

QDRO PROFESSIONALS PLLC  
30300 Northwestern Hwy.  
Suite 260  
Farmington Hills, Michigan 48334

Telephone: 248.865.4700  
Fax: 248.865.4705  
JON@QDRO.PRO  
WWW.QDRO.PRO

## **TIMING CONSIDERATIONS AND MALPRACTICE TRAPS**

The judgment of divorce or marital settlement agreement usually expresses the parties' intent to divide retirement benefits in general terms only. By law, this intent is not generally carried out until appropriate domestic relations orders have been prepared, signed, entered with the court and submitted to and accepted by the retirement plans as valid orders. Typically, divorcing parties are eager to conclude the divorce as soon as possible. Therefore, the judgment of divorce is often entered with the court before any necessary orders dividing retirement benefits have been prepared. Usually this causes no problems; however, you should be aware of some situations where timing can have significant consequences. These situations include:

- The division of a retirement benefit already being paid to the participant at the divorce date.
- The retirement of the participant after the divorce date but before the necessary division orders have been accepted by the plan or even entered with the court.
- The death of the participant after the divorce date but before the necessary division orders have been accepted by the plan or even entered with the court.

The latter two of these situations can be even more significant if the participant has married another spouse in the interim.

**Participant is Already Receiving Retirement Benefits at the Divorce Date.** The key issue in this situation is retroactivity. Typically, the alternate payee is awarded a share of all benefits paid after the divorce date. Generally, plans will not accept orders requiring them to pay benefits to an alternate payee that have already been paid to the participant. They will pay benefits to the alternate payee prospectively but not retroactively unless a previous order has been received and retroactive benefits have been segregated (as required by law) for a specified period during which the issue of whether a domestic relations order is a QDRO is being determined. This segregation requirement does not begin until the plan receives a court order purporting to be a QDRO and ends 18 months after the first date (after the plan receives the order) that the order would require payment to the alternate payee. After the order has been accepted as a QDRO, the alternate payee generally receives all previously segregated amounts.

The alternate payee may be able to receive retroactive payments that have not been segregated either by direct payment from the participant or by inclusion in the order of a special provision that, if accepted by the plan, permits the alternate payee to recover the retroactive awarded payments as additional future temporary payments that would otherwise have been paid to the participant. The greater the amount of retroactive payments, the more difficulty in and delay until the alternate payee receives all intended retroactive payments.

Under some pension plans, including those of automobile manufacturers and certain governmental plans, the previous election of a qualified joint and survivor annuity may be rescinded by the participant in the event of a divorce. Typically, a domestic relations order would restrict the participant's right to rescind the qualified joint and survivor annuity election in order to preserve the alternate payee's survivorship rights. However, until the plan receives a proposed order with such restrictions, it cannot enforce them and the participant may be able to unilaterally eliminate the alternate payee's survivorship rights without any available recourse to the alternate payee to restore such rights.

*In the case of division of benefits already being paid, the sooner after the intended division date that the proposed order is entered with the court and submitted to the plan, the less likely are potential complications of retroactive payments and possible loss of the alternate payee's survivorship rights. Informing the plan, as soon as possible (even before a domestic relations order is presented to the plan), of the parties' divorce and their intent to divide retirement benefits may not always eliminate problems, but it certainly cannot cause any harm.*

**Participant Retires After the Divorce Date But Before a QDRO is Received by the Plan.** Until the plan receives an order, the plan usually has no knowledge of the parties' intent to divide retirement benefits or to possibly restrict the participant's choice of benefit payment options. Before the divorce, the alternate payee's consent was necessary for the participant to select any benefit payment option other than the plan's qualified joint and survivor annuity for all qualified, non-governmental pension plans. This requirement no longer applies after the parties' divorce and, in the absence of a domestic relations order, the participant can select any benefit payment option without the alternate payee's consent.

