

QDROS

FOR NON-FAMILY LAW ATTORNEYS

By: Gretel Smith, Esq.

I recently co-counseled a client who had simultaneous family law and probate matters: His bifurcated divorce proceeding (they were divorced but still had property to divide) had not been finalized when his ex-wife died without a will. To complete the probate process, a QDRO needed to be drafted to put a value on and finalize the division of the community estate. Probate counsel was unfamiliar with this term and after a lengthy and awkward discussion (my awkwardness not hers), it seems it might be valuable to other non-family law attorneys to provide a simple explanation of the term and concept, focusing on California law as it pertains to QDROs and DROs.

What is this odd term QDRO (pronounced “Quadro”)?

Before I answer this question, we need to remember that in California, we are community property state. As a general rule, assets acquired or contributed to during marriage are usually community property (there are many exceptions to this rule but for brevity's sake let's ignore those exceptions for now). If a party to a divorce contributed to a retirement plan during the marriage, a community interest was created. Upon divorce (dissolution of marriage), or legal separation, the retirement plan will need to be divided. No one truly likes paying taxes, and if you are old enough to retire, you cannot simply split most retirement plans - that is where QDROs come into play.

QDRO stands for Qualified Domestic Relations Order. A QDRO in its simplest form is a court order that divides a percentage of a family law litigant's retirement account and assigns that percentage to the alternate payee (often the former spouse). This order issued by the court must specifically meet the requirements under ERISA (Employee Retirement Income Security Act) 29 USC§ 1056 and the Internal Revenue Code.

Another term heard in relation to the division of retirement accounts in divorce is a DRO or Domestic Relations Order. This is an order issued by the state court but may not necessarily meet ERISA requirements. All QDROs must be DROs but not all DROs will be QDROs. These terms are often used interchangeably. QDROs are usually drafted to divide privately funded retirement plans that fall under the umbrella of ERISA. Even though government retirement accounts such as CalSTRS and CalPERS do not fall under the umbrella of ERISA, parties seeking to divide a retirement benefit still must have a DRO. The division of government retirement plans and non-ERISA plans in California are governed by California Government Code §21290 - 21298, California Education Code §22650 - 22666, and the California Family Code §2610.

In order to qualify as a QDRO, a state court or authorized agency must issue either an order, judgement, or decree that is made pursuant to the state's family law codes, and payment must relate “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.”[1]

If a party in a family law matter has a retirement account into which they have contributed during the marriage, the account will most likely need to be divided so the non-employee spouse (alternate payee) may get community share. The QDRO instructs the retirement plan administrator to divide the retirement account according to the terms set forth in the QDRO or DRO. Once the funds are divided, the alternate payee is paid according to the terms set forth in the retirement plan. This division is a non-taxable event that allows the employee spouse to transfer a community share of the retirement to the alternate payee. Retirement plans have to meet the requires set forth in ERISA and be qualified plans pursuant to the Internal Revenue Code (26 U.S. Code § 401).

QDROs are not limited to just divorces. QDROs can also be issued in relation to child support, alimony, or division of assets. Parties that remain legally married (legal separation) that want to divide their community property retirement benefits will do so with a QDRO.

QDROs requirements are set forth in 29 USC§ 1056 the ERISA statute. A QDRO must contain:

- "The name and last known mailing address of the participant and each alternate payee
- The name of each plan to which the order applies
- The dollar amount or percentage (or the method of determining the amount or percentage) of the benefit to be paid to the alternate payee
- The number of payments or time period to which the order applies."^[2]

Retirement plans under ERISA are required to have provisions setting forth their rules as they pertain to QDROs, and retirement plan requirements vary from plan to plan. If the plan is a government plan not under ERISA it will most likely still require a DRO in order to divide the asset without creating a taxable event and those plans have their own specific rules for division. Not every retirement plan requires a QDRO. For example, non-employer sponsored IRAs allow the parties to roll over a share of community funds to the other party without creating a taxable event.

So here we are. I am a family law attorney who by no means is an expert on QDROs. If you are interested in learning more about QDROs you can spend days, weeks, months, becoming an expert on learning the ins and outs of the many retirement plans and laws associated with division of those plans. It is important to note that there is an entire subindustry of professionals who have devoted their careers to the drafting of QDROs and DROs. Should you, as a non-family law attorney, find yourself having to delve into the world of QDROs and DROs, hopefully you now have a superficial understanding of them.



By: Gretel Smith, Esq.

Gretel is a Family Law attorney who recently relocated back to San Diego from the Bay Area. She is excited to be back in San Diego after a 4.5 year hiatus. The Bay is lovely but North County San Diego has her heart.

[1] QDROs The Division of Retirement Benefits Through Qualified Domestic Relations Orders <https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/publications/qdros.pdf> page 4

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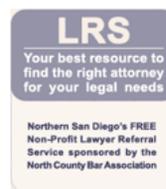
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