

Drafting Retirement Division Provisions That Work

Best practices for separation agreements and equitable distribution consent orders

Tayler R. d'Alelio
Parker Bryan Family Law
Raleigh, NC

David E. Holm
Parker Bryan Family Law
Holly Springs, NC

THE GOAL

The QDRO should implement the deal — not make the deal.

Start with the question the QDRO drafter will ask

“Wife shall receive 50% of Husband’s 401(k), by QDRO.”

- 50% as of what date?
- Before or after loans and withdrawals?
- Do gains and losses follow the awarded share?
- Are post-separation contributions excluded?
- What if the account is rolled over — or the participant dies?

If the document does not answer these questions, the QDRO becomes a second negotiation.

1. Identify exactly what you are dividing

- Participant and alternate payee / recipient
- Employer + formal plan name
- Plan type: defined contribution vs. defined benefit
- Every plan addressed separately — pension, 401(k), supplemental plan, deferred comp
- Confirm the correct division vehicle: QDRO, DRO, or other appropriate order

“QDRO” is not a generic synonym for every retirement division order.

2. Put the math in the agreement

BAD

“50% of Husband’s retirement.”

No plan. No date. No formula.

BETTER

“50% of the marital portion of the ABC 401(k).”

Still leaves calculation details open.

BEST

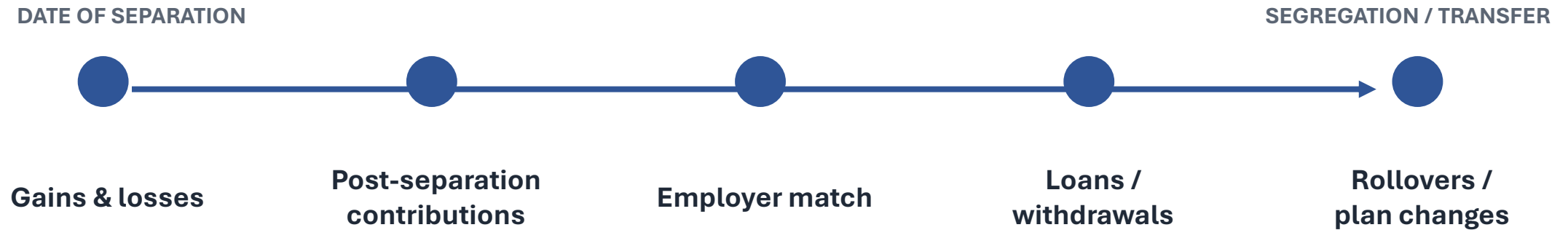
Plan + formula + valuation date + gains/losses + post-separation activity

The QDRO implements a complete bargain.

Bracey: a later QDRO cannot be used to add passive gains and losses that the consent order did not award.

3. Draft the “gap period” expressly

05



Make the calculation mechanical. Do not leave the administrator to infer the parties' intent.

4. A pension is not a 401(k)

DEFINED CONTRIBUTION

A pot of money

- Account balance
- Contributions
- Investment gains / losses

DEFINED BENEFIT

A promise to pay later

- Marital / coverture fraction
- Commencement & subsidies
- COLAs / survivor rights

Where permitted, decide whether the intended structure is separate interest or shared payment.

5. Ask: “What if someone dies tomorrow?”

- Pre-retirement death of the participant
- Post-retirement death of the participant
- Survivor annuity / survivor benefit election
- Who bears the cost of survivor protection?
- What if the alternate payee predeceases the participant?
- Are beneficiary designations required or permitted by the plan?

Death provisions are part of the substantive bargain — not cleanup for the QDRO drafter.

6. Assign the implementation job

- 1** **WHO** Who prepares the order?
- 2** **WHEN** Deadline to start and submit
- 3** **COST** Who pays drafting / review fees?
- 4** **PROCESS** Preapproval + signatures + cooperation
- 5** **FOLLOW-UP** Who tracks qualification and segregation?

