

Using Others to Get that QDRO to the Finish Line

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As family law attorneys, many of you are familiar with the various hurdles you may encounter in trying to divide retirement benefits through use of a court order (referred to generically in this article as a “QDRO”). Your clients may be divorce weary but are still anxious to complete the division of their retirement benefits. They may be planning to use a defined contribution account award to pay off marital debt (maybe even the rest of your fees).

This article examines how you can work with a third party (for this article, assumed to be a neutral) to get that QDRO to the finish line. This third person may be called an expert, which often can be a dirty word with the legal regulators, but certainly would be experienced with the division of retirement benefits.

Why Use Another Resource?

Why should a family law attorney use someone else to accomplish this task for their clients? The end result, after all, is a court order. The challenge is the subject of such an order: the retirement plan. It is a small niche of attorneys who have much legal experience with retirement plans. These plans are highly regulated and must remain in compliance with both tax and federal labor laws. Even very experienced family law attorneys may not know the difference between an ESOP and a cash balance plan.

In determining what help you need, you should consider if you need a pension plan present value for settlement purposes or if you need an attorney who can approach the court to get a QDRO entered.

Your Continuing Involvement

You will also want to determine the involvement of you and your clients in getting the process completed. There are third parties who will provide a proposed draft QDRO and do nothing further. Check the internet for these websites. Keep in mind that this approach leaves much for the client and/or their attorneys to do to complete the process. Another option is to find a third party who will take the QDRO process from start to finish.

When you have determined who you are going to use to accomplish a retirement benefit division, if possible get them involved before the Decree is finalized. For example, the Federal Employees Retirement System (FERS) will require that certain language regarding survivor benefits be included in the Decree. If not included in that first order, subsequent amended orders will not change the refusal of that plan to implement survivor benefits.

If you are engaging a neutral, their involvement in drafting the decree’s language regarding the retirement benefits will reduce the likelihood that unrecognized issues will arise in the drafting the QDRO. The neutral can be more specific in the terms used in the Decree,

minimizing the need for wholesale changes in the terms of the QDRO itself. They can also help ensure the award is completely defined in the appropriate portion of the Decree.

You should encourage engaging the neutral as early in the divorce process as possible. Not only does that lighten your load to enable you to deal with other duties at the end of the case, but it will likely be more cost efficient to get started early. It should be easier to complete the work while the necessary information is fresh and readily accessible. As an order will need be entered in most cases, accomplishing that before a case has been closed for a significant period could save time and fees. Employers merge and disappear and plans may be frozen, merged or terminated. Trying to track down an old plan many years later can add significant costs and frustrate clients.

Know What You Need to Provide

It is crucial for the QDRO to clearly identify the exact name of the plan involved. You will need to have written evidence of the technical name of the plan. For example, it is not the Fidelity 401(k) plan, unless perhaps the employee works at Fidelity. It is best to have your client get a plan statement (or a benefit estimate for a defined benefit pension plan). In some cases, the Decree will not have used the technical name of the Plan. To get a QDRO past the Judge's clerk for entry, the neutral may need to explain the difference in the preliminary paragraphs of the QDRO.

A neutral will also want contact information for the Plan's QDRO administrator. That person may be able to provide model QDRO language and is an important contact to have during the QDRO process. They will likely be the person with whom the neutral will communicate in getting a draft QDRO pre-approved and upon who the final certified copy of the QDRO will be served. All qualified retirement plans must have a set of written QDRO procedures. Sometimes a copy of the Plan's Summary Plan Description ("SPD") will also be helpful. For some plans, these documents are available online.

The neutral will also need a copy of the Decree (preferably the version signed and entered by the Court), the parties' contact information and the Confidential Information Form that contains the parties' Social Security numbers. It is difficult for the neutral to begin the work requested before having this information.

If there is a non-marital aspect of the retirement benefit, it will need to be clear how that is determined. Often for a pension plan, the use of the marital coverture formula may be sufficient to define the marital portion. Defined contribution plans, such as 401(k) plans, however, do not have an easy formulaic method to define the marital portion. It would be the rare defined contribution plan that would be willing to calculate the amount of contributions made during the marriage and adjust those for earnings and losses. It may be necessary to hire a financial tracing expert to arrive at the marital and non-marital values. A military pension will require a print out of retirement points and someone familiar with the calculations to determine the marital portion. Before hiring the neutral, you will want to coordinate with your client the responsibility for determining any marital and non-marital portions.

It is very helpful to coordinate with your client who will be responsible for providing this information to the neutral. You should clearly communicate your role in the QDRO process and your expectations for the billing of your time. A common client complaint is that their family law attorney is billing them “just” for reading the e-mails they have been copied on as the process goes along.

Our practice is to inform the clients that we will copy their family law attorney on all communications unless the client specifically requested that we do not do so. The client usually permits us to copy the family law attorney on the final service of the certified copy of the QDRO on the Plan so they can choose to close their file accordingly.

What to Expect from the Process

When the neutral has all of the requested information, you can next expect a draft QDRO to be sent to your client for their review. Unless your client has asked that you not be included in the e-mails forwarding the draft, you need to determine how active of a role you will take in reviewing the terms of the QDRO. In most cases, the neutral is merely giving your client the opportunity to ask questions before a draft QDRO is sent to the Plan for pre-approval. You and your client will have another opportunity to object to terms before the order is presented for entry to the Court.

Once a QDRO has been pre-approved by the Plan, the attorneys and the neutral will want to coordinate who will handle the signing of the order, entry with the Court and service of the certified copy on the Plan. Whether the family law attorney should handle these matters depends greatly on their involvement in other matters of the family law case at that time. For instance, if there are post decree motions perhaps the family law attorney, (often times for the alternate payee who stands to benefit from the QDRO being entered), may be the best person to continue to interact with the Court.

There should also be coordination on who should be involved with any follow-up with the Plans. Currently the Office of Personnel Management (the agency that administers the Federal employees’ retirement plans such as FERS and CSRS), is taking over a year to respond to the receipt of the certified orders served on them. It is greatly appreciated when the client loops the neutral back in on the eventual resolution of the QDRO so that the neutral can know the work is completed and close their file.

While a neutral can often assist an alternate payee with distribution questions, it is crucial that the alternate payee get personalized tax advice on the income tax ramifications of his or her decisions regarding the QDRO.

You can assist the neutral by encouraging your client to timely provide requested information, feedback and involvement in the QDRO review process. A party who sees themselves as unfairly losing a significant benefit may require some ongoing motivation.

The interaction between you as a family law attorney and the neutral can provide a valuable resource for matters outside of each other’s respective areas of experience. In working

together on these cases, each of the advisors can learn who best can do certain tasks. The neutral can help you by do the things they do best and allow you to do the things you do best in your practice. This should make it easier to achieve the goal of getting your client's QDRO to the finish line.

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Tom frequently serves as neutral on employee benefit matters in family law cases.