DAVID T. RUEGG
Attorney At Law
Phone: (Riverside) 951-268-4479
Phone: (Orange) 714-836-5836
david@qdrodivision.com

Attorney Fees

Challenge: An attorney cannot be an alternate payee.

A domestic relations order can be a QDRO only if it creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a part of a participant's benefits. For purposes of the QDRO provisions, an alternate payee cannot be anyone other than a spouse, former spouse, child, or other dependent of a participant.

Reference: ERISA § 206(d)(3)(K), IRC § 414(p)(8)

Similar rules apply for other retirement benefits that are not covered under ERISA law.

Solution: Get creative. (and be prepared for some tax analysis)

While the funds from a QDRO can only be paid to a proper alternate payee-the alternate payee can make an agreement to turn over those funds to a 3rd party. Example: Alternate Payee elects to receive a 'cash out' payment in the form of a check c/o an attorney's office. Alternate Payee then signs over that check to the attorney (check bank policies regarding 'signing over' checks).

BUT BE CAREFUL-Taxes can be a mess: Alternate Payee is still responsible to pay ordinary taxes on the funds according to Alternate Payee's personal tax bracket. The Plan administrator will withhold 20% of the funds payable for estimated taxes, as well. The actual taxes will be determined after the alternate payee files his/her tax return. Depending on the alternate payee's tax bracket, the 20% withholding for estimated taxes may be an overestimate or an underestimate-resulting in a refund or additional tax liability.

WHAT IF YOU DON'T REPRESENT THE ALTERNATE PAYEE? The Employee Participant Spouse cannot 'cash out' their own interest via the QDRO process-but they can agree to assign more to alternate payee then alternate payee's community interest-with a side agreement that Alternate Payee will return funds back to Participant. This 'side agreement' cannot be contained in the QDRO document itself. Not recommended if you are worried about the other side running off with the money. Again-the Alternate Payee will be responsible for the entire tax liability in the eyes of the IRS.

CONSIDER A LOAN-401(k) and similar defined contribution plans (most of the time) offer loan options. For 401(k) this can be up to $50,000 under current IRS rules. Other accounts may be more or less. The loan can then be distributed without complex tax liability analysis and the loan money can be properly allocated through the QDRO document-avoiding worry about having someone 'run off' with the money or dealing with complex tax analysis.