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The Last But Not The Least Important Acronym In The Divorce Language

Parties in the midst of a divorce are often demoralized by the decisions required of them. Adding to the distress is the need to learn a new language — terms used by attorneys and judges to denote important pleadings and court documents. Acronyms abound:

OSC — The Order to Show Cause, which sets an issue such as child support for court hearing prior to trial.

I&E — The Income and Expense Declaration, an inquiry into finances and income, which all parties are required to complete, especially when spousal or child support are contested and the dispute is to be heard by the court.

The **MSA** — Marital Settlement Agreement, the lengthy document prepared by the parties' counsel which sets out those issues which the parties have settled. For example, support and/or how the parties have or will divide their community assets and debts.

QDRO — Qualified Domestic Relations Order, which addresses community retirement benefits and monies.

The fact that the QDRO is the last pleading in the divorce process ought not to mislead any party as to its importance. Through a QDRO, the parties and the court answer one or two questions, depending on the scope of the QDRO: (1) What will happen to pension annuity income upon the employee spouse's death; and/or (2) How to divide retirement accounts and whether to transfer monies to the non-employee spouse.

Provisions of The Employee Retirement Income Security Act and The Retirement Equity Act of 1984, permit the parties to (1) select annuity beneficiaries, (2) to elect an equal or unequal division of retirement accounts and (3) to provide for distributions, all with varying tax consequences. The choices made will affect not only the title ownership of retirement accounts, but also benefits provided by employers and legal rights established by REA.

The QJSA, the Qualified Joint and Survivor Annuity, and the QPSA, the Qualified Preretirement Survivor Annuity:

With the enactment of the ERISA amendments to

Section 205 by REA, the employee participant in a pension plan no longer has the unilateral right to choose a "single life annuity" (meaning that pension income would terminate upon the employee's death). Now, if a pension plan contains a provision for the payment of benefits in the form of annuity — the plan must offer a "qualified joint and survivor annuity" as an option. This QJSA must be not less than one-half nor more than 100 percent of the annuity payable during the participant and his spouse's joint life, and is to be the actuarial equivalent of a single life annuity for the life of the participant in its most common form. The QJSA is a 50 percent survivor annuity — the survivor's annuity is reduced on the death of whichever spouse dies first, by one half.

ERISA Section 205(c)(2)(A)(i) provides that the participant/employee may waive the QJSA, but only if "the spouse of the participant consents in writing." In the absence of a written spousal consent, the pension administrator must continue to pay the surviving spouse the annuity, in the QJSA form. (Note Section 205(b)(3) permits a pension plan to contain a provision requiring that the marriage existed for a minimum of one year before the non-employee is a "spouse.")

REA also requires that a plan provide a QPSA, a Qualified Preretirement Survivor Annuity, whenever a participant/employee has any vested benefits. The non-employee spouse will receive a survivor annuity if the participant dies before retiring. As in the case of the QJSA, unless the non-employee spouse waives entitlement in writing, the annuity must be paid. (Note: pension plans may also contain a provision requiring that the marriage existed for a minimum of one year before the non-employee is a "spouse" entitled to a QPSA.)

The QDRQ is the mechanism for enforcing an MSA provision, or court order, that retirement benefits belong to the non-employee spouse.

Uses of the QDRO:

Although the parties in a QDRO may include a provision apportioning or waiving the QJSA and/or the QJPA, the most common use of a QDRO is to



divide community retirement monies. If a QDRO is used, the transfer is not considered an early and taxable distribution of retirement monies to the non-employee spouse (IRS Ltr Ruling 9234014, IRS publication 590).

Entry of a QDRO permits a retirement plan administrator to (1) transfer monies into an account, managed by the administrator but maintained in the non-employee's spouse's name, all or a portion of an employee's retirement account; or (2) to "roll-over" retirement monies into a retirement account elsewhere. Whether or not the administrator continues to manage the retirement account or there is a rollover is determined by reference to the retirement plan, as well as the court order. All retirement plans permit a rollover into an IRA or other retirement account. Some retirement plans mandate a rollover, depending on the dollar amount under management, or whether the participant continues to be an employee.

Entry of a QDRO also permits the plan administrator to make one-time or periodic payments to the designated "alternate payee" — a spouse, former spouse, or child, or dependent who is determined by the court to have a right to receive all a portion of the benefits or monies held in a retirement account. Thus, QDROs are used to ensure that the non-employee spouse obtains a portion of the periodic payments to be made from a retirement plan or defined contribution retirement monies previously held in the name of his/her spouse.

When and how the periodic payment of monies will be made is determined by reference to the retirement plan. For example, if the plan provides for "early retirement," or establishes a schedule of entitlement depending on years worked and/or age, this schedule is used to determine both when retirement payments can be made to the employee and to the alternate payee. The alternate payee's benefits can be a fraction of the benefits to which the participant is entitled. Or, a specific dollar amount may be ordered to be deducted from each payment to be made to the employee. But the QDRO may not require the plan to provide increased benefits or a form of benefit not otherwise provided under the plan IRC 414(p)(3). (Note: entry of a QDRO also permits the non-employee spouse to obtain child support or spousal support directly from the retirement plan and/or retirement accounts of the employed spouse.)

Taxes — the effect of qualification and payment of monies pursuant to a QDRO:

Taxation of retirement monies, especially monies paid from a defined contribution plan, is a sophisticated and complex topic, beyond the scope of this article. Three simple rules regarding monies transferred and paid pursuant to QDROs are: (1) The alternate payee will not be taxed if the transfer or distribution from a retirement account is directly rolled over within 60 days into an IRA or other retirement account in his/her name as provided by the QDRO; (note: certain employee contributions to a retirement account may not be rolled-over — the IRS rules are not considered here); (2) any monies paid to the alternate payee from a retirement account pursuant to a QDRO, if not rolled-over, are taxable in the year received; (note: there are rules concerning the proration of the participant's investment costs to reduce the taxable amount, not discussed here.); (3) if monies are paid and distributed to the alternate payee under a QDRO, the alternate payee is not subject to the 10 percent penalty tax for early distributions, (note: this exception to the penalty tax does not apply to the distribution of IRA monies, which must be rolled-over into another IRA if the recipient is under 59.5 years of age.)

The QDRO and financial planning:

The ability to designate all or a portion of an account to be one spouse's and the exception to the 10 percent penalty tax, may allow the parties to divide their retirement and other assets, taking into account the parties' respective tax brackets in a manner which provides greater net income or greater non-taxable income than simply dividing all assets equally. If the parties have substantial other assets as well as retirement assets which include IRAs and defined benefit and/or defined contribution accounts, using a QDRO as a tax-planning tool is possible, and worth pursuing with a tax or QDRO specialist.



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