*FOOTE* Notes on Retirement

**Topic:** **Premarital 401k Credit**

**Scenario**

Wife has $200,000 401k balance on date of termination of community. She had a $40,000 premarital balance at time of marriage. In an effort to resolve matters without litigation, a property settlement is quickly signed with the provision that “Husband is granted one-half of the balance of the community portion of the 401k as of June 1, 2013.” Then, due to custody reasons, the husband and wife start quarreling before the QDRO can be prepared and qualified.

**Question**

1. Can Wife’s attorney get her a $40,000 credit for the premarital balance when doing the QDRO or has that credit been waived?
2. What statute gives the wife’s attorney the right to include a premarital balance credit in a QDRO that was not included in the Property Settlement Agreement?

**Proposed Answer**

Since all assets in existence as of the termination date of community is presumed to be community (See CC article 2340), Husband’s attorney may argue that all account balances in existence as of June 1, 2013 that are not specifically identified and included in property settlement as separate property must be considered community property. In Dodd v. Dodd, 568 So.2d 1134 (La.App. 5 Cir., 1990), the Fifth Circuit stated “A QDRO is simply a means of effectuating the final judgment of partition and must be considered an interlocutory judgment. As such, it may be changed in substance, although such changes must not contradict the terms of the judgment on which it is based.”

Does giving the wife a premarital credit “contradict the terms of the judgment” in violation of the Dodd ruling? The answer may be debatable, why take this chance. Make sure that all important provisions of the QDRO are included in the Property Partition Agreement.