

A Primer on QDROs, Women, and Retirement at Divorce

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Pension Rights Center

Pension Rights Center

Founded in 1976, the Pension Rights Center is a nonprofit consumer organization committed to protecting and promoting the retirement security of American workers, retirees, and their families. The Center has an unparalleled reputation for credibility, hard work, and an untiring commitment to securing economic justice for America's workers, retirees, and their families.

Why Retirement and Divorce?

Women over 65 are nearly twice as likely as men to face poverty in old age. This gender disparity is even greater for African American and Latina women. Divorce exacerbates this situation. Studies show that divorced women over 65 are three times more likely to live in poverty than their married counterparts.¹

According to the Government Accountability Office, after a divorce, women had a 41% decline in income and assets, compared to a 23% decline in income and a 39% decline in assets among men.² Meanwhile, survivors of domestic violence face unique retirement security challenges because financial abuse, which is present in 99% of domestic violence cases, can have a lifelong impact on income, career trajectory, and overall financial security.³

One reason for this dismal picture is that many women aren't getting a fair share of their former spouse's retirement benefits, which can make the difference between having an adequate income in retirement—or just scraping by. Retirement benefits like traditional pensions or 401(k)s are often the largest asset in a marriage other than the home, especially for low-and moderate-income couples. The right to a share of a former spouse's benefit is based on the understanding that labor in the home, including caring for children and elderly relatives, is valuable, and that a spouse who performs this work is supporting the other spouse's career, and in turn, has contributed to the other spouse's retirement benefits. State law also generally considers retirement assets earned during a marriage to be marital property.

Yet many women never receive their fair share. In 2018, the Pension Rights Center received approximately 2,000 calls and e-mails from individuals around the country seeking help with an earned retirement benefit. One in five of these calls was about the division of retirement benefits at divorce. Furthermore, of the approximately 750,000 unique visits to the Center's website in 2018, 120,000 of those unique visits were to a one page document covering the division of retirement benefits at divorce. It is clear that thousands of Americans are struggling to navigate this process. The vast majority of individuals who reach out to the Center for this type of help are older divorced women.

1 Jennifer Erin Brown et al., Nat'l Inst. on Ret. Sec., *Shortchanged in Retirement: Continuing Challenges to Women's Financial Future*, at 1 (2016), laborcenter.berkeley.edu/pdf/2016/NIRS-Women-In-Retirement.pdf

2 U.S. Gov't Accountability Office, GAO-12-699, *Retirement Security: Women Still Face Challenges*, at Introduction, 46 (2012), gao.gov/assets/600/592726.pdf.

3 National Network to End Domestic Violence, *Financial Abuse Fact Sheet*, at 2 (as of June 13, 2019), nncdv.org/content/about-financial-abuse/.

In some of these cases the retirement benefits simply weren't addressed at the time of divorce, whether because retirement seemed far away and was not made a priority, because the benefit-earning spouse had failed to properly disclose the existence of some or all retirement assets, or because the non-participant spouse or the spouse's legal counsel did not know to ask about the benefit-earning spouse's retirement benefits or was unfamiliar with how to divide them. In far too many cases where the retirement benefits were addressed, women were not receiving what they were legally awarded by their divorce decrees because federal law requires them to go through additional, difficult-to-navigate steps to obtain the benefits they were awarded at divorce. As previously noted, this process is not well understood by the general public, or even by divorce attorneys and family law judges. And in cases involving abusive relationships, the benefit-earning spouse can prolong or otherwise leverage the complex process of dividing retirement benefits at divorce to continue exerting economic coercion and control over a former victim.

What is a Qualified Domestic Relations Order (QDRO)?

Retirement benefits—which are often the largest asset in a marriage other than a home—can be divided between spouses at divorce. The divorce decree must clearly award a share of the benefit to the benefit-earner's former spouse, **but a divorce decree alone is not enough**. The parties must also obtain a *Qualified Domestic Relations Order (QDRO)*. Whereas a divorce decree is issued by a state court and approved by the judge, a QDRO, although signed by the judge, relates to federal law and is approved by the retirement plan. QDROs go into much greater detail than a divorce decree about how and when to divide the benefit. Federal law authorizes retirement plans to require this additional information and plans cannot legally divide a benefit without it.

