

FOOTE Notes on Retirement

Scenario

Client advises there is a good bit of community property, but the husband may not be cooperative. The litigation costs may be substantial. Among other assets are a pension plan and a 401k with over \$100,000, both in the husband's name. Your client says she does not have the funds to advance the \$5,000-10,000 to litigate. Is there any way you can help her?

Issue

We all know that QDROs can be utilized to divide retirement account and some attorneys are aware that QDROs can be utilized to pay child support and spousal support. In the scenario above, can the QDRO process be utilized to actually fund future attorney fees and litigation costs?

Proposed Answer

Yes, payment of attorney fees and litigation costs are allowed through QDROs under federal ERISA law, assuming the Plan allows such a distribution. In Renner v. Blatte 650 N.Y.S.2d 943 (N.Y. Supp. Oct. 18, 1996), the non-participant spouse filed an "enforcement action" prior to divorce asking that the participant's retirement plan be required to transfer \$119,425, chargeable solely against the participants account, to cover a number of expenses related to the divorce proceedings. The Court ruled that the non-participant spouse was entitled and authorized payment through a QDRO of the following amount: (1) \$20,825 in direct maintenance and child support arrearages; (2) \$7,600 for third-party payment arrearages; (3) \$15,000 for attorneys fees arrearages; (4) \$5,000 for attorneys fees awarded in the enforcement action; (5) \$41,000 for income taxes that the non-participant will have to pay upon receipt of the funds; and (6) \$20,000 as security for future payments or to cover future arrearages.

As long as the QDRO states that the order "relates" to the enforcement of support and/or property rights, the Plan Administrator must accept the order as lawfully issued. Again, this assumes that such a distribution is authorized by the content of the Plan. Getting a state family court judge to approve of such an award may be more difficult, but it is for this exact reason that the Louisiana Legislature enacted La. R. S 9:374E to assist in the litigation costs involved in a divorce. Most judges don't have a problem allowing a party to get their hands on funds in a checking or savings account to use for litigation costs and attorney fees. A QDRO should be viewed in the same context.