

Dividing Retirement in Separation and Divorce Cases

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Drafting Retirement Division Provisions That Work

Best Practices for North Carolina Separation Agreements and Equitable Distribution Consent Orders

IF YOU ONLY REMEMBER ONE THING: The QDRO should implement the deal, not make the deal.

****A retirement provision should be specific enough that a later drafter, plan administrator, or judge can determine the parties' rights without reopening negotiations.**

1. Identify the Exact Plan and the Correct Division Vehicle

Identify each retirement asset separately: participant, employer, formal plan name, and plan type. If an employer maintains a pension, 401(k), supplemental account, or other benefit, address each one rather than referring generically to "retirement."

Also determine whether a QDRO is actually the correct instrument. North Carolina law permits distribution through a QDRO, DRO, or other appropriate order and reaches a broad range of private, governmental, military, federal, State, local, IRA, 401(k), 403(b), and 457 arrangements. Plan-specific procedures should be obtained before the settlement language is finalized whenever practicable.¹

2. Do NOT Leave the Formula for Later (why do later what you can do now?)

The agreement or consent order should state whether the alternate payee receives a fixed dollar amount, a percentage of the entire account, a percentage of the date-of-separation balance, or a percentage of a specifically defined marital portion. "Fifty percent of retirement" is not a formula.

For defined-contribution accounts, N.C. Gen. Stat. § 50-20.1(d1) generally looks to contributions made or earned during the marriage and before separation, together with attributable income, gains, losses, appreciation, and depreciation; post-separation contributions and returns attributable to those contributions are excluded.²

Bracey v. Murdock is a useful drafting warning. The consent order awarded fixed sums equal to one-half of the date-of-separation balances. When the recipient later sought passive gains and losses, the Court of Appeals concluded that relief would go beyond effectuating the consent order. If gains and losses are intended, say so expressly.³

3. Define the Valuation Date and the Gap Between Separation and Transfer

For every defined-contribution account, address the valuation date and what occurs before segregation or distribution. The provision should expressly address investment gains and losses; post-separation employee and employer contributions; outstanding loans; withdrawals; transfers and rollovers; and plan mergers or conversions.

Consider a preservation clause prohibiting either party from taking loans, withdrawals, transfers, or other action that would impair the other party's awarded interest, except as specifically permitted by the agreement or order.

¹N.C. Gen. Stat. § 50-20.1(g)-(h) (2025).

²N.C. Gen. Stat. § 50-20.1(d1) (2025).

³*Bracey v. Murdock*, 286 N.C. App. 191 (2022).

4. Draft Pensions Differently from Account-balance Plans

A defined-benefit pension is a promise of future payments, not simply a pot of money. Section 50-20.1(d) uses a time-based marital fraction for benefits determined in whole or part by length of employment. Drafting should address the marital fraction, the percentage awarded, commencement, early-retirement subsidies, cost-of-living adjustments and similar enhancements, and any plan-specific limits.⁴

Where available, determine whether the intended structure is a separate-interest or shared-payment approach. North Carolina creates a rebuttable presumption favoring a separate-interest approach when the statutory conditions are met and the plan permits it.⁵

5. Address Death and Survivor Benefits While Negotiating the Deal

A provision that explains retirement but not death is unfinished. Address pre-retirement death, post-retirement death, survivor annuity rights, who bears the cost of survivor protection, beneficiary designations when appropriate, and the consequence if the alternate payee dies first.

North Carolina specifically authorizes survivor-annuity relief and directs courts to order pre-retirement survivor protection when the plan permits it and does not provide it automatically.⁶

6. Assign Implementation Responsibility and a Deadline

Do not stop with “a QDRO shall be prepared.” State who prepares it, who pays drafting and plan-review fees, when drafting must begin, whether preapproval will be sought, and each party’s duty to provide information and sign or cooperate promptly.

