

Around

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Negotiating the QDRO minefield

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Attorneys often think about preparing a Qualified Domestic Relations Order (QDRO) only after a Community Property Settlement Agreement is signed and approved by the court. This practice, however, is dangerous. This job is sometimes like walking across a minefield; the best time to do this job is before the settlement agreement is signed. This article details some of the land mines that attorneys may encounter should they brave the whirl of retirement division.

Public Enemy No. 1

The most common mistake is failing to negotiate the specific terms of the division order before signing the property settlement, resulting in such familiar but vague phrases as: "Wife gets one-half of her community property interest in the ABC Company Retirement Plan, to be divided by a qualified domestic relations order (QDRO)." What is the "community interest"? Does it include a requirement that the wife be named as surviving spouse? If so, is the "community interest" protected if the participant selects a single life annuity without survivorship rights? Does the "community interest" include a requirement that the wife receive the gains and losses on the amount to be transferred from the 401k? Before October 2008 (the stock market crash), most attorneys for the non-participant spouse would have said "yes." Today, they would search the plan looking for the word "lump sum" in order to justify the position that the intent of the parties in drafting the property settlement was to not award "gains and losses" (*i.e.*, losses). It is much better to deal with these issues intentionally and up front, rather than scramble for arguments in subsequent litigation.

Remember, a QDRO cannot change the negotiated terms of the property settlement. In *Dodd v. Dodd*, 568 So.2d 1134 (La.App. 5 Cir. 1990), the court stated:

[T]he original DRO was subject to amendment.... because it does not determine the merits of the action....[I]t may be changed in substance, although such changes must not contradict the



terms of the judgment on which it is based.

Reversal of Fortune

Family law attorneys recently breathed a sigh of relief when the Louisiana Supreme Court reversed itself. In December 2007, the Louisiana Supreme Court had held that survivorship rights were not community property because the statute governing LASERS benefits did not list former spouses as an included survivor beneficiary. In December 2008, the Supreme Court reversed this holding in *LASERS v. McWilliams*, 06-2191 (La. 12/2/08), 996 So.2d 1036. The Supreme Court did not say that survivorship rights under

LASERS (or any other pension plan) are inherently part of the pension benefit and automatically assumed to be included in a domestic relations order. Rather, the Court held that such rights are community property. However, community property can be waived if not included in the property settlement. Any saving account opened during the marriage is probably community. But if an account is not included in the property settlement, absent fraud, there will be an uphill battle in getting a supplemental partition to divide that savings account. The most recent *McWilliams* decision does not solve this problem. Even though survivor benefits are community, they may still be waived if not specifically accounted for in the property settlement.

Who Knew?

A common practice is to finalize a property settlement, then contact the plan administrator for a sample QDRO form or hire an attorney who specializes in pension division to prepare the QDRO documents. This practice does not ordinarily result in a major problem, but it can occasionally lead to litigation. Why? Because the plan has some quirky rule that the parties did not anticipate and the spouse who is benefitted by the rule becomes strangely uncompromising because (s)he has a signed property settlement in hand.

An example of such quirky rules is the treatment of military disability. If a military member is classified as partially disabled (say 30 percent), that member's pension is reduced by 30 percent. The member gets two checks, a pension check and a disability check. The Department of Defense will pay the former spouse only a percentage of the pension, not the disability pay, no matter what the division order says. If the parties want to divide the disability pay, they must state IN THE PROPERTY SETTLEMENT that if the military member qualifies for any disability pay that reduces the military pension pay, the military member must pay a compensating amount to the former spouse. It may be appropriate to include other language to ensure enforcement of this duty, because the former spouse who is entitled to this payment must now chase an ex spouse for the rest of his or her life. If the parties deal with the disability issue before the property settlement is signed, the non-member spouse may want to negotiate an offset and waive this portion of the military retirement.

Who would have guessed?

The Federal Employee Retirement System (FERS) contains a regulation that if a former spouse remarries before age 55, that former spouse loses any right to seek survivorship rights, regardless of any provision in the pension division order. Such arcane and counter intuitive rules must be considered when negotiating the property settlement. If the former spouse is already remarried before the resolution of the property settlement and the attorney does not discuss this rule, malpractice may result from the mere act of signing the property settlement.

Don't be a sampler

The fact that a QDRO has been qualified doesn't mean it adequately protects your client's rights. ERISA contains only nine mandatory requirements before an order can be "qualified." Most sample QDROs contain only the language that is sufficient to meet these minimum requirements. However, other permissible provisions often are not included in the sample form. For example, many sample orders do not contain cost-of-living-adjustment language, even though the plan provides them. If the QDRO does not award the adjustments, the plan may not pay them. Many sample orders have a paragraph dealing with survivor benefits. However, they usually do not contain language that divides the survivor benefits among multiple survivors if the participant remarries before retirement. Again, any attempt to accomplish this must be clear and specific.

Sometimes, using the sample form without knowing

what each provision means can be disastrous. The most common example is when there are outstanding loans on the participant's 401k and the sample QDRO says that loans will not be considered in dividing the account. An attorney who gets too comfortable in using sample forms may be doomed by the small word "not."

Side Effects of Sampleformitis (the over reliance on sample forms)

A dramatic illustration of unintended effects of using a sample form appears in the ExxonMobil form, which is perhaps the most frequently prepared QDRO in this area. Section 6 of the sample form states:

Alternate Payee's benefit will not include any Pre-Social Security Pension to which the Participant might become entitled unless under applicable Federal Law such Pre-Social Security Pension is considered part of Participant's Accrued Benefit.

A "Pre-Social Security Pension" is a benefit that Exxonmobil pays early retirees until age 62. It is clearly community and has a significant value (often more than \$500 per month). As with military disability pay, the company does not pay this benefit directly to the alternate payee because of company policy, not Louisiana law. The alternate payee's interest in this benefit may be able to be protected, but the time for dealing with such matters is during negotiations of the PROPERTY SETTLEMENT, not in the execution of the QDRO.

Death before QDRO

No, I don't mean that death is preferable to preparing a QDRO. Whether you are a practicing family law attorney or handle only the rare family law case, almost every attorney knows the following rule – Get it signed and qualified before the participant dies; otherwise, you may get nothing. That axiomatic rule changed in 2006 when Congress passed the Pension Protection Act of 2006, which allows a domestic-relations order to be qualified after the participant's death in certain circumstances. It is never wise to defer preparation and qualification of a QDRO. However, don't give up and walk away if the participant dies before it is qualified.

If a retirement benefit is an important element of community property, it is essential that an attorney know the rules before preparing a Community Property Settlement Agreement. If you don't know the rules, get help — and do it right the first time.