Furthermore, after the participant has elected a benefit payment option, the plan generally will not permit the revocation of that election after benefit payments have begun. Therefore, the participant's benefit payment option may be locked in for the participant and, most likely, for the alternate payee as well. Depending upon the benefit payment option selected by the participant, the alternate payee's awarded benefits may be at risk if the participant predeceases the alternate payee. The alternate payee's interest may not be protected even if the parties' intent was that the alternate payee be treated as the participant's surviving spouse.

If the participant has married a subsequent spouse before the participant's retirement benefits begin, the plan may be required by law to grant the subsequent spouse all rights previously accorded to the alternate payee including the necessity of securing the subsequent spouse's consent to any benefit payment option election unless a QDRO has been received by the plan before the participant begins to receive benefits. In the absence of such a QDRO, the plan may have no choice but to grant the subsequent spouse certain survivorship rights even where those rights were clearly intended for the alternate payee.

If a proposed QDRO is received by the plan before the participant begins to receive retirement benefits, the plan will be required to segregate the alternate payee's benefits

and preserve any survivorship rights awarded to the alternate payee. Therefore, it is vital that if a participant is, or will soon become, eligible to retire (and especially where the participant's retirement is anticipated), a proposed QDRO must be submitted to the plan ***before the participant retires***. Another less effective alternative is to restrict the participant's right to retire in the judgment of divorce or other court order until a QDRO can be prepared and approved by the plan.

***The sooner after the divorce date that the proposed order is entered with the court and submitted to the plan, the less likely are potential complications of possible loss of the alternate payee's survivorship rights and the right to select a benefit payment option of the alternate payee's own choosing. Again, informing the plan, as soon as possible (even before a domestic relations order is presented to the plan), of the parties' divorce and their intent to divide retirement benefits may not always eliminate problems, but it certainly cannot cause any harm.***

**Participant Dies After the Divorce Date But Before a QDRO is Received by the Plan.** Under most defined benefit pension plans (plans with benefit formulas), the only death benefits payable after the participant dies are the qualified pre-retirement survivor annuity benefits. There are generally no death benefits after an unmarried participant dies. If a divorced participant who has not subsequently married dies before a QDRO has been submitted to the plan, the plan will generally not pay any subsequent benefits. Thus, there is nothing left to divide.

Similarly, under most defined contribution plans (plans with individual accounts), death benefits are generally paid to the designated beneficiary. In most cases, the designated beneficiary is or must be the surviving spouse unless another beneficiary has been selected with the spouse's consent. After a divorce, the participant is generally permitted to change the designated beneficiary unless a QDRO provides otherwise. Thus, if a divorced participant dies before a QDRO has been submitted to the plan but after changing the designated beneficiary, the alternate payee may not receive any portion of the participant's account intended for the alternate payee.

***Some of the worst horror stories involving QDROs involve the death of the participant before a QDRO has been received or accepted by the plan. There are various attempts that can be made to attempt to produce the intended results in such cases. These include post-mortem QDROs and arguments that the judgment of divorce itself constituted a QDRO. However, the success of these attempts is doubtful. The best solution is "an ounce of prevention." Be certain that all necessary orders are prepared, entered and submitted promptly. The safest course is to enter all necessary orders together with the judgment of divorce.***

**Timing is Everything.** To avoid the problems discussed in this explanation, some attorneys enter all necessary domestic relations orders together with the judgment of divorce.

However, this is not always feasible and can result in a delay in entering the judgment of divorce that is frequently unacceptable to the parties. Often, necessary domestic relations orders are prepared after the judgment of divorce has been entered. *The clear message should be that domestic relations orders should be prepared as expeditiously as possible to avoid potentially serious problems. QDRO Professionals PLLC prides itself on prompt turnaround and even offers three business day turnaround as an available option.*

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**This article is not a substitute for legal advice. If you need legal advice, please contact Jon Mallin at 248.865.4700 or by e-mail at JON@QDRO.PRO.**