McMurray v. McMurray illustrates the risk of leaving implementation unresolved for years. The Court of Appeals addressed a long-delayed QDRO contemplated by the parties’ separation agreement and the parties’ competing arguments about responsibility for obtaining it. The drafting lesson is to assign responsibility rather than assume someone will eventually handle it.⁷

7. Build in a Repair Mechanism Without Changing the Bargain

Plan administrators may reject an order for technical reasons. Section 50-20.1(i) allows a court, on motion, to clarify or correct an unacceptable retirement-division order as necessary to satisfy plan requirements. The settlement document should authorize additional or amended implementing orders needed to effectuate the substantive agreement, while expressly prohibiting a later implementing order from changing the substantive division.⁸

Patterson v. Patterson reinforces the distinction between the underlying right and the implementing order. In that case, the Court of Appeals explained that the contemplated QDRO was intended to preserve or effectuate an interest created by the consent order, rather than create the interest itself.⁹

⁴N.C. Gen. Stat. § 50-20.1(d) (2025).

⁵N.C. Gen. Stat. § 50-20.1(f1) (2025).

⁶N.C. Gen. Stat. § 50-20.1(f2)-(f3) (2025).

⁷*McMurray v. McMurray*, 290 N.C. App. 243 (2023) (unpublished) (the Separation Agreement stated: “The parties agree that the Wife’s marital share of the Husband’s IBM pension or retirement shall be divided by QDRO pursuant to N.C. Gen. Stat. § 50-20 *et seq.*, on or before the absolute divorce is final. Said Qualified Domestic Relations Order shall be filed with the Court after being approved by the plan administrator”).

⁸N.C. Gen. Stat. § 50-20.1(i) (2025).

⁹*Patterson v. Patterson*, 137 N.C. App. 653 (2000).

8. Be Precise About Taxes and Fees

Avoid casual promises that a transfer will simply be “tax free.” State the intended mechanism, distinguish a direct rollover from a distribution retained by the recipient, and allocate responsibility for taxes caused by a party’s unilateral conduct. Plan processing fees should also be allocated; North Carolina law permits equal allocation of fees assessed to process a DRO or QDRO.¹⁰

QUALITY	EXAMPLE	WHY IT MATTERS
BAD	“Wife receives 50% of Husband’s retirement.”	No plan, date, formula, gains/losses, death protection, or implementation terms.
BETTER	“Wife receives 50% of the marital portion of Husband’s ABC 401(k).”	Identifies the plan and concept, but still leaves calculation and post-separation activity unclear.
BEST	Define the plan, award/formula, valuation date, gains/losses, post-separation contributions, loans, survivor rights, fees, drafting responsibility, deadline, and repair jurisdiction.	The QDRO becomes implementation rather than negotiation.

The Drafting Checklist: 10 Questions Before Anyone Signs

1. What exact plan or account is being divided?
2. Who is the participant and who is the alternate payee/recipient?
3. What exact amount, percentage, or formula is awarded?
4. What is the valuation date?
5. Are gains and losses included, and through what date?
6. How are post-separation contributions, employer matches, loans, withdrawals, and rollovers treated?
7. For a pension, when may benefits begin and how are enhancements treated?
8. What happens if either party dies before or after benefits begin?
9. Who pays plan fees and QDRO drafting/review costs?
10. Who prepares the implementing order, by when, and what happens if the plan rejects it?

REMEMBER: If the QDRO drafter has to call counsel to ask what the parties intended, the settlement provision probably was not finished.

¹⁰N.C. Gen. Stat. § 50-20.1(f4) (2025).

