

There are things known and there are things unknown, and in between are the doors.

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QUALIFIED DOMESTIC RELATIONS ORDERS - BASIC PRACTICE TIPS

For most family law practitioners Qualified Domestic Relations Orders (QDROs) tend to be somewhat of an unknown. Some family law practitioners might even quake at the prospect of having to negotiate and draft these often complicated and rarely straightforward orders. The purpose of this article is to provide a short simple discussion regarding several basic practice tips that can assist in easing some of the fear related to negotiating and drafting QDRO's. The purpose of this article is not to claim that QDROs are not complicated, but to open the door, however slightly, to QDROs and provide the family law practitioner some straight forward advice in order to avoid problems later.

A Qualified Domestic Relations Order is an order that creates or recognizes the existence of an alternate payee's right to receive or assign to an alternate payee the right to receive all or a portion of the benefits payable with respect to a participant under a pension plan that includes certain information and meets certain other requirements. ERISA §206(d)(3)(B)(i); IRC §414(p)(1)(A). The first step in any dissolution is to determine what, if any, retirement savings are subject to a Qualified Domestic Relations Order. There are two types of retirement plans that will require a Qualified Domestic Relations Order. A defined benefit plan, the traditional pension plan, and a defined contribution plan, most commonly a 401(k). QDROs are not needed to transfer interests in Individual Retirement Accounts (IRA).

It is a good idea to identify early on in the divorce process if QDROs will be necessary and to contact the retirement plan administrator to get copies of the plan

summary and sample QDRO language. Sample language is useful because it is the plan administrator who will decide if the Order is a QDRO. If at all possible send the proposed QDRO to the plan administrator for pre-approval prior to obtaining a judge's signature.

While it is usually useful to obtain sample language from the plan administrator, it is also important to understand that you are not bound by their sample language. In some instances the sample language you receive will not accomplish the transfer the parties envision. You are not limited to the sample language provided but again getting approval from the plan administrator prior to submitting your QDRO to the court will save your headaches later.

It is also important to determine under the rules of the particular plan how much of the participant's interests can be conveyed to the alternate payee. For example, if you want to assign 100% of a participant's interest to the alternate payee you must make sure that the participant's retirement plan allows for an assignment of all of the participant's benefits to the alternate payee. Another common problem arises when the parties agree to an assignment of a percentage of the participant's interest but the plan only allows for a assignment of a dollar amount or vice versa. These problems can easily be avoided provided you get specific plan information early on in the dissolution process.

Sometimes a plan participant refuses to cooperate at all in valuing or dividing the retirement accounts. Should you be confronted by that particular problem, M.S. §356.49 provides a tool by which the practitioner may acquire the necessary information needed to value and divide the participant's interest in the retirement plan. Specifically, the statute requires a public or private plan administrator to provide information regarding pension benefits to the court and the parties to a marriage dissolution action involving a

plan member or former plan member upon request. The request may come from the court, the parties or a party's attorney; must cite the statute; must include a copy of the petition for dissolution; and must include a copy of the affidavit of service showing that the petition was served.

Upon receipt of this request, the plan administrator is required to provide pension benefits or rights of the participant as of the first day of the month the request is made or at the end of the last fiscal year. The information must also include the accrued service credit of the participant, the credited salary for the last five years, a summary of the benefit plan and any other information relevant to the calculation of the present value of benefits or rights. See Minn. Stat. §356.49.

Note it is important to make this request as early as possible as plan administrators are sometimes slow to comply with these requests. It may also be necessary on occasion to send a follow up letter to the administrator or in some instances schedule the deposition of the plan administrator. When making this request we also suggest asking for sample QDRO language even though more often than not it is provided.

Another issue to consider is the tax implications of an assignment of retirement benefits. Generally, the alternate payee is assigned all of the participant's tax attributes under the plan. If the alternate payee is a spouse or former spouse they are usually taxed when they receive distributions. IRC Sec. 402(e)(1) (A). However, if the alternate payee wants to take an early distribution, there is a distinct benefit to the alternate payee because the usual 10% penalty for early withdrawal does not apply. However, you must still be careful. If the distribution is immediately rolled into an IRA, rather than taken as

a cash payout, then an early withdrawal will be subject to the penalty. IRC Sec. 72(t)(2)(C). The early distribution allows the parties some flexibility in negotiating financial settlements. An overpayment of pension or 401(k) benefits may allow for a financial settlement that benefits both parties by creating cash for immediate purchases such a down payment for a home or debt payment for the alternate payee, presumably at a lower tax rate, while increasing monthly cash flow for the plan participant.

Since it is usually the alternate payee that benefits from the QDRO, it is routine that the alternate payee be responsible for the costs associated with preparing the QDRO. However, it is certainly negotiable and many times the participant's attorney may well want to handle the drafting in order to ensure that the QDRO accomplishes the correct division of retirement benefits. This is common when the alternate payee is pro se. In any case it is important to make sure that the judgment and decree set out which party will be responsible for drafting and paying for drafting of the QDRO.

Another issue that has come up recently is that plans are now allowed to charge participants a fee for dividing the plan pursuant to the QDRO. Pursuant to a field assistance bulletin the Department of Labor has taken the position that a plan administrator may charge the participant of a defined contribution plan reasonable expenses attributable to the QDRO determination. DOL Field Assistance Bulletin 2003-3. Although not every plan administrator assesses charges and the costs are usually only a small percentage of the total benefit a practitioner may consider drafting the judgment and decree to effectively split or otherwise allocate the cost of these additional expenses associated with drafting a QDRO between the parties.

Having said all that, by planning ahead and getting as much information as possible regarding the type of retirement interests that the parties in a marriage dissolution have and what, if any, restrictions there may be to dividing those interests, the family law practitioner can greatly reduce some of the risk and stress associated with negotiating and drafting a QDRO.

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