



# NEWSLETTER

## Retirement Benefits and Bifurcation

By Elizabeth Van Clief, Esq. of Van Clief & Van Clief

### How do I complete FL 347?

This is a common and important question posed by family law attorneys with clients seeking a bifurcation and immediate termination of status, or by family law attorneys who are concerned bifurcation will jeopardize their client's claims to benefits.

Why is this issue important? Termination of marital status eliminates the government code and ERISA protections afforded to spouses in almost all types of retirement plans. (29 U.S.C. §1055.) For example, ERISA requires spousal consent to name anyone other than a spouse as a beneficiary. (29 U.S.C. § 401(a)(11).) Under federal law, the termination of marital status allows the participant to name a new beneficiary (even if the community interest has not been divided). If the participant dies before the community interest is divided and a post-death QDRO is not immediately served on the Plan Administrator, 100 percent of the benefits will be payable to the non-spouse beneficiary.

For government plans (not regulated by ERISA), survivor benefits can be eliminated upon termination of marital status. For example, the Survivor Benefit Plan for military benefits has two types of survivor benefits: a spouse survivor benefit and a former spouse survivor benefit.

### Upcoming Events Calendar

**February 8 – Annual Dinner and Installation of Officers and Directors**  
**5:30–9:00 p.m.**

Babylon Palace  
456 Magnolia Avenue, El Cajon

**February 8 – Family Law Facilitator's Office Closed**

**February 12 – Lincoln's Birthday**  
**State and Federal Courts Closed**

**February 18 – President's Day**  
**State and Federal Courts Closed**

**February 26 – What You Need to Know in 2019 from the Bench**

12:00–1:15 p.m.  
El Cajon Courthouse, Department 5

**March 19 – Family Law MCLE**  
(1 hour Bias CLE credit)

12:00–1:15 p.m.  
Testo Pepesto, 221 E. Main Street, El Cajon

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The spouse survivor benefit disappears upon termination of marital status and a former spouse survivor benefit must be elected in order for coverage to extend to the non-member former spouse.

A properly completed FL 347 will allow the moving party in a bifurcation proceeding to be successful, and will protect the non-moving party from risk of loss of benefits.

### **Understanding FL 347:**

The court must make an order pertaining to each retirement plan. (Family Law Code § 2337(d).) There are three options for what type of order the court should make: (1) a final QDRO, (2) an interim QDRO, or (3) a notice of adverse interest. Each of these orders has pros and cons.

Option 1—FINAL QDRO: If a final QDRO can be entered dividing the community interest in the retirement benefits, this is the best possible type of order on FL 347 to protect both parties. The non-employee would receive half of the community interest in the benefits and the employee would be left with the remaining benefits in the account allowing the employee to change their beneficiary designation. If either party dies, their benefits are protected. However, a final QDRO may not always be possible. The parties may want to “horse trade” retirement benefits with other assets in a settlement or there may be a separate property claim that is undermined in amount which prevents a final QDRO from being agreed upon by the parties.

Option 2-INTERIM QDRO: An interim QDRO is a good solution if the plan is an ERISA plan and the parties do not trust each other. An interim QDRO prevents the participant from withdrawing benefits and fixes the survivor benefit election at 50 percent for the non-employee spouse. In other words, the participant is allowed to change the beneficiary designation for his benefits to be someone other than the former spouse but only for 50 percent of the account. And, the non-employee spouse is guaranteed to be the survivor beneficiary for 50 percent of the entire account if the participant dies before a final QDRO is entered (and a post-death QDRO is not entered). It is a good placeholder until the final amount of the benefits is determined.

However, interim QDROs can be costly to prepare if an outside service is used and interim QDROs have no legal effect on government plans.

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Option 3—NOTICE OF ADVERSE INTEREST. This option offers the least protection for the parties, nevertheless this is by far the most common approach when dealing with retirement benefits in divorce if the parties do not expect the imminent death of either party and the amount of the retirement benefits is not high. The effect of this notice is that the participant is not able to withdraw benefits in ERISA and state and local plans because there is a community property claim on the benefits. The plan is on notice that there is a claim, and if the participant should pass away before a final QDRO is entered, a post-death QDRO can be entered for most ERISA plans to assign the non-employee their half of the community interest. There is virtually no cost to the parties of a notice of adverse interest.