Drafting QDROs and Other Retirement Division Orders

QDROS

1. A private sector plan (company plan) is governed by the Employee Retirement Income Security Act of 1974 (ERISA). An example of a private sector plan is IBM's 401(k) plan. Private sector plans are divided by a Qualified Domestic Relation Order (QDRO).
2. If a pension plan has a model QDRO, it should have two model QDROs; one for the shared interest approach and one for the separate interest approach. If the pension is in pay status, only the shared interest approach can be used. If the pension is not in pay status, the alternate payee will usually prefer the separate interest approach because the alternate payee has more control of the type of benefit to be elected and when payment starts.
3. Sometimes pensions get frozen. If you are representing the alternate payee, do not use a coverture fraction on a frozen pension. The IBM personal pension was frozen on December 31, 2007. IBM QDROs that do not note the pension was frozen as of that date are usually rejected by the plan administrator.
4. When companies go bankrupt, their pensions get taken over by the Pension Benefit Guaranty Corporation (PBGC). The PBGC accepts and approves QDROs. They provide a publication and a form QDRO. The Nortel pension was taken over by the Pension Benefit Guaranty Corporation.
5. "Excess Benefit Plan". Federal law limits how much plans can put into a tradition pension or defined contribution plan for a given employee in a given year. Some employers set up excess benefit plans to provide for additional deferred compensation in excess of the maximum amount allowed in the traditional plans. Some excess benefit plans will recognize a QDRO and others will not. The IBM Excess 401(k) Plus Plan will accept a QDRO. The following plans cannot be divided with a QDRO:
 - a. GlaxoSmithKline Supplemental Pension Plan (Executive Pension Credit Account)
 - b. GlaxoSmithKline Supplemental Pension Plan (Excess Cash Balance Account)
 - c. GlaxoSmithKline Executive Supplemental Savings Plan
6. Most 401(k) plan administrators have a limit for how far back they will calculate gains and losses. Plans can switch records custodians and will usually only calculate gains and losses from the time they took over as custodian going forward. GlaxoSmithKline recently switched plan custodians and the new custodian will only calculate gains and losses back one year from when the draft QDRO is submitted to the plan.
7. Some companies have more than one pension plan and it is possible for an employee to be a member of more than one plan. If this is the case, it is likely that more than one QDRO will be needed. For example, UPS has three or four pensions and they are in the process of freezing some of them.
8. Some plans will accept a QDRO after the death of the participant and others will not. If attempting a Consent QDRO after death, the Executor or Administrator of the estate of the deceased can sign the QDRO. It is easier and more certain to enter QDROs while both parties are alive.
9. QDRO Review Fees. Some 401(k) plans charge QDRO review fees. They are usually less than \$1,000.00. I don't think I have seen a government plan or pension charge a review fee. Usually, the QDRO can address allocation in one of three ways:
 - a. The parties equally divide;
 - b. The Participant pays 100%; or
 - c. The Alternate Payee pays 100%.

COAPs

(Section Originally Prepared by Nancy Grace of Wake Family Law Group)

1. FERS (the current plan) and CSRS (the old plan) are defined benefit plans administered by the Federal Government through the Office of Personnel Management. They are NOT covered by ERISA but have their own statutory provisions in federal law which allow them to be divided incident to divorce. There is a lot of information about these two plans online at <https://www.opm.gov/retirement-services>
2. Under the CSRS plan, retirees do not get Social Security benefits.
3. There are no model orders for FERS or CSRS. However, OPM has a publication that has the relevant Code and Federal Regulation sections and sample paragraphs for drafting retirement division orders (called Court Orders Acceptable for Processing). The Handbook for Attorneys on Court-ordered Retirement, Health Benefits and Life Insurance is available online at: <https://www.opm.gov/retirement-services/publications-forms/pamphlets/ri38-116.pdf>
4. There is no pre-approval process for submitting COAPs to OPM before they are entered.
5. In order for OPM to process the FERS or CSRS COAP, you must submit the filed order along with a certified copy of the parties' divorce judgment.
6. There are three basic features of FERS or CSRS, all of which should be specifically addressed in the COAP: the employee annuity, former spouse survivor annuity, and refund of contributions. If you want to make sure your client gets a former spouse survivor annuity, you must also prohibit a refund of contributions because if a Participant takes a refund of contributions, there are not benefits left in the system from which the former spouse can get a former spouse survivor annuity.
7. A FERS or CSRS survivor annuity will not be paid to a former spouse who remarries before age 55 no matter what the COAP says.
8. Be careful... There is a loophole in the law which would not allow an ex-spouse of a former federal employee who dies before retiring/beginning in pay status to receive a former spouse survivor annuity under CSRS despite a COAP providing that he/she is entitled to it. See *Hubbard v. OPM*, 247 F.3d 1236, *reh'g and reh'g en banc denied* (Fed. Cir. 2001)
9. If the FERS or CSRS Participant is already retired, the Federal Regulations (5 CFR "§838.806)" have very stringent requirements about the timing of an order awarding a former spouse survivor annuity (**it must be the first order dividing the marital property or the retiree and former spouse) and prohibiting amended orders providing for a former spouse survivor annuity – you only get one shot at it so you have to do it right the first time!

