



CONTROLLING THE PREPARATION OF THE QDRO

Introduction:

The general rule is that the attorney representing the non-participant spouse has the greatest potential liability and the strongest motivation to assure the order is prepared based on the intent of the settlement provisions. This month we will look at the reasons this is so and the means that can be employed to assure that potential future problems can be avoided. Naturally the participant spouse's attorney has the same potential problems in assuring that the order does not over reach what has been bargained for or ordered by the court.

Tip of the Month:

When dealing with a lump sum defined contribution plan always check with the plan to determine that immediate distribution is permitted.

When the Retirement Equity Act of 1984 was passed by the U.S. Congress the timing of the lump sum distribution of the alternate payee's share of de-fined contribution funds was governed by the same plan provisions that applied to the plan participant. Often the earliest age the participant was eligible to receive these funds was 59½. This meant that the plan would assume responsibility for the maintenance and investment returns for the money awarded to the non-participant spouse. The company was also required to provide quarterly statements to the non-participant spouse detailing the in-vestment results of the previous quarter. As this requirement often meant decades of uncompensated management and reporting responsibilities, de-fined contribution (Employee Savings Plans, 401(k) plans, Employee Stock Ownership Plans, etc.) plan administrators rightly felt they were being penalized unfairly. In 1989 they petitioned IRS to be allowed to make immediate distributions if a Qualified Domestic Relations Order (QDRO) was served upon them. IRS responded with a ruling that plans could make immediate distributions to the non-participant spouses if the plan administrators changed the by-laws of their plan to permit immediate distribution to a non-participant spouse upon receipt of a QDRO. Most plans have since taken actions to permit immediate distribution, but not all. Plans covering just a few employees often did not make the necessary by-law changes and a number of big union managed plans have also resisted the change for reasons unknown to me. Before promising immediate distribution of these funds to your client always check with the plan to be sure they will honor immediate distribution. Often case distribution strategy is dependent on the immediate receipt of these funds by the non-participant spouse. Before going forward, be sure they will be available.

CONTROLLING THE PREPARATION OF THE QDRO

The key to any good Qualified Domestic Relations Order is not in the order but in the completeness of the settlement language dealing with the retirement benefit. If survivorship is not in the settlement language then survivorship cannot be in the QDRO. In previous newsletters I have outlined the importance of negotiating a settlement that clearly details all that the non-participant spouse is entitled to receive from the marital property retirement assets. Assuming this has been done then which attorney should prepare the domestic relations order?

If you represent the non-participant spouse then clearly your client has the bigger interest in having the order done in a timely manner and is relying upon you to insure that all that was bargained for will be available. If the participant dies or leaves employment before the plan receives an order, thereby negating some or all of the terms of your agreement, your only defense is that you filed the order in a timely manner. We often see requests for orders years after the case was settled. You should prepare the order, as it is clearly in your client's interest that you do so. You are limited to including only what was specified in the settlement agreement or the court order if this issue was litigated. We make it a general rule not to use plan provided model orders because many of them are written to the advantage of the participant (their employee) and use arcane actuarial language that can take advantage of your client. If a plan insists on using its model order we modify the order to meet the provisions of the settlement and if necessary negotiate with the plan to get its acceptance. The plan does not have the right to change the provisions of the settlement unless your settlement causes the plan to pay out more money than they would have had to pay in the absence of a Qualified Domestic Relations Order.

The following may sound self-serving because we prepare QDRO's for attorneys but that is not the intent. When I refer to experts I am not specifying LawDATA, Inc. but any of the numerous family law specialist or ERISA attorneys and consultant/practitioner companies that draft QDRO's for attorneys. If you are not sure of the actuarial factors that apply to defined benefit pension plans or, if you are not comfortable with dealing with the ERISA rules that govern Qualified Domestic Relations Orders, then sub-contract that out to an expert. It is cheaper than you trying to self educate yourself in every situation. Your client is not going to pay you for all the hours you expend to draft an order if you are not that familiar with their preparation. Also, if the plan rejects the order, the expert who prepared it will have to deal with the plan to get it "qualified" at no additional cost to you or your client (most experts operate on that basis so be sure whomever you are dealing with will guarantee acceptance at no additional cost).

What is probably even more important than the expert preparing the order is having an expert with whom you can discuss the settlement language before it is presented to opposing counsel, a mediator or the court. Many experts will write your settlement language for you for a small fee. This is critical in lengthy marriages as survivor benefits and enhanced pension provisions should always be addressed. Even if you don't prevail on every issue there is a record that you fought for what was in the best interest of your client and the record of that effort can go a long way to insulating you from future and unforeseen problems.

If you represent the participant spouse you also must negotiate with the knowledge of your state statutory and case law guidelines to insure that the non-participant spouse is not getting more than he or she would be entitled to receive under your state pension distribution guidelines. Always review any order drafted by your opposing counsel to be sure it is consistent with the agreement or court ordered settlement. If you are not sure if the order is consistent with the agreement run it past an expert to avoid future problems. Unless there is something meaningful in substance let the order go through. Don't waste your time renegotiating for word or format changes that do not change the substance of the order.

[Model Property Settlement Language](#)

Download our settlement language form and let the experts at LawDATA, Inc. [draft model property settlement language](#) (<http://www.lawdatainc.com/SetLanForm.pdf>) that deals specifically with the pension plan to which the order is addressed and the facts of your case.

Mr. Commerford has been active in the valuation of pensions and the preparation of Domestic Relations Orders for his attorney clients since the founding of LawDATA, Inc. in 1984. He has presented Continuing Legal Education programs, dealing with the valuation and distribution of retirement assets incident to divorce cases, for State Bar Associations throughout the country and written many articles on the subject for legal publications.

For any questions or ideas for upcoming articles you can reach Paul Commerford at paul@lawdatainc.com.

Web: www.lawdatainc.com

©LawDATA, Inc 2003