving spouse for the Participant’s entire benefit, or just for the portion of the benefit awarded to her. For the

Alternate Payee, this can mean the difference between having her benefit remain unaffected by the Participant's pre-retirement death, and having her benefit *reduced by half* upon his death. This will also affect the Participant's ability to leave a survivor benefit to any subsequent spouse. Some plans will accept language providing for the Alternate Payee to receive "that amount of the QPSA necessary to ensure that the Alternate Payee's benefit is not reduced as a result of the Participant's death prior to benefit commencement." This is often a good compromise.

In *most*, but not all, defined benefit plans, the Alternate Payee can be awarded a "separate interest" under a QDRO which will mean that the Participant's post-retirement death will not affect the Alternate Payee's benefit. Therefore, the Alternate Payee does not need to be named the surviving spouse in order to receive her full benefit without regard to the post-retirement death of the Participant. However, if the Plan does not provide for a completely separate interest (and plans at many large corporations do not), then it is crucial that the Alternate Payee be designated as the surviving spouse for the appropriate portion of the Participant's post-retirement survivor benefit. Attorneys should determine in advance whether the benefit will be paid as a separate interest in which the death of the Participant will not affect the Alternate Payee. If not, the extent of the Alternate Payee's interest in the post-retirement survivor benefit (often called the "Qualified Joint and Survivor Annuity" or "QJSA") should be defined in the Agreement. Again, some plans will accept language providing for the Alternate Payee to receive "that amount of the post-retirement survivor benefit necessary to ensure that the Alternate Payee's benefit is not reduced as

a result of the Participant's death following the commencement of benefits." This is often a good compromise.

(6) **Implementing the QDRO.** Make it clear in the Settlement Agreement who is responsible for handling the QDRO. Explain the QDRO process to your clients at the time of settlement. It is always an ugly surprise when a client learns, after the divorce, that she has to pay you (or some other attorney) *more* money just to get the money she was awarded in the divorce (or worse, in order to give away that money to the ex-spouse). Make it clear in the Agreement who will be responsible for drafting the QDRO, and who is supposed to pay for it. If QDRO processing fees will be charged to the employee's account, state whether the parties are to split these fees.

Once the divorce is final, it is a dangerous mistake to close the file without making sure that the division of retirement assets has been completed. Even if you are not the one responsible for drafting the QDRO, you need to follow up and make sure that it has been properly completed. Do not **ever** close a QDRO matter without obtaining some form of certification from the Plan Administrator that the final QDRO has been received and accepted. For a **defined contribution** plan, this is often easily determined without a formal letter from the Plan (which you should receive nonetheless), because the transfer of funds is reflected in the employee's account balance, and because the Plan contacts the non-employee spouse once a separate account has been established for her.

Defined benefit plans are less easy to check. **NEVER** assume that the matter is completed simply because you mailed a copy of the QDRO to the Plan. Twenty years

from now, after the parties have each remarried and the employee spouse dies, if the Plan Administrator does not make payments to the Alternate Payee and states that it never received your QDRO, you will need to have a letter in your file from the Plan Administrator acknowledging receipt of the QDRO and formally accepting it. This scenario is far more common than you might imagine.

Some approval letters from the Plan simply state that the QDRO has been received and approved as qualified. However, many formal approval letters are extremely detailed, and set forth the Plan Administrator's interpretation of each provision of the QDRO. Boring as it may seem, it is **very** important to read such letters carefully and compare them with the text of the actual QDRO. I find mistakes in these letters all the time. Most plans use some kind of form letter for their approval notices, and if your QDRO contains any different language from their standard form, they might not pick it up in the approval letter. These errors are often substantial; they often affect surviving spouse benefits. If you do not read the approval letter carefully and do not identify an error, you may be unable to fix the error down the road, if and when it is discovered when the benefits commence (or fail to commence). If the Plan sent out a letter detailing their interpretation of the QDRO at the time of qualification, it may be extremely challenging to fix later, even if the language of the QDRO is clear. So, do not simply toss an approval letter in the file and send the file into storage before reading the letter and making sure that the Plan's interpretation of the QDRO matches the parties' intent.

Conclusion

Retirement assets can be complicated to divide, but you can save yourself lots of agony, and your clients lots of legal fees, if you investigate these assets at the beginning. Do not be shy about tracking down the information that you need to understand the parties' retirement assets. Many, if not most, clients have absolutely no idea how the plans that they (or their spouses) participate in operate. Ask for account statements, and if those don't answer your questions, contact the employer's benefits department. Keep pushing until you get the information that you need. Although this may seem unduly burdensome at the beginning of a divorce case, it can save you and your client from making costly mistakes. Once you understand the nature of the parties' retirement assets, you can negotiate a settlement (or win at trial) that will properly divide the assets without coming back to haunt you long after the divorce is over.

APPENDIX A

Internal Revenue Code Section 414(p)

(p) Qualified domestic relations order defined.--For purposes of this subsection and section 401(a)(13)--

(1) In general.--

(A) Qualified domestic relations order.--The term "qualified domestic relations order" means a domestic relations order--

(i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order.--The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which--

(i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

(ii) is made pursuant to a State domestic relations law (including a community property law).

(2) Order must clearly specify certain facts.--A domestic relations order meets the requirements of this paragraph only if such order clearly specifies--

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits.--A domestic relations order meets the requirements of this paragraph only if such order--

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) Exception for certain payments made after earliest retirement age.--

(A) In general.--A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee--

(i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age.--For purposes of this paragraph, the term "earliest retirement age" means the earlier of--

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of--

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits.--To the extent provided in any qualified domestic relations order--

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d).

(6) Plan procedures with respect to orders.--

(A) Notice and determination by administrator.--In the case of any domestic relations order received by a plan--

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures.--Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made.--

(A) In general.--During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations order.--If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases.--If within the 18-month period described in subparagraph (E)--

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved, then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) Subsequent determination or order to be applied prospectively only.--Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period.--For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined.--The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401(a)(13) does not apply.--This subsection shall not apply to any plan to which section 401(a)(13) does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) pursuant to a qualified

domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) applies.

(10) Waiver of certain distribution requirements.--With respect to the requirements of subsections (a) and (k) of section 401, section 403(b), section 409(d), and section 457(d), a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) Application of rules to certain other plans.--For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b)) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) Tax treatment of payments from a section 457 plan.--If a distribution or payment from an eligible deferred compensation plan described in section 457(b) is made pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) shall apply to such distribution or payment.

(13) Consultation with the Secretary.--In prescribing regulations under this subsection and section 401(a)(13), the Secretary of Labor shall consult with the Secretary.