RBCOs

1. Retirement Benefits Court Orders (RBCOs) are used for the Thrift Savings Plan (TSP).
2. RBCOs are similar to 401(k) QDROs, but are not the same. The Thrift Savings Plan is essentially the Federal Employee Version of a 401(k). Thus, RBCOs look similar to QDROs.
3. The TSP has a model that should be followed.

IRAs

1. Individual Retirement Account (IRA) custodians usually do not calculate gains and losses from a past date until the date of division. Usually a percentage, dollar amount or number of shares to be transferred needs to be specified.
2. IRAs are not regulated by ERISA and a DRO should not be needed to divide them. They can be divided at divorce pursuant to Internal Revenue Code Section 408(d)(6). For the transfer to be tax free, the code requires that the transfer be incident to divorce. If the parties are divorced and the IRA division is addressed in a separation agreement or consent order for equitable distribution a DRO should not be needed. Most IRA custodians either have an IRA transfer at divorce form or require the IRA account holder to sign a letter of instruction and the receiving ex-spouse to sign a letter of acceptance. Some IRA custodians will require a medallion signature guarantee.

TSERS

(Section Originally Prepared by Nancy Grace of Wake Family Law Group)

1. Do not be fooled by the fact that State employees have mandatory contributions from their paychecks. TSERS are defined benefit plans, not defined contribution plans.
2. Unlike with ERISA qualified plans, the North Carolina's State-sponsored plans DO NOT require that a spouse automatically be the member's survivor beneficiary unless the spouse waives that right. So, the spouse of a member in TSERS is not required to waive his/her potential rights in the plan before the member can designate another person as the beneficiary.
3. A member in TSERS may take ANY action with regard to the member's retirement benefits without any notice to or consent required from anyone, including the member's spouse. Such actions include the designation of beneficiaries and withdrawal of accumulated employee contributions.
4. A pension division order which requires the payment of a marital share of a member's TSERS benefits to the non-member ex-spouse automatically also applies to any survivor benefits which may be paid to a member's beneficiary when the model order is used.
5. TSERS orders are now required to be "consistent with" the model order available on the Retirement System's web site: myncretirement.com/retirees/payments/dro. If you are contemplating deviating at all from the model order, you should submit a draft order to the NC Retirement Systems Division before it is entered. Orders can be mailed to N.C. Department of State Treasurer, Retirement Systems Division, 3200 Atlantic Ave. Raleigh, NC 27604, faxed to 919-855-5800, or emailed to ncretirement@nctreasurer.com.
6. TSERS benefits cannot be paid out to a non-member ex-spouse until the member retires and actually begins receiving benefits.
7. For orders entered on or after January 1, 2015, payments to a non-member ex-spouse are limited to the lifetime of that non-member, and if the non-member predeceases the member, the non-member's share shall revert to the member.
8. The division of a TSERS monthly benefit can be by a percentage or a fixed dollar amount, and unless the order provides otherwise, the division using a percentage generally applies to future increases in a member's benefit (i.e., COLAs).

FINAL CHECKS: EXECUTION, FILING, QUALIFICATION, AND SERVICE

Some plans will require a certified copy of the order and others will not. The entered order needs to be submitted to the plan. Don't forget to include a cover letter with the parties' dates of birth and social security numbers. Most plans will send letters to the parties and attorneys stating that the QDRO has been approved or rejected. Don't close your file until you receive that letter or confirm your client has received the funds.