### **Takeaways From This Article:**

1. A final QDRO offers the most protection for both parties.
2. An interim QDRO will preserve the survivor benefits of the parties in ERISA plans.
3. A notice of adverse interest is the most common and least costly selection in bifurcation, but will have no legal effect on government plans.
4. The choice on FL 347 is a cost-benefit analysis for your client. If the value of the retirement benefits is high enough and your client is concerned, then full protection using a final QDRO or interim QDRO is warranted.

### **Common Questions:**

**What if there is a military plan?** If one of the parties is a retired military member, we recommend that the only acceptable order is a final QDRO which is entered upon termination of marital status. The spouse survivor benefit is cancelled upon termination of marital status and an election for former spouse survivor benefits must be made within one year of the judgment in order for the former spouse to be protected in the event of the member's death.

**What if the parties have approximately equal retirement benefits?** Normally a notice of adverse interest is sufficient because each party will have control over the beneficiary designation of their respective accounts and the risk of loss of benefits if the opposing party should die is low given that the parties have equal benefits in their possession.

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**What if IRA benefits are involved?** IRA companies do not recognize the legal effect of an interim QDRO or a notice of adverse interest. The court can order that the IRA account holder name their former spouse as beneficiary for 50 percent of the account upon death in the meantime before the assets are divided. However, such court orders are not effective on IRA companies and the parties would have to trust that the IRA account holder will comply with the court order. A final order assigning half of the community interest in the IRA benefits is the only true legal protection for the spouses in this situation.

This article is intended to provide generalized advice and guidance when termination of marital status is sought prior to the determination of the property rights. Specific plans may have specific requirements, risks, and regulations that require special attention.

## Options for Accessing Retirement Benefits to Fund Litigation or Other Divorce Expenses

By Elizabeth Van Clief, Esq. of Van Clief & Van Clief

The situation is too often that clients are rich in defined contribution retirement benefits and cash poor. The client wants to hire an attorney to help them achieve an equitable divorce, but they cannot afford the cost of legal services. Many times the opposing party has retirement benefits that seem unreachable before a final judgment is entered. Below is a discussion of the various options afforded the parties in such circumstances.

**Option 1** — The participant can apply for a distribution with spousal consent and an agreement that this will not violate ATROS. The plan does not have to allow for a distribution if the participant is still working (called an “in-service” distribution) so this may or may not be an option. The participant can find out this information by asking the plan administrator. The participant will need to obtain spousal consent (because the parties are still married) to obtain a distribution. Normally the parties would agree to share equally in the distribution amount, or agree that this amount is charged solely against participant and is trued up in the community property calculation when the asset is divided later in the divorce. The participant will be taxed at ordinary income tax rates plus a 10 percent federal penalty and a 2.5 percent California penalty for taking out these funds if the Participant is under the age of 59 ½. Therefore, this method can be very costly in terms of tax consequences. A divorce case does not need to be opened for this to occur.

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**Option 2** — The participant can apply for a loan with spousal consent and an agreement that this will not violate ATROS. The plan does not have to allow for loans so again the participant needs to ask the plan administrator. Loans are not available unless the participant is still an employee of the plan sponsor and the limit is the lesser of 50 percent or \$50,000. The participant will need to obtain spousal consent (because the parties are still married) to obtain a loan. Normally the parties would agree to share equally in the loan proceeds or agree that this amount is charged solely against the participant and is trued up in the community property calculation when the asset is divided later on. The participant will have to make payments on the loan from his paycheck and those payments are generally his separate property contributions so again, this can be trued up when the asset is divided. The Participant will not be taxed on the loan so long as he is making payments. Therefore, this method can be the easiest for obtaining liquidity when both parties agree. A divorce case does not need to be opened for this to occur.

