


Judgment Language for the
Division of Retirement Benefits



Presented by:






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Malpractice and Judgment Language

Misconception is that the malpractice occurs with the QDRO. But that is not true.

The QDRO facilitates what is written in the judgment. Malpractice happens at judgment.

Duty of Competence

Judgment language

In family law, every judgment that includes language regarding the division of retirement benefits is a representation that the judgment language adequately protect the client's interest in the retirement plan(s) under the law.

See e.g. Fed. Rule 11; Cal. Code Civ. Proc. §128.7

4

Duty of Competence

Judgment language (cont'd.)

- ▶ This representation implies that the FLA is knowledgeable about the law governing the benefits and therefore a representation that they are competent.

5

Duty of Competence


Judgment malpractice common

- ▶ At least half of the judgment we see fail to protect both parties interest in retirement benefits
- ▶ Draconian affect with bad judgment language
- ▶ Especially if death or retirement between the time judgment entered and the QDRO done
- ▶ Can cause irreparable harm to the nonmember spouse resulting in loss of the retirement asset

6


Duty of Competence
Most Common Problems

- ▶ Fail to properly identify a retirement plan;
- ▶ Omit retirement plans (Common!)
- ▶ Divide the retirement plan in a manner that is not possible
- ▶ Fail to divide the retirement plan so that it properly complies with state and applicable federal law
- ▶ Have inconsistent retirement benefit awards - unclear how to divide
- ▶ Fail to properly secure survivor benefits
- ▶ Order equalization/offset that is not possible




Discovery
Judgment Language Drafting

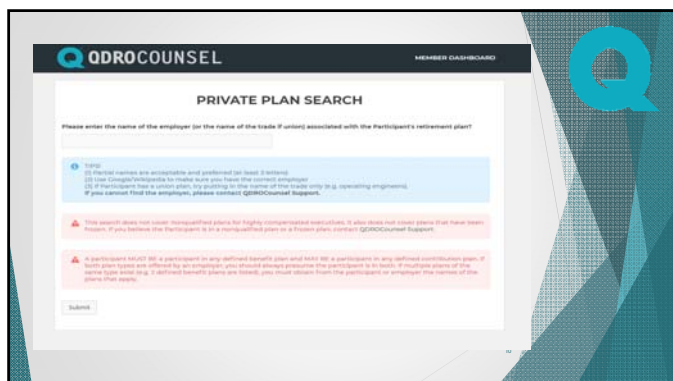
- ▶ Judgment language should be plan specific
- ▶ DCP, DBP, IRAs, State plans, military, federal employees require different specific awards
- ▶ QDRO Counsel generates plan and case specific judgment language
- ▶ If not sure what to write, keep very general in CA using FL-348 language

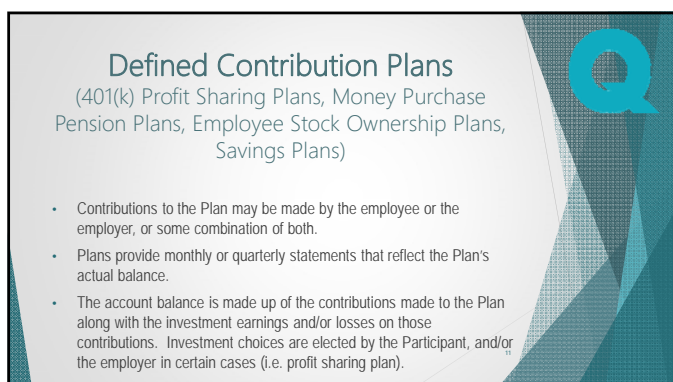


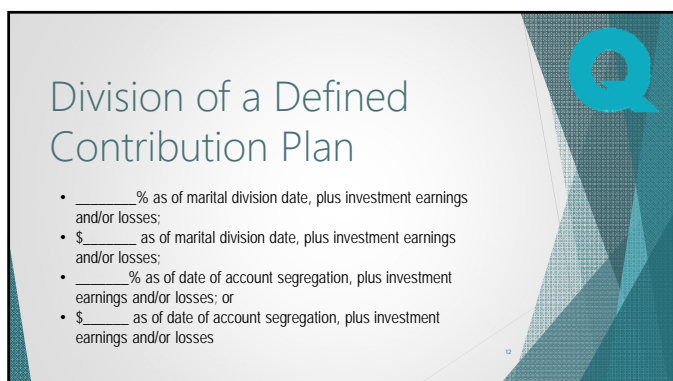
The Basics

Get the Plan name right!!!










