

Protecting Economic Security at Divorce: What You Need to Know About Qualified Domestic Relations Orders (QDROs)

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Housekeeping

- All on mute. Use Questions function for substantive questions and for technical concerns.
- Problems getting on the webinar? Send an e-mail to NCLER@acl.hhs.gov.
- Written materials and a recording will be available at NCLER.acl.gov. See also the chat box for this web address.

About NCLER

The National Center on Law and Elder Rights (NCLER) provides the legal services and aging and disability communities with the tools and resources they need to serve older adults with the greatest economic and social needs. A centralized, one-stop shop for legal assistance, NCLER provides Legal Training, Case Consultations, and Technical Assistance on Legal Systems Development. Justice in Aging administers the NCLER through a contract with the Administration for Community Living's Administration on Aging.

About Pension Rights Center

The Pension Rights Center www.pensionrights.org is the Resource Center for six pension counseling projects serving 31 states. The Pension Counseling and Information Program was established under the Older Americans Act and is primarily funded by the Administration for Community Living.

Key Lessons

- Why retirement benefits are important to address in a divorce
- What Qualified Domestic Relations Orders (QDROs) are and why they are important
- How to issue spot and avoid pitfalls in the process of dividing retirement benefits and drafting QDROs
- Special considerations in gray divorces

What is a QDRO?



Retirement, Divorce, & Older Women

- Retirement and divorce affects spouses of every race and gender—but often these issues affect older women most.
- 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.
- Studies show that divorced women over 65 are three times as likely to live in poverty than their married counterparts.
- According to the Government Accountability Office, after a divorce, women had a 41% decline in income and assets compared to 23% decline in income and 39% decline in assets among men.
- Survivors of domestic violence face unique retirement security challenges

Importance of Retirement Benefits

- Getting a rightful share of a former spouse’s retirement benefits can make a difference between being financially secure in retirement—or just scraping by.
- Workplace retirement benefits are often the largest asset in a marriage other than the family home.
- Most states consider retirement assets earned during a marriage to be marital property.
- Older women are more vulnerable as “gray divorces” are on the rise.

Unfortunate Loss of Retirement Benefits in a Divorce

- Many spouses lose out because the retirement benefit was not addressed at the time of the divorce.
- It's harder and sometimes impossible to get a portion of the former spouse's retirement benefit if it is not divided at the time of divorce.

Why are Retirement Benefits Not Being Addressed?

- Retirement seemed far off and isn't an immediate concern.
- The benefit-earning spouse failed to disclose the existence of some of the assets.
- Legal counsel for the non-employee spouse was unaware of existence of the benefit or was unfamiliar with how to divide it.
- Even when they are addressed, in order to receive their awarded benefit, the spouse needs to obtain a QDRO and have it approved by the plan.
- This process of getting a QDRO is not well understood by the general public or even by divorce attorneys and family law judges.

Moving forward on solutions...

- To make the QDRO process easier, Pension Rights Center launched the common ground *Initiative on Women and Retirement at Divorce* to address obstacles that prevent former spouses from obtaining a QDRO.
- By training attorneys and providing information to divorcing parties, the goal is to have the retirement benefits properly addressed in the decree and make QDROs more accessible.

Poll #1

- Before this webinar, had you heard of a Qualified Domestic Relations Order (QDRO)?
 - a) Yes
 - b) No

Poll #2

- How many Qualified Domestic Relations Orders have you drafted?
 - a) None
 - b) 1-10
 - c) 11-50
 - d) Too many to count!

The Importance of Retirement Benefits in a Divorce

- Retirement benefits are often the largest marital asset.
- Women especially are more likely to be poor after a divorce.
- The right to a share of the former spouse's benefit is based on the understanding that labor in the home is valuable and most states consider retirement assets earned during the marriage to be marital property.
- Ensuring the non-employee spouse gets a portion of the former spouse's retirement benefits will help protect financial security in retirement.
- The division of retirement benefits must be addressed in the divorce decree. It can be costly and sometimes impossible to do so after the divorce is finalized.

What is a Qualified Domestic Relations Order (QDRO)?