McMurray: do not assume “someone” will eventually obtain the QDRO.

7. Build in a repair mechanism

PLAN REJECTS ORDER → CLARIFY / CORRECT → EFFECTUATE SAME DEAL

Retain jurisdiction to enter, clarify, or amend implementing orders necessary to satisfy plan requirements — but state that no implementing order may alter the substantive division.

Patterson: the implementing order preserves/effectuates the interest; it should not create a different bargain.

8. Do not casualize taxes and fees

- Avoid promising that every retirement transfer is simply “tax free.”
- Distinguish direct rollover / transfer from a distribution actually received and retained.
- Allocate taxes caused by unilateral withdrawals or conduct inconsistent with the agreement.
- Allocate QDRO / DRO drafting, review, and plan processing fees.

The drafting goal is to describe the intended transaction — not guarantee a tax result the plan or tax law may not support.

Before anyone signs: the 10-question test

- ✓ Exact plan?
- ✓ Participant / recipient?
- ✓ Exact award or formula?
- ✓ Valuation date?
- ✓ Gains and losses?
- ✓ Post-separation activity?
- ✓ Pension commencement / enhancements?
- ✓ Death / survivor rights?
- ✓ Taxes and fees?
- ✓ Who drafts, by when, and what if rejected?

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

Tips for drafting Qualified Domestic Relations Orders (QDROs), Domestic Relations Orders (DROs), Court Orders Acceptable for Processing (COAPs), Retirement Benefits Court Orders (RBCOs), and for dividing Individual Retirement Accounts (IRAs)

**Overview: ERISA, QDROs,
and other Retirement Orders**

1. QDROs

- Employee Retirement Income Security Act of 1974 (ERISA)
- Pensions
 - If they have a model, there should be 2- shared interest and separate interest
 - Sometimes pensions are frozen – ex: IBM personal pension was frozen on Dec. 31, 2007
 - Company bankruptcy – Pension Benefit Guaranty Corporation (PBGC)
 - Excess Benefit Plans- some allow QDROs, some do not
 - Some companies have more than 1 pension – then need multiple QDROs
- 401(k) Plans
 - Many limit how far back they will calculate gains and losses
 - Sometimes, records custodians switch

1. QDROs (cont.)

- Death of the Participant-
 - Some plans accept QDROs after death, some do not
 - Executor or Administrator of Estate can sign
- QDRO Review Fees
 - Some 401(k) plans charge fees to review
 - Typically, they are less than \$1,000
 - Can be split 3 ways-
 - Each party pays half
 - Alternate Payee pays 100%
 - Participant pays 100%

2. COAPs

- FERS –
 - Defined benefit plans administered by the Federal Government through OPM
 - NOT ERISA
 - No model orders, but OPM has relevant information published
 - Model is called a Court Order Acceptable for Processing (COAP)
 - No pre-approval process
 - 3 basic features:
 - Employee annuity
 - Former spouse survivor annuity
 - Refund of contributions

3. RBCOs

- The Thrift Savings Plan (TSP) uses Retirement Benefit Court Order (RBCO)
- Similar to 401(k)
 - TSP is essentially the Federal Employee Version of a 401(k)
- Model exists

4. IRAs

- IRA Custodians do not usually calculate gains and losses
 - Usually need a percentage, dollar amount or number of shares to be transferred
- Not regulated by ERISA
 - May need DRO, may not
 - Can be divided incident to divorce
 - Most IRA custodians have a transfer due to divorce form

5. TSERS

- Teachers' and State Employees Retirement System (TSERS) are defined benefit plans
- A spouse is not required to be the member's survivor beneficiary
- A division order requiring payment of a marital share of TSERS benefits to the non-member ex-spouse automatically applies to survivor benefits
- REQUIRED to be consistent with the model order on the Retirement System's website
- Benefits-
 - Cannot be paid to the non-member ex-spouse until the member retires
 - Can be a percentage or fixed dollar amount

6. 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 a letter 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.