Defined Contribution Plans: Issue Spotting

- Is there a separate property interest?
 - Did the Participant contribute to the Plan prior to date of marriage?
 - Did the Participant roll over the account balance of another defined contribution plan that is composed of separate property monies?
 - Is the earliest division date under the Plan after the marital division date?




13

Calculating the Separate and Community Property Interests

DEFINED CONTRIBUTION PLAN SEPARATE PROPERTY CALCULATORS


- + ESTIMATE - RATE OF RETURN (S&P 500/BOND VALUES) CALCULATOR
- + ESTIMATE - MARITAL FRACTION (TIME-RULE) CALCULATOR
- + SIMPLE TRACING CALCULATOR (Additional cost may apply)



14

Defined Contribution Plans: Issue Spotting



Is there a loan?
When was the loan taken?
Presumption is that a loan taken during the marital period is a debt of the community.



15



Exclude or Include the Loan?
What's the difference?

To exclude a loan means that the Participant's account balance on the date of division is reduced by the value of any outstanding loan prior to calculating Alternate Payee's share of the benefits.





Exclude or Include the Loan?
What's the difference?

To include a loan means that the Participant's account balance on the Date of Division is not reduced by the value of any outstanding loan prior to calculating Alternate Payee's share of the benefits.



Exclude or Include the Loan?
What's the difference?

Example: \$15K in account with a \$5K loan
If Loan Include is Included:
Then Alternate Payee is awarded 50% of \$15K
If Loan is Excluded:
Then Alternate Payee is awarded 50% of \$10K



CA Law re: Investment Earnings and/or Losses

Under California law, the community property interest in a defined contribution plan includes investment earnings and/or losses from date of separation to date of distribution pursuant to *In re Marriage of Behrens* (1982) 137 Cal.App.3d 562, 187 Cal. Rptr. 200.

California law has long held that an Alternate Payee's community interest award includes Alternate Payee's share of the benefits "as enhanced." See *In re Marriage of Lehman* (1998) 18 Cal.4th 169; 74 Cal.Rptr2d 825.

In addition, *In re Marriage of Janes* (2017) 11 Cal. App. 5th 1043 held that an amount awarded to an Alternate Payee in a judgment or MSA becomes the Alternate Payee's separate property on the date awarded and any investment earnings and/or losses on that money belong to the Alternate Payee.



Investment Earnings and/or Losses



Investment Earnings and/or Losses

JUST SAY IT!

Alternate Payee is awarded \$10,000

- Excluding Investment Earnings and/or Losses
- Including Investment Earnings and/or Losses



And If You Say It...PICK A DATE!!!

- Date of Separation/Marital Division Date
- Date of Valuation
- Date Judgment is Entered
- Date of Account Segregation

Defined Benefit Plans (Pension Plans, Cash Balance Plans, Retirement Plans)

- Defined benefit plans are either (1) traditional pension or retirement plans (usually monthly payments over time) or (2) cash balance plans (lump sum payment with the option for monthly payments over time).

Defined Benefit Plans: Traditional Pension or Retirement Plan

- A pension plan qualified under ERISA and the IRC that provides a specific pre-determinable amount of benefits to a participant at the individual's projected date of retirement.
- Usually the benefits are based on a formula that incorporates the participant's years of service and final average compensation. The form of benefit paid under this type of plan is generally a monthly annuity.

Defined Benefit Plans: Cash Balance Plan

- A form of qualified defined benefit plan under ERISA that has many features of a qualified defined contribution plan.
- Benefit may be in the form of a cash lump sum amount
- Or may elect monthly payments over alternate payee's life.

Division of a Defined Benefit Plan

Most important to know: Is the participant retired and receiving a monthly benefit

If not commenced benefits, "separate interest" QDRO in almost all cases and lifetime benefit

If retired, "shared interest" QDRO and may be issue with survivor benefits

Division of a Defined Benefit Plan

Language: The following language or similar language is in most QDROs awarding the Alternate Payee's marital interest based on the Marital Fraction (One Half) as follows:

Accrued benefit through the date Alternate Payee commences benefits hereunder	×	Participant's credited service in the Plan from date of marriage to (specify date of divorce based on state law)	÷	Participant's credited service in the Plan as of the earlier of Participant's date of cessation of benefit accruals or the date that Alternate Payee commences benefits hereunder	× 50%	=	Alternate Payee's allocated portion
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The denominator shall exclude any credits earned by Participant after Participant has earned the maximum retirement benefit under the Plan.