- **SHORT VERSION: Document that is required in order to divide retirement benefits in a divorce—namely, the court order to the plan that implements the divorce court’s award of retirement benefits.**
- Domestic Relations Order: Judgment, decree or order, made pursuant to state domestic relations law that is related to child support, alimony, or marital property rights.
- Creates or recognizes the existence of an alternate payee’s right to receive, or assigns to them the right to receive all or a portion of the benefits payable to a participant under the retirement plan.
- Must include specific information and meet certain requirements under federal private pension law
- Qualified by the Plan Administrator not the Court!

Key Terms

- **DRO versus QDRO**
 - Not a QDRO until it is **QUALIFIED** by the Plan Administrator.
- **Participant**
 - The person who earned the retirement benefit (employee, former employee, retiree).
- **Alternate Payee**
 - Spouse, former spouse, child, or dependent of the Participant.

Why do QDROs Exist? (1 of 2)

- Employee Retirement Income Security Act of 1974 (ERISA)
 - Designed to protect participants in private employer tax-qualified retirement plans
 - State law is preempted by ERISA, thus ERISA protects private retirement plans from state regulation
 - Anti-alienation provision prevented retirement benefits from being divided in a divorce
 - Purpose is to prevent participant's benefit from being paid to anyone else in order to protect financial security in retirement

Why do QDROs Exist? (2 of 2)

- Retirement Equity Act of 1984 (REA)
 - Amends ERISA
 - Purpose was to resolve inequities in private retirement systems that harmed women
 - Created an exception to ERISA's anti-alienation provision and preemptive scope for Qualified Domestic Relations Orders dividing a retirement benefit in divorce
 - QDROs eliminate concerns that states would place conflicting or difficult-to-administer legal requirements on retirement plans

What Makes a QDRO Special?

- A typical divorce decree or property settlement agreement is not enough to obtain the awarded portion of the retirement benefit.
- Special Retirements for a QDRO:
 - Must contain the exact name of the plan
 - Must clearly detail how to divide the benefits
 - Must not require plans to pay greater benefits than the participant is entitled to or change a form of benefit
 - Must not require payment of benefits already required to be paid to another alternate payee
 - **Must follow the rules of the plan and of ERISA**

When is a QDRO Needed?

- **Any time** a benefit in a private employer plan is being divided in a divorce.
- Time is of the essence—do not wait until retirement age to obtain a DRO and getting it qualified by the plan.
- Failure to timely and accurately submit and receive approval from the plan can result in lost benefits.

Types of Retirement Plans Under ERISA

Defined Benefit Plan (DB Plan)

- Typically funded by employer
- Usually provides a set monthly benefit for life at retirement (annuity)
- Typically uses a formula to determine the benefit amount
- Examples: Pension Plan

Defined Contribution Plan (DC Plan)

- Contributions made by employee and/or employer
- Usually is paid as a lump sum
- Benefit is usually determined by market performance
- Examples: 401(k) Plan, Profit Sharing Plan, Employee Stock Ownership Plan (ESOP)

What About Non-ERISA Plans?

- ERISA does not cover:
 - Governmental plans (local, state, and federal)
 - “Church” plans and church/religious-sponsored hospital plans (except for those that have agreed to be subject to ERISA)
 - Military plans
 - Individual Retirement Accounts (IRAs)
- These non-ERISA plans still may be divided by a special domestic relations order, but they are not always called QDROs and may have different requirements. For example:
 - FERS/CSRS – Court Order Acceptable for Processing
 - Thrift Savings Plan – Retirement Benefits Court Order

Non-ERISA Plan Practice Tips

- Do not refer to ERISA when drafting an order for a non-ERISA plan
- Some of the non-ERISA plans have special features that need to be addressed
- Plan requirements can be different

Special Features of Pension Plans

- All features need to be addressed in the divorce decree as a QDRO can't award anything not awarded by the court.
- Features unique to traditional pension plans:
 - Cost-of-living adjustments (COLAs)
 - Survivor Benefits
 - Qualified Pre-retirement Survivor Annuity (QPSA)
 - Qualified Joint and Survivor Annuity (QJSA)
 - Early Retirement Subsidies
- Special QDRO considerations for pension plans
 - Two Types of QDROS
 - Shared Interest
 - Separate Interest

Shared vs. Separate Interest QDRO

- Shared Interest
 - Required to be used if the participant is in pay status
 - Can also be used if the participant is not in pay status
 - Keeps the two parties tied together
- Separate Interest
 - Only allowed when not yet in pay status
 - Gives the alternate payee more freedom and control
- Considerations
 - Age
 - Health
 - Effect of death on benefits