**Option 3** — The participant and spouse can agree to enter a QDRO assigning a certain sum to the non-employee spouse. The spouse can either retain the funds, remit them to the participant, or share equally in the funds. Whatever is agreed to can be addressed in the true up calculation when the benefits are ultimate divided. The spouse will be taxed on the distribution at ordinary income tax rates but will not pay an early withdrawal penalty. If spouse's tax bracket is less than the participant's then this can be a much better way to obtain funds than a straight distribution. A divorce case must be opened for this to occur because the QDRO must be filed with the court, but the QDRO can be done before Judgment. All of the options discussed are based on the premise that both parties agree to access the retirement benefits for liquidity pending the final Judgment and final QDROs. If the parties cannot agree to one of the options above, the participant or spouse can argue to the court for an order permitting access to plan funds prior to Judgment so long as the request is limited in dollar amount and reasonable to fund litigation. The court can order that the non-employee spouse must provide a signature on a distribution form, loan form, or QDRO as long as you can prove that the amount requested for liquidity for the party does not exceed their half of the community interest. An elisor can also be appointed to sign these forms.

Because there are various mechanisms to accessing retirement benefits pending divorce and ERISA provides that a QDRO is an exception to the anti-alienation and creditor protections afforded to retirement benefits, it follows that *arguably* requesting liquidity from a retirement plan is no different from requesting a distribution from a jointly owned investment account.

# Notices

**Looking for Speakers for Future FBA Civil Litigation Section Meetings:**

**If you have a litigation topic you would like to present at an upcoming Civil Litigation Section MCLE meeting, please contact Section Chair Steven Banks at: [sbanks@krigerlawfirm.com](mailto:sbanks@krigerlawfirm.com) or 619-589-8800.**

**Foothills Bar Association Notice of Board Meeting:**

The Foothills Bar Association Board of Directors generally meets on the second Tuesday of each month. The next meeting will be on January 8, 2019 at the Law & Mediation Firm of Klueck & Hoppes, APC., 7777 Alvarado Road, Suite 413, La Mesa, CA 91942 beginning at 4:45 p.m. If you want your voice to be heard in policy discussion and upcoming event planning or would simply like to learn more about the organization, your attendance is welcome.

The Family Court needs settlement conference judges. Please volunteer and share your expertise. Contact Kelly Fabros at 619-456-4065 or [Kelly.Fabros@SDCourt.CA.Gov](mailto:Kelly.Fabros@SDCourt.CA.Gov).

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**Your submissions are welcome! Send articles, letters, flyers, and other non-advertising submissions to Will Hannosh at [will@familylawsandiego.com](mailto:will@familylawsandiego.com).**

**ADDRESS CHANGES**

**Send change of address or telephone number to Bradley Schuber at [bschuber@krigerlawfirm.com](mailto:bschuber@krigerlawfirm.com)**

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# NEWS RELEASE

SUPERIOR COURT OF CALIFORNIA • COUNTY OF SAN DIEGO

Post Office Box 120128 • San Diego, CA 92112-0128

Release: Immediately  
Date: 02/04/19

Contact: Karen Dalton  
Phone: (619) 844-2353

## **San Diego Superior Court's Family Law Facilitator Services Closed on Friday, February 8, 2019** *One Day Closure for Staff Training*

The Family Law Facilitator's Office which provides self-represented litigants with assistance on their family law cases will be closed on Friday, February 8, 2019. The closure will allow time for annual mandatory staff training.

The Family Law Facilitator's Office (FLF) provides, at no cost, help for unrepresented parents and parties who have questions about family law issues. Staff can help prepare court forms and provide general legal information. The FLF office is operated by court attorneys, paralegals, and clerks with experience in Family Law.

Executive Officer Michael Roddy says, "These self-help legal services are very popular and we know how much people depend on the help provided by our Family Law Facilitators' office. We hoping by getting the word out now about the planned closure, we can keep those who need the service from coming to the courthouse on that Friday. This training must be done and we are trying to minimize the impact on customers as much as possible. We apologize for any inconvenience this may cause."

The FLF office will resume services on Monday, February 11, 2019.

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