QDROs: Background and Context

While divorce is regulated under state law, retirement benefits are governed by the federal *Employee Retirement Income Security Act of 1974, (ERISA)*. ERISA applies to retirement plans sponsored by private employers, non-profit organizations, and labor unions. Many government plans that provide retirement benefits to public employees have also adopted rules similar to those under ERISA, though some refer to QDROs by a different name (for instance, orders dividing retirement annuities for federal employees are called *Court Orders Acceptable for Processing*, or *COAPs*).

When ERISA was first enacted, it didn't include any provisions relating to dividing retirement benefits at divorce. Instead, it contained two provisions that prevented divorce courts from awarding a share of one party's retirement benefits to the other party. One of these provisions, called the anti-alienation provision, prohibits retirement plans from paying an individual's earned benefits to anyone other than that individual.⁴ This provision was included by Congress to prevent an individual's creditors from seizing or creating liens against an individual's retirement benefits to satisfy other unrelated financial obligations.

The second ERISA provision that prevented retirement benefits from being divided at divorce is its preemption provision, which says that states may not regulate ERISA-covered retirement benefits whatsoever.⁵ Congress was concerned that subjecting retirement plans to fifty different, and potentially conflicting, state legal frameworks would make them impossible to administer and that employers would simply stop offering them.

In 1984, Congress enacted the *Retirement Equity Act (REA)* to resolve several inequities in the retirement system that harmed women. It created an exception to the anti-alienation and preemption provisions of ERISA by granting states the ability to divide otherwise federally regulated retirement benefits at divorce. However, Congress was still concerned about the possibility that states would place conflicting or difficult-to-administer legal requirements on retirement plans, and so it created the *QDRO*.

⁴ 29 U.S.C. §1056(d).

⁵ 29 U.S.C. §1144(a).

Understanding the QDRO Process

The QDRO process involves the following steps:

1. The divorce decree must address the division of retirement benefits before a QDRO can be obtained. If the benefits were not addressed at divorce, a QDRO cannot be obtained without going through the onerous process of reopening the divorce. In some states, divorce cases cannot be reopened, permanently barring a party from obtaining a portion of the retirement benefits at a later time.
2. The parties must obtain a *domestic relations order (DRO)* that is consistent with the divorce decree, and both parties must agree to it and/or the court must approve it. Drafting this kind of court order requires an understanding both of state domestic relations law and of federal retirement law, so many divorce attorneys do not draft these orders. Instead, drafting is frequently performed by a QDRO specialist. QDRO specialists typically charge flat fees that must be paid on top of what is being paid to the divorce attorney. Some retirement plans provide model QDRO forms. These are designed to make it much easier to comply with the QDRO rules, but not all plans offer a model QDRO and, even then, parties usually still need help filling one out and they may not be suitable in every case.
3. The parties must submit the DRO to the retirement plan for *qualification*. Once a DRO is submitted, the plan will review the DRO to ensure that it is consistent with the plan's own benefit rules. For instance, the DRO must not require the plan to pay out larger benefits than the benefit-earner actually earned, and can't require the plan to pay benefits out using a method it doesn't normally use or earlier than it would normally allow the benefit-earner to begin taking benefits.
4. If the plan approves the DRO, it is deemed to be *qualified*, and becomes a QDRO. The plan will keep the QDRO on file and begin paying benefits at the time specified by the QDRO. However, the plan may reject the DRO without qualifying it, in which case it does not become a QDRO. If this happens, the parties must fix any problems with the DRO and resubmit it for qualification. If the parties do not resubmit the DRO, there is no QDRO on file, and plans WILL NOT pay out benefits to a former spouse. It is important to obtain a QDRO as soon as possible so that nothing else happens to the benefit before the QDRO process is finalized.

Some defined contribution plans such as 401(k) plans charge QDRO review fees. These fees are deducted from the account balance, so there is not an up-front charge preventing low-income individuals from submitting a DRO. However, if a DRO is rejected and re-submitted, the fee may be charged again. Plans that offer model QDROs may reduce the fee for individuals who use them.

Why Do Individuals Struggle with Understand the QDRO Process?

In the process of fielding help requests from the impacted individuals who contact the Pension Rights Center, and through our discussions with various stakeholder communities, the Center has identified many reasons for which women do not obtain a QDRO and never receive the benefits they have been granted in their divorce decrees. A common thread is a lack of education about QDROS and about retirement generally, not only among impacted individuals but also among divorce attorneys, family court judges, and other professionals.