Special Features of Defined Contribution Plans

- All features need to be addressed in the divorce decree as a QDRO can't award anything not awarded by the court.
- Features unique to retirement savings plans:
 - Gains and losses
 - Loans
 - Late Contributions
 - In-service distributions

Concerns with Grey Divorce (1 of 2)

- **Survivor Benefits**
 - Most ERISA plans will not allow a participant, once retired, to change the form of payment elected at retirement.
 - Once an alternate payee waives rights to a survivor benefit, it is waived, even if the parties later divorce.
- **Retirement Payments Prior to QDRO approval**
 - **QDRO reviews can take months**
 - QDRO procedures—does the plan pay retroactively?
 - Court can order the participant to pay until former spouse's portion is withheld.

Concerns with Grey Divorce (2 of 2)

- Benefit commencement during the divorce
 - Freeze benefits if possible
 - Make sure the soon-to-be former spouse does not sign any forms
- Benefits that have been moved
 - Defined contribution plans may have been cashed out, rolled over to an IRA, or used to purchase an annuity
- Financial Security
 - Lump sum vs. annuity
 - Other assets

Pitfalls: Division of Retirement Benefits

- Not finding all the available benefits/plans
- Difficulty in obtaining benefit information/not know what information is needed
- Not properly valuing the benefit
- Not preserving the benefit
- Not dividing all plan features, especially survivor benefits
- Not being specific enough or providing enough details in the divorce decree

Pitfalls – QDROs

- Waiting to prepare and submit the QDRO
 - Death
 - Remarriage
 - Distributions
 - Plan / recordkeeper changes
- Failing to follow up to ensure the QDRO is approved
- Not amending and resubmitting the QDRO if it is rejected
- Not including all the benefits/features awarded
- Underestimating difficulty & complexity of QDROs

Other Concerns

- Cost of QDRO Preparation
- Cost of QDRO Review
- Lack of understanding by parties, attorneys, and judges
- Limited availability of pro-bono or low-bono assistance for QDROs
- Need for easier to understand information on QDROs and the division of retirement benefits

Issue Spotting

- Collect the names of all the companies the other party worked for during the marriage, then you can check to see what retirement plans the companies offer.
- If they are older and have a skilled labor trader or union, odds are there may be a pension plan.
- Is the other party a government employee? They usually have mandatory pensions.
- If they have copies of any paystubs, check for deductions.
- Is any mail coming to the house from financial institutions, or documents that say something about benefits on the outside of the envelope?
- What sources of income (if they are retirement age) besides Social Security? They may know the spouse has a pension but not realize they may be entitled to a portion.

Determining if a QDRO is Needed or Preparing for Preparation of One

- Assess where the person is during divorce process
- Contact the plan to put them on notice/let them know they have a marital interest in the benefit
- Review divorce decree/settlement agreements (sometimes this is sufficient, or a QDRO exists and the individual doesn't know)
- Request Model Orders and plan documents from the pension plan to gather necessary information for any necessary QDRO

Resources for QDRO Support

- [Pension Rights Center](#) Initiative on Women and Retirement at Divorce
- PRC and regional pension counseling projects
- Local bar associations
 - [Women bar groups, Family law chapters](#)
- Family law facilitator, family law court self help centers
- Domestic Violence agencies/women shelters

Western States Pension Assistance Project (1 of 2)

- **Goal:** Help older adults stay out of poverty by protecting and defending retirement benefits of workers, retirees, and their beneficiaries. Employer-sponsored retirement benefits are an important piece of the patchwork of retirement savings/income and provides greater income security to older adults.
- **Any employer-sponsored retirement benefit issue**
 - Examples: overpayments, lost pensions, survivor/former spouse benefits, disability benefits, proving work histories, correcting benefit errors, claims/appeals, etc.

Western States Pension Assistance Project (2 of 2)

- **Eligibility:** Live or worked in Arizona, California, Hawaii or Nevada. Any age, any income level!
- **Recoveries:** Over \$31 million of earned retirement benefits recovered for participants, survivors, beneficiaries.
- **How to Refer:** Toll-free: (866) 413-4911 or [online](#)

Poll #3

- Would you be interested in additional trainings on such topics as:
 - a) More technical trainings on drafting QDROs
 - b) General information on governmental plans
 - c) Basic ERISA training
 - d) Common pension issues facing older adults
 - e) Other

Questions?

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