

Equitable Distribution: Can the court enter a QDRO without an ED claim?

*****Since this article was posted, the NC General Assembly amended the statute governing the division and distribution of retirement benefits and made a significant change regarding the topic of this post. For a discussion of that legislation, see post from October 30, 2019, "[Equitable Distribution: Significant legislative amendments regarding retirement accounts and other forms of deferred compensation.](#)"

It's not at all uncommon. Parties sign a separation agreement addressing all property issues and agreeing that a QDRO or two will be entered by the court to divide the retirement account(s). Obviously – at least I hope it is obvious to everyone - a party cannot simply hand a QDRO to a judge to sign when no action has been filed. What must be filed to give the court jurisdiction to enter a valid division order? Must it be an ED claim?

What is a QDRO?

For the detailed answer to this question, see my last blog post - [So someone forgot to draft that QDRO. Now what?](#) In short, for ERISA-qualified plans