



Splitting Everything, Including the Wedding Cake

Written by Dianne Schechter

Understanding the Importance of Qualified Domestic Relations Orders When You Are Going Through a Divorce

Marriage usually begins with a wedding where your closest friends and family come together to celebrate the union of yourself and the one person whom you have chosen to share your life experiences and grow old with. Most people would agree that the word “divorce” never enters their minds on their wedding day. The bride(s) and groom(s) profess their love to each other and swear that they’ll be one of the couples who make it.

Unfortunately, according to statistics from the Centers for Disease Control and Prevention, 45–50% of marriages in the United States end in divorce.¹ If you happen to end up in that group, there’s a lot of compromising and dividing of assets while you finalize your divorce. Once the ownership of the cars is decided, the proceeds from the sale of the house are finalized, and both parties have at long last agreed on who gets what in the divorce settlement, they breathe a sigh of a relief that the emotional ordeal is over. But what if one or both of you have retirement plans?

Retirement plans are usually the most financially significant asset divided by a divorcing couple. Your family law attorney »

might need to hire another attorney—someone who understands how to divide retirement plans and prepare the appropriate court orders.ⁱⁱ Though spending even more time and money on legal fees is frustrating, this is one of the best decisions you'll make. Mistakes can come back to haunt you years down the road and end up costing even more money when trying to correct them—if they can be corrected at all.

In general, retirement income is marital property to the extent that income was earned, accrued, or vested during your marriage. If you divorce, the income must be shared with your ex-spouse. Most retirement plans, such as defined benefit plans, defined contribution plans, and cash balance plans, require the use of a qualified domestic relations order (QDRO) to properly divide the benefits between the two divorcing spouses. A QDRO essentially creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and which includes certain information and meets certain other requirements.ⁱⁱⁱ For purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant.^{iv}

A domestic relations order is a judgment, decree, or order (including the approval of a property settlement) made pursuant to state domestic relations law (including community property law) which relates to the provision of child support, alimony payments, or marital property rights for the benefit of a spouse, former spouse, child, or other dependent of a participant.^v

A state authority, generally a court, must actually issue a judgment, order, or decree or otherwise formally approve a property settlement agreement before it can be a qualified domestic relations order under ERISA (Employee Retirement Income Security Act). The mere fact that a property settlement is agreed to and signed by the parties does not, in and of itself, cause the agreement to be a domestic relations order.^{vi}

Once in a while, the division of a retirement plan is simple, but most of the time there are considerations of which the parties are unaware. Even for simple plans, such as a 401(k), the issue of outstanding loans can make the division of the plan problematic. For more complex plans, such as pensions, the basic accrued benefit is considered, as well as survivor benefits, early retirement benefits, post-retirement cost-of-living adjustments, and disability benefits. Determining which of these benefits to share with the non-employee spouse, and in what amounts, can be difficult, especially since there are numerous ways to define how much of the pension is the "marital portion."^{vii} The misconception that retirement plans are simple can lead to delays in discovery, improper expectations, and disappointment. You need only read a summary plan description (SPD) for any retirement plan to realize that they are complicated, highly regulated, and difficult to assign assets.^{viii}

A few employer-sponsored retirement plans cannot be divided, even if the judgment of divorce says the parties shall divide them. These plans are usually called non-qualified deferred compensation plans. Your attorney needs to know whether or not the particular plan can be divided by a "QDRO type" court order, because if it cannot, he or she needs to factor it into the settlement some other way, perhaps by offsetting against another asset and/or present value calculation, or by sharing of benefits in the non-qualified deferred compensation plan when they are eventually paid to the participant.^{ix}

Works Cited

ⁱ Marriage and Divorce (June 13, 2016), www.cdc.gov/nchs/fastats/marriage-divorce.htm

ⁱⁱ Amelia Island, *Top Ten QDRO Mistakes That Even Experienced Lawyers Make*, ABA 2011 Section of Family Law Spring Conference (April 2011), page 4. Retrieved from <http://www.kegelmcburney.com/sites/www.kegelmcburney.com/files/Top%20Ten%20QDRO%20Mistakes.pdf>

ⁱⁱⁱ United States Department of Labor Employee Benefits Security Administration, FAQs about Qualified Domestic Relations Orders, https://www.dol.gov/ebsa/pdf/faq_qdro.pdf (last visited September 20, 2016).

^{iv} Id.

^v Id.

^{vi} Id.

^{vii} Robert Treat, Esq., *Why The Lawyer Representing You In Your Divorce Is So Concerned About Retirement Plans*, <http://www.qdroexpressllc.com/articles/article13.html> (last visited September 20, 2016).

^{viii} Id.

^{ix} Id.



Dianne Schechter is the qualified domestic relations order paralegal at the firm Butterfield Schechter LLP. Additionally, Ms. Schechter has assisted attorneys with client matters before the IRS, FTB, and the State Board of Equalization. She has also assisted attorneys with legal collections and recovery processes, while managing a process service department. Ms. Schechter received her undergraduate degree in history and Italian studies, magna cum laude, from the University of San Diego (USD) in 2008. She also acquired her paralegal certificate, cum laude, from USD in 2008 and her master of arts in history, summa cum laude, from USD in 2013.