Here is a short list of some of the major obstacles that can prevent women from obtaining a share of a former spouse's retirement benefit:

- **The retirement benefit is not addressed at divorce.** The parties may intentionally or unintentionally fail to disclose earned retirement benefits at divorce. Sometimes women give up their rights to a share of the benefit because they do not understand how valuable these benefits can be in the long run, or because they are more focused on more immediate concerns (like the family home or support). If a woman gives up her rights to a share of the retirement benefits, she cannot come back later to try to get a share. Once

a divorce is final, reopening the divorce in order to address the undivided retirement benefits can be an onerous process. In cases where a party's retirement assets were not disclosed, recourse under state law can be limited.

- **They do not know they need a QDRO.** Most Americans have never heard the term QDRO. The Center has heard from many individuals whose divorce attorneys never explained the QDRO process to them. Family law courts do not have robust procedures in place to ensure that divorce parties understand the need for a QDRO or follow through on obtaining a QDRO. Retirement plans vary dramatically in the degree of education that they provide to their participants regarding the QDRO process.
- **They cannot obtain a DRO.** With a few exceptions in certain geographic areas, there are no organizations providing regular, *pro bono* QDRO-drafting assistance. Legal services attorneys do not typically have the expertise to draft a DRO that will satisfy plan requirements. Divorce attorneys frequently do not draft QDROs, and parties must go to a QDRO drafting specialist, which costs additional money. Self-represented individuals are particularly vulnerable because they do not have a divorce attorney to make a referral. Some retirement plans offer model QDROs, but many do not, and many model QDROs are still highly technical and difficult to understand, even for divorce attorneys.
- **The DRO meets the requirements to become a QDRO, but nevertheless fails to sufficiently protect the former spouse's benefit.** For example, ERISA retirement plans are required to provide for the surviving spouse of a benefit-earner to continue receiving a share of benefits after the earner dies. A QDRO can award these survivor benefits to a former spouse but the divorce decree and QDRO must do so expressly. Otherwise, depending on the type of retirement plan, if the person who earned the benefit dies the former spouse may end up receiving nothing even if there is a valid QDRO on file. In addition, some QDROs are "separate interest" QDROs and some are "shared interest" QDROs. Separate interest QDROs tend to give more independent rights to the former spouse of the benefit-earner, but parties frequently end up obtaining and submitting a shared interest QDRO when a separate interest QDRO would have been in the best interests of the former-spouse.
- **They do not submit a DRO in time.** While there is no formal expiration date for when a DRO can be submitted to a retirement plan, the longer women wait to obtain a QDRO the greater the risk of intervening circumstances jeopardizing the benefit. For instance, the former spouse who earned the benefit could retire and take the entire benefit as a lump sum, or they could remarry and divorce again, and that new spouse could submit a QDRO that grants them the entire benefit.
- **The DRO is never qualified.** The qualification process is one of the hardest parts of the QDRO process to understand, not only for impacted participants and alternate payees, but also for divorce attorneys and family law judges. Retirement plan administrators have reported that they frequently encounter poorly drafted QDROs that do not provide the information they need to divide the benefit, or that ask the plan to do something in conflict with ERISA or with its rules. Retirement plans are required to inform individuals who have submitted prospective QDROs of their determination that a DRO has been rejected, but this appears to be a point at which many divorced women fall through the cracks because no further action has been taken to qualify the DRO.

How Can Advocates Assist Older Adults Who Have a QDRO Issue?

Legal assistance, elder rights, and aging services providers can help connect older adults to help with their retirement and QDRO issues. Some steps to take include:

- Provide educational materials about QDROs and retirement benefits to the community;

- Develop a process for issue spotting or screening for QDRO issues when working with clients to help identify potential issues; and
- Work with local bar associations and pro bono projects, the [Pension Rights Center](#) and the [pension counseling projects](#) to identify opportunities for eligible clients to receive legal help.

The Pension Rights Center Initiative on Women and Retirement at Divorce

The Pension Rights Center has launched a new, multi-phase initiative that will help economically vulnerable older Americans—especially low-income women, people of color, members of the LGBT community, and survivors of abuse—achieve financial security in retirement by helping them obtain a fair share of a former spouse’s retirement benefit. The initiative seeks to increase public awareness about QDROs and their importance, increase access to QDROs, and make it easier to navigate the complex and highly technical process of finalizing a QDRO with a retirement plan.

Case consultation assistance is available for attorneys and professionals seeking more information to help older adults. Contact NCLER at ConsultNCLER@acl.hhs.gov.

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