***FOOTE* Notes on Retirement**

**Topic:** 401k Loans

**Scenario**

You represent the non employee spouse and are drafting the property settlement agreement. The opposing party has a 401k with a $20,000 loan taken out during the marriage which he is to assume. You draft the agreement to state “Alternate Payee is awarded 50% of 401k account balance as of June 1, 2013 and shall not include the 401k loan in QDRO calculations.”

**Question**

If the 401k is administered by Fidelity, as well as a few other administrators, does this language cause the non employee spouse to lose $10,000?

**Proposed Answer**

Yes. Plan Administrators document 401k loans in different ways. Fidelity, which is a very prominent 401k administrator, classifies outstanding loan balances as a separate line item from the Vested Account Balance, which is the vested **liquid** balance in the Plan. A Participant’s total interest in the Plan is the sum of the Vested Account Balance and the outstanding loan balance shown on the statement. Since the actual property settlement agreement is not often sent to Fidelity along with the QDRO, the only document in Fidelity’s possession states that the loan balance is NOT to be calculated; therefore, it will only pay the alternate payee 50% of the Vested Account Balance which is $10,000 less than the property settlement meant to award. Although an amended qdro could remedy the mistake, who is likely to double check Fidelity’s calculations to observe that the $10,000 was not included in the final rollover calculations. Most attorneys consider their job done after receipt of the qualification letter and most clients are not well versed enough to verify the calculations themselves. Fidelity has an on line qdro preparation website wherein a qdro is prepared by pressing a series of buttons. Make sure you press the correct buttons.