APPENDIX: North Carolina QDRO Statutes

N.C. Gen. Stat. § 50-20.1

Current through Session Laws 2020-35 of the 2020 Regular Session of the General Assembly, but not including corrections and changes made to Session Laws 2020-2 through 2020-35 by the Revisor of Statutes

NC - General Statutes of North Carolina Annotated > CHAPTER 50. DIVORCE AND ALIMONY > ARTICLE 1. DIVORCE, ALIMONY, AND CHILD SUPPORT, GENERALLY

§ 50-20.1. Pension, retirement, and deferred compensation benefits

(a) The distribution of vested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:

- (1) As a lump sum from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.
- (2) Over a period of time in fixed amounts from the plan, program, system, or fund for those benefits subject to subsection (d1) of this section.
- (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age. For purposes of this section, "participant-spouse" means the spouse who is a participant in the plan, program, system, or fund.
- (4) By awarding a larger portion of other assets to the party not receiving the benefits and a smaller share of other assets to the party entitled to receive the benefits.
- (5) As a lump sum, or over a period of time in fixed amounts, by agreement.

(b) The distribution of nonvested marital pension, retirement, or deferred compensation benefits may be made payable by any of the following means:

- (1) As a lump sum by agreement.
- (2) Over a period of time in fixed amounts by agreement.
- (3) As a prorated portion of the benefits made to the designated recipient, if permitted by the plan, program, system, or fund (i) at the time the participant-spouse is eligible to receive the benefits, (ii) at the time the participant-spouse actually begins to receive the benefits, or (iii) at the participant-spouse's earliest retirement age.

(c) Notwithstanding the provisions of subsections (a) and (b) of this section, the court shall not require the administrator of the plan, program, system, or fund involved to make any payments or distributions to the nonparticipant spouse, except as permitted by the terms of the plan, program, system, or fund.

(d) When the amount of the benefit payable by the plan, program, system, or fund to the participant-spouse is determined in whole or part by the length of time of the participant-spouse's employment, the marital portion shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution, to the total amount of time of employment that earned the benefit subject to equitable distribution. The determination shall be based on the vested and nonvested accrued benefit, as provided by the plan, program, system, or fund, calculated as of the date of separation, and shall not include contributions, years of service, or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the

date of separation and cost-of-living adjustments and similar enhancements to the participant's benefit. Notwithstanding any other provision of this Chapter, if the court makes the award payable pursuant to subdivision (a)(3) or (b)(3) of this section and the court divides the marital portion of the benefit equally between the participant-spouse and nonparticipant spouse, the court shall not be required to determine the total value of the marital benefits before classifying and distributing the benefits. However, neither party shall be prohibited from presenting evidence of the total value of any marital benefits or of any benefits that are separate property of either spouse. When a pension, retirement, or deferred compensation plan, program, system, or fund, or an applicable statute limits or restricts the amount of the benefit subject to equitable distribution by a State court, the award shall be determined using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the total time of the employment which earned the benefit subject to equitable distribution to the total time of employment, as limited or restricted by the plan, program, system, fund, or statute that earned the benefit subject to equitable distribution.

(d1) When the amount of the benefit payable by the plan, program, system, or fund is not determined in whole or part by the length of time of the participant-spouse's employment, but is instead based on contributions and held in one or more accounts with readily determinable balances, including, but not limited to, individual retirement accounts and defined contribution plans, such as those within the definitions of *Internal Revenue Code* section 401(k), [403\(b\)](#), 408, [408A](#), or [457](#), the court shall not determine the award using the fraction described in subsection (d) of this section. The court instead shall determine the marital portion of the benefit by determining the amount of the account balance that is due to contributions made or earned during the marriage and before separation, together with the income, gains, losses, appreciation, and depreciation accrued on those contributions. If sufficient evidence is not presented to the court to allow the court to make this determination, the court shall then determine the marital portion of the benefit by using the fraction described in subsection (d) of this section, namely, by using the proportion of time the marriage existed (up to the date of separation of the parties) simultaneously with the employment which earned the benefit subject to equitable distribution to the total amount of time of employment. In either event, the award shall be based on the vested and nonvested accrued benefit as of the date of separation, **together with the income, gains, losses, appreciation, and depreciation accrued after the date of separation on the date-of-separation benefits.** However, the award shall not include contributions that may accrue or be made after the date of separation, or any income, gains, losses, appreciation, and depreciation accrued on those contributions.

