



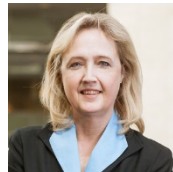
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Intricacies of Drafting Qualified Domestic Relations Orders

Advice from a Plan Administrator

by Kathryn A. Graves and Jason K. Damberg

Most family law practitioners at some point have to prepare a Qualified Domestic Relations Order (“QDRO”) on behalf of their client. Depending on the retirement plan, the process of obtaining pre-approval and final approval of the QDRO from the plan administrator can be long and arduous. Even though many family law attorneys have experience in drafting QDROs, most do not know what happens once the QDRO is in the plan administrator’s hands. Our firm represents the plan administrator for various retirement plans, as well as our clients in the drafting of QDROs. This article will therefore offer some tips on the QDRO drafting process from “both sides of the curtain.”



[Kathryn A. Graves](#)



[Jason K. Damberg](#)

One of the first things an attorney should do when drafting a QDRO is contact the plan administrator and get the following three documents: i) QDRO sample language; ii) QDRO Procedures; and iii) the Summary Plan

Description for the plan. While the first two items might be self-evident, on numerous occasions our first contact with an attorney is when they send us a certified copy of QDRO which has already been entered by the Court (which is almost always rejected for not complying with the terms of the plan). These documents should be requested as soon as it appears a QDRO may be required as a part of the divorce settlement, as they could impact the final terms of the division of the retirement plans as discussed below.

The third item, the Summary Plan Description, can be extremely helpful in drafting a QDRO, especially for defined benefit plans (i.e., pensions) and in our experience, it is often overlooked by attorneys drafting QDROs. In fact, we receive a request for the Summary Plan Description just a few times per year. The Summary Plan Description contains detailed information about how each plan works, which is important, as all defined benefit plans are not created equal. In the case of defined benefit plans, the Summary Plan Description will tell you the vesting schedules, how benefits are calculated, the early and normal retirement ages, vesting requirements to qualify for early

retirement, forms of payment, various subsidies, survivor annuities, COLAs, etc. In some cases, the defined benefit plan is a “cash balance plan,” which is analogous to a defined contribution plan and often can be paid out in a lump sum rather than a monthly annuity.

It is wise to review the Summary Plan Description prior to finalizing an agreement on how to divide the defined benefit plan to make certain that the terms of the divorce stipulation will comply with the terms of the plan. Sometimes the parties will reach an agreement on how to divide a defined benefit plan, but the plan rules and procedures do not allow the parties to implement their agreement.

Another reason to review the Summary Plan Description is that quite often, the QDRO sample language is generic and does not reveal all the nuances of each plan. By simply filling out the sample language you may not capture all of the benefits for your client or you may overlook plan requirements that will affect your client. For instance, some plans will not allow benefits to be paid even though the participant reaches the early retirement age if the participant has less than 10 years of vesting service (it is common for defined benefit plans to

have vesting restrictions for early retirement). This restriction would be a problem if the alternate payee was planning on commencing her/his benefits at the early retirement age and now has to wait until the participant reaches the normal retirement age to receive benefits, particularly if the early receipt of benefits was a consideration in the property and/or spousal maintenance settlement. The sample QDRO language may not have language regarding this vesting restriction.

Additionally, some plans allow the alternate payee's benefit to revert back to the participant if the alternate payee predecease the participant. The sample QDRO language may or may not have language regarding the reversion, but the Summary Plan Description will.

There are also some common omissions we see in QDROs submitted to us. One such omission is not addressing investment earnings and losses from the date of valuation to the date of division. The amount of earnings or losses actually awarded to the alternate payee will depend on the conditions of the stock market between the valuation date and the date the account is divided and distributed to the alternate payee. If the valuation date and the date of division are close together, the amount of earnings or losses is likely to be minimal. However, we have seen some cases where the differential between the valuation date and the date of division is five years or more. In these cases, the alternate payee will likely miss out on a significant amount of earnings. On the other hand, in a down market, the participant could lose a share of his/her interest in the plan, since the alternate payee would not be sharing in the investment losses on her/his share.

Another common omission we see is not addressing contributions made by the employer after the valuation date which relate to a period before the valuation date. Many defined contribution plans have a profit sharing component, where the employer may make an annual lump sum contribution to the participant's account. This contribution typically happens within a couple of weeks to a couple of months following the end of the employer's fiscal year. For example, assume that the plan year ends on March 31, 2015 and the company makes a profit sharing contribution on May 15, 2015. This contribution, while made in 2015, was accrued during fiscal year 2014. If the valuation date in the QDRO is any date prior to May 15, 2015, this contribution will not be awarded to the alternate payee unless the QDRO specifically directs the plan administrator to do so. In most cases, the plan year and formula for the discretionary profit sharing contribution can be found in the summary plan description of the plan.

The discussion above identifies just a few examples of the intricacies of drafting QDROs. By requesting and reviewing the QDRO sample language, QDRO Procedures, and the Summary Plan Description, you will have the necessary information to avoid most mistakes and complications, which will protect your client, as well as ease your dealings with the plan administrator.

[Kathryn A. Graves](mailto:kgraves@hensonefron.com), shareholder and family law attorney can be reached at kgraves@hensonefron.com. [Jason K. Damberg](mailto:jdamberg@hensonefron.com), family law, business and litigation paralegal, can be reached at jdamberg@hensonefron.com.

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