

Qualified Domestic Relations Orders: Issues to Consider

Division of retirement benefits in domestic relations cases is handled either through the inclusion of technical text in the dissolution or separation judgment itself, or more often through entry of a supplemental judgment, commonly called a qualified domestic relations order (QDRO).

Types of Plans Divisible by QDROs

The types of retirement plans that are typically divisible by a QDRO are called “tax-qualified” plans. These plans meet specific Internal Revenue Code requirements for favorable tax treatment. Examples include 401(k) plans, profit-sharing plans, and most traditional pension plans, including government plans and church plans.

Most non-qualified retirement plans are not divisible by a QDRO. Typically, these non-divisible plans are “deferred compensation” plans, “executive” plans, or “supplemental” plans. Be especially careful when encountering a plan with those or similar terms in its title.

Although this article will use the term QDRO for convenience, and QDRO is the correct term for the instrument that divides a tax-qualified retirement plan, instruments that divide federal retirement benefits are “court orders acceptable for processing” (COAP), and instruments that divide military benefits are “qualifying court orders.”

Problems Resulting from Delay

Problems can arise from procrastination or failure to understand the nature of benefits and how benefits are divided. Practitioners often delay in undertaking discovery of the parties’

retirement benefits, in learning the nature of the retirement benefits, and in dividing the benefits either through the dissolution judgment or through a QDRO. Division of benefits should be done simultaneously with or as soon as possible after the entry of the judgment of dissolution of marriage. The more time that passes before the QDRO is entered, the more things can go wrong. Some things that go wrong cannot be fixed.

- The plan participant might remarry, and his or her new spouse may acquire rights in the plan that cannot be divested by subsequent entry of a stipulated judgment.

- The plan participant might die. Sometimes, it is possible to complete the division of retirement benefits or to secure a survivor benefit following the participant’s death, but not always.

- The plan participant might commence pension benefits, with resulting loss of the opportunity to provide a survivor benefit to the former spouse. The participant might commence benefits earlier than expected due to disability or early retirement. Although the pension plan participant’s benefits still can be divided, the spouse’s benefit payments will cease when the participant dies, and no further payments will be made by the plan to the former spouse.

- The plan participant might cash out benefits in a defined contribution plan, leaving no benefits to transfer to a former spouse.

- The parties might move. It may not be possible to locate a party when it comes time to enter a QDRO to divide the plan benefits. The court may lose personal jurisdiction over a party if enough time elapses, requiring the dissolution

Continued on page 2

DISCLAIMER

IN BRIEF includes claim prevention information that helps you to minimize the likelihood of being sued for legal malpractice. The material presented does not establish, report, or create the standard of care for attorneys. The articles do not represent a complete analysis of the topics presented, and readers should conduct their own appropriate research.

judgment to be forwarded to a new jurisdiction where (hopefully) the court will register the judgment for enforcement and enter a QDRO to implement the division of retirement benefits.

- Defined contribution plans change their record keepers and purge old data from time to time. Passage of time can make it impossible to divide benefits in a defined contribution plan by reference to an account balance as of a prior date.

- The former spouse might lose a claim for survivor benefits. The survivor benefit in a military pension must be secured within one year after the dissolution of marriage. If a Federal Employee Retirement System (FERS) or Civil Service Retirement System (CSRS) member is receiving retirement benefits as of the date of dissolution, the dissolution judgment must state that the former spouse will receive the survivor annuity.

Preliminary Research – What to Look For

Obtain a copy of the plan documents. Obtain the name, address, and phone number of the plan administrator. Find out whether the plan administrator has a form of QDRO that the plan desires to be used. If you decide to use the plan's form of QDRO, be sure you understand its operation.

Determine whether the plan can establish a separate benefit for the alternate payee (typically the former spouse but in some cases a child) independent of the benefits retained by the participant.

- Most qualified defined contribution plans will establish a separate account within the plan for the benefit of the alternate payee. Under most, but not all, defined contribution plans, an alternate payee may elect to receive a distribution of his or her account soon after the QDRO is approved by the plan.

- Before the participant retires, most qualified defined benefit plans will provide a separate interest for the alternate payee (i.e., benefits payable over the alternate payee's lifetime at a time and in a manner of the alternate payee's choosing). After the participant retires, nearly all qualified defined benefit plans require that the alternate payee's benefits be paid as a shared interest (i.e., benefits payable over the participant's lifetime, requiring the protection of a post-retirement survivor annuity, if still available).

- Some pensions, including military and federal (FERS or CSRS), do not permit the creation of a separate interest for the alternate payee. The alternate payee's benefit payments will not commence until the participant's benefits commence.

Benefit Considerations

Make sure you know the payout or benefit options available under the plan. The QDRO cannot provide the alternate payee with any type of benefit or option not otherwise provided by the plan.

- If the plan provides for survivor benefits only to a spouse or former spouse, then a QDRO cannot provide a survivor benefit to a child.

- A QDRO cannot provide for a joint and survivor option with the alternate payee as primary recipient and the new spouse as a survivor beneficiary.

- In a defined benefit plan with an early retirement subsidy, the QDRO cannot require the plan to pay a portion of the subsidy to the alternate payee before the plan participant starts receiving benefits. (If a plan encourages early retirement by only partially reducing benefit payments, the "subsidy" is the difference between the partially reduced payment and a fully reduced payment.)

- The early commencement of benefits from a defined benefit plan to an alternate payee will result in a decrease in monthly benefit payments to the alternate payee.

Under most, but not all, defined benefit plans, an alternate payee may start receiving benefits any time the participant attains (or would have attained) the "earliest retirement age." "Earliest retirement age" means the earlier of:

- (1) the date on which the participant is entitled to a distribution under the plan; or
- (2) the later of:
 - (a) the date the participant attains age 50; or
 - (b) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

Survivor benefits are essential to protect the interest of an alternate payee when dividing most defined benefit plans. The alternate payee usually should be named as the survivor beneficiary for purposes of any pre-retirement death benefits, at least to the extent of the former spouse's interest in the participant's retirement benefit.

Conclusion

The most important thing is to resolve the terms of the retirement benefit division at the time you resolve the other issues in the case. If you try the case and do not adjudicate the terms of the division, you may find yourself back in court. Make sure the terms of the retirement benefit division are

spelled out in the dissolution judgment or the marital settlement agreement. Be sure that survivor benefits are addressed as necessary. The QDRO is the technical instrument that effects the division of benefits, but the terms of the marital settlement agreement or the dissolution judgment govern the preparation of the QDRO, and it pays to be precise. If you decide to consult an attorney with expertise in preparing QDROs, engage the attorney early in the case so that you will have the full benefit of the attorney's counsel.

DANIEL M. RICKS
KENNEDY WATTS ARELLANO & RICKS

Thanks to Ann Mercer for her assistance with this article.