Individual Retirement Accounts (IRAs)

IRA division governed by Internal Revenue Code Section 408(d)(6)


Does not need a "qualified domestic relations order"

May need a domestic relations order or 408 Order if the judgment language is not clear for an IRA to IRA transfer incident to divorce.




Division of an IRA

- _____% as of date of implementation
- OR
- \$_____ as of date of implementation



IRAs: Issue Spotting

- Is there a separate property interest?
 - Did the Participant contribute to the Plan prior to date of marriage?
 - Did the Participant roll over the account balance of another defined contribution plan that is composed of separate property monies?
 - Is the earliest division date under the Plan after the marital division date?



Calculating the Separate and Community Property Interests

IRA SEPARATE PROPERTY CALCULATORS

- + ESTIMATE - RATE OF RETURN (S&P 500/BOND VALUES) CALCULATOR
- + ESTIMATE - MARITAL FRACTION (TIME-RULE) CALCULATOR
- + SIMPLE TRACING CALCULATOR (Additional cost may apply)

Division of an IRA in the Judgment

- Include name of IRA custodian;
- The last four (4) digits of the IRA account number; and
- And clear award of either _____% as of date of implementation OR \$_____ as of date of implementation.

Discovery

Protect Survivor Benefits

- ▶ Bad things can happen with judgment language that does not protect survivor benefits
- ▶ Usually happens post judgment before QDRO entered
- ▶ Common issue is flawed judgment language resulting in former spouse loses the right to lifetime benefit
- ▶ Fam. Code 2610
- ▶ *Carmona v. Carmona* (9 Cir 2010) 603 F.3d 1041 and *IRMO Padgett* (2009) 172 Cal.App.4th 830

CA Survivor Benefits

California Code, Family Code - FAM § 2610

The "court shall make whatever orders are necessary or appropriate to ensure that each party receives the party's full community property share in any retirement plan, whether public or private, including **all survivor and death benefits** ... (emphasis added)".

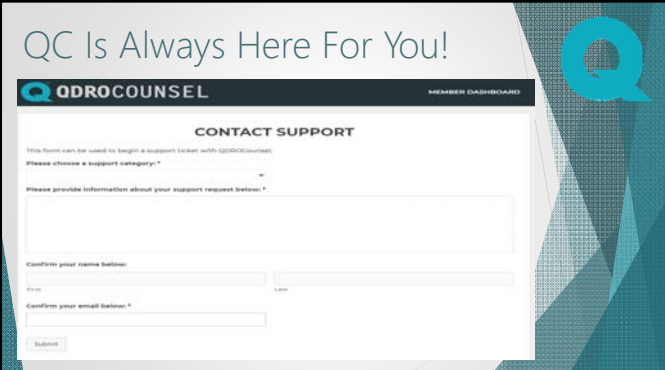
It's So Easy So Just Say It Or Else....

Always have pension award state that includes survivor benefits

The Bottom Line if plan would have allowed survivor benefit...

- If the Judgment does not specifically award survivor benefits especially if the Participant died or retired with a second spouse,
- Out spouse may lose survivor benefit
- *Carmona v. Carmona* (9 Cir 2010) 603 F.3d 1041 and *IRMO Padgett* (2009) 172 Cal.App.4th 830

QC Is Always Here For You!



The screenshot shows a web form titled "CONTACT SUPPORT" on the "QDRO COUNSEL MEMBER DASHBOARD". The form includes a dropdown menu for "Please choose a support category:", a large text area for "Please provide information about your support request below:", and fields for "Confirm your name below:" (with first and last name sub-fields) and "Confirm your email below:". A "Submit" button is at the bottom.

When Should I Prepare the QDROs?

- ▶ **RIGHT NOW!!!**
- ▶ Divorce judgment drafted but before you file it prepare the QDROs with QDROcounsel's help
- ▶ Or, have QDROcounsel or other qualified QDRO professional prepare
- ▶ Then have parties sign all documents and file them all at the same time!
- ▶ AND YOU CAN WITHDRAW IN PEACE!



Closing Thoughts

- ▶ Retirement benefits are a major asset in a divorce
- ▶ About one million divorces per year and only about 40 pension division experts
- ▶ Let's change case management of pension division!
- ▶ So QDROs can facilitate what is written in judgment without post judgment problems



Thank you for spending time with QDROcounsel.

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