

## **Retirement Plan Division Dos and Don'ts**

### **The Key to Success when Dividing Retirement Plans in a California Divorce**

By Diana L. Martinez  
Collaborative Lawyer and Mediator

Dividing retirement plans in a divorce can be complicated. Whether you are in a high-conflict divorce in court or in an out-of-court process like mediation or collaborative divorce, mistakes can result in losing your interest in the plan completely. Here are the “Do’s” and “Don’ts” to avoid the more common mistakes.

#### **DO your research early.**

Start gathering information and discussing retirement plans with your partner and/or your lawyer right away.

- What plans and plan types do each of you have?
- Who is the plan administrator and is notice of the divorce necessary?
- Are there prior jobs that had retirement plans?

The sooner you start gathering the information, the smoother your process will be.

#### **DON'T assume the balance on a statement is the accurate value of the plan.**

The statement balance may not reflect employer contributions and/or additional benefits that apply at the time of retirement or death. Pension plan calculations are also based on the participant's income level just prior to the time of retirement, which is often not reflected in a current statement. Benefits that were earned prior to marriage or after date of separation (or perhaps credits purchased using separate property funds) will not be reflected in a statement balance. Because of this, you need to know the fair market value of the plan to make informed decisions as to the community interest.

#### **DO research employment history.**

Employment history can disclose different plans and plan administrators. With company take-overs and plan changes that result, it may be more difficult to identify plans and community and separate property interests. It can be months or years from the time between when a divorce judgment is filed and the order dividing the plan (a Qualified Domestic Relations Order, or QDRO) is completed. If a plan is not included in the judgment (or is reserved for a later resolution), a court can conclude that it's too late – you can't fix the problem if there wasn't proper notice. Under federal law, if the participant remarries, retires, or dies, you cannot get a QDRO done after judgment or death.

#### **DON'T assume all plans are the same.**

If you have multiple plans that require a QDRO, it can get expensive, with most qualified lawyers charging about \$1,000 per plan. It can be enticing to QDRO only one plan in order to save, potentially, several thousands of dollars. For example, where Wife's plans total \$500,000 more than Husband's plans, why not just QDRO one of Wife's plans, giving the difference

(\$250,000) to Husband, leaving all other plans untouched? Well, if the plan being divided is more conservatively invested than the other plans (not being divided), regardless of the balances at the time of division, it could result in 10's or 100's of thousands of dollars difference over time. In addition, a specific amount (\$250,000) does not take into account market fluctuations from that community portion, which may cause a windfall for one spouse or the other, at the time the plan is actually divided.

**DO discuss notifying the plan administrator about your divorce.**

Divorces can take several months or several years. During that time, the participant spouse still has full management of his/her retirement plans. It may be necessary to notify the administrator about the divorce to prevent the participant from taking any action that could impact your interest in the plan. This can be tricky, though, since such a notice may result in stoppage of payments on a plan already being paid out. With the increase in people divorcing later in life (near or at retirement) many people cannot afford to freeze these plans. Have this conversation early with your divorce professional(s) and your partner. In California there are Standard Family Law Restraining Orders that specifically prohibit unilateral actions by one partner that can financially impact the other. Unfortunately, these orders are often ignored or violated, especially in high conflict divorce cases. When spouses are working cooperatively in a collaborative or mediation process, there is often less concern over mishandling of the plan, although it is still important to have the discussion and make sure everyone is on the same page.

**DON'T go for the cheapest QDRO preparer.**

There are online companies that will charge significantly less than individual lawyers/law firms. QDROs are complex and specific to the type of plan. Most companies that do QDROs on the cheap are doing little more than cut and paste, replacing your name for the placeholders on a document template that is not customized to the requirements of that specific plan, and there is typically no follow up. If there is an error in your divorce judgment or your QDRO and it is not corrected timely, you can lose your interest in the plan; no do-overs and no other recourse.

**DO your homework... and follow up.**

The type of plan will determine how the community share is calculated and divided, under the law. If you have this information ahead of time, you can start the division sooner rather than later, even if you decide to divide in a way different than what the law would have provided. The time between preapproval of a QDRO and filing the QDRO with the court can take about 6 months or more. It is best to figure this all out before you start working on your divorce judgment. And once the QDRO is completed, it is important to follow up with the administrator, in a timely fashion, to make sure everything is completed. Working with knowledgeable and experienced professionals will be crucial to a smooth and successful outcome.