(e) No award shall exceed fifty percent (50%) of the benefits the person against whom the award is made is entitled to receive as vested and nonvested pension, retirement, or deferred compensation benefits, except that an award may exceed fifty percent (50%) if (i) other assets subject to equitable distribution are insufficient; or (ii) there is difficulty in distributing any asset or any interest in a business, corporation, or profession; or (iii) it is economically desirable for one party to retain an asset or interest that is intact and free from any claim or interference by the other party; or (iv) more than one pension or retirement system or deferred compensation plan, program, system, or fund is involved, but the benefits award may not exceed fifty percent (50%) of the total benefits of all the plans added together; or (v) both parties consent. In no event shall an award exceed fifty percent (50%) if a plan, program, system, or fund prohibits an award in excess of fifty percent (50%).

(f) In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession, or by beneficiary designation with the plan, program, system, or fund consistent with the terms of the plan, program, system, or fund unless the plan, program, system, or fund prohibits such designation. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan, program, system, or fund involved.

(f1) Whenever the award is made payable pursuant to subdivision (a)(3) or (b)(3) of this section, and the pension or retirement or deferred compensation plan, program, system, or fund permits the use of a

"separate interest" approach in the order, there shall be a presumption, rebuttable by the greater weight of the evidence, that the "separate interest" approach shall be used to divide the benefit in question. For purposes of this section, the phrase "separate interest" approach means any method of dividing pension or retirement system or deferred compensation benefits in which the nonparticipant spouse, the spouse not a participant in the plan, program, system, or fund in question, receives an interest that allows the nonparticipant spouse to receive benefits in a manner independent, in whole or part, of the benefits received by the participant-spouse, or to make elections concerning the receipt of benefits independently of the elections made by the participant-spouse.

(f2) Whenever the pension or retirement or deferred compensation benefit is distributed pursuant to subdivision (a)(3) or (b)(3) of this section in an order that does not employ the "separate interest" approach, the court may, considering the length of the marriage and the ages of the parties, (i) award all or a portion of a survivor annuity to the nonparticipant spouse or former spouse and (ii) allocate the cost of providing the survivor annuity between the parties. The survivor annuity awarded by the court, if any, shall be allocated in accordance with the terms of the retirement plan, program, system, or fund.

(f3) Whenever the pension or retirement or deferred compensation plan, program, system, or fund does not automatically provide pre-retirement survivor annuity protection for the nonparticipant spouse, the court shall order pre-retirement survivor annuity protection for the nonparticipant spouse if permitted by the plan, program, system, or fund.

(f4) The court may allocate equally between the parties any fees assessed by a plan, program, system, or fund in order to process any domestic relations order or qualified domestic relations order.

(g) The court may require distribution of the award by means of a qualified domestic relations order, or as defined in [section 414\(p\) of the Internal Revenue Code of 1986](#), or by domestic relations order or other appropriate order. To facilitate the calculating and payment of distributive awards, the administrator of the plan, program, system, or fund may be ordered to certify the total contributions, years of service, and pension, retirement, or other deferred compensation benefits payable.

(h) This section and [G.S. 50-21](#) shall apply to all vested and nonvested pension, retirement, and deferred compensation plans, programs, systems, or funds, including, but not limited to, uniformed services retirement programs, federal government plans, State government plans, local government plans, Railroad Retirement Act pensions, executive benefit plans, church plans, charitable organization plans, individual retirement accounts within the definitions of *Internal Revenue Code* sections 408 and [408A](#), and accounts within the definitions of *Internal Revenue Code* section 401(k), [403\(b\)](#), or [457](#).

(i) If a plan, program, system, or fund deems unacceptable an order providing for a distribution of pension, retirement, or deferred compensation benefits, then the court may upon motion of a party enter a subsequent order clarifying or correcting its prior order, as may be necessary to comply with the specific technical requirements of the plan, program, system, or fund.

(j) Notwithstanding any other provision of this Chapter, a claim may be filed, either as a separate civil action or as a motion in the cause in an action brought pursuant to this Chapter, for an order effectuating the distribution of pension, retirement, or deferred compensation benefits provided for in a valid written agreement, as defined in [G.S. 50-20\(d\)](#), whether or not a claim for equitable distribution has been filed or adjudicated. The court may enter an order effectuating the distribution provided for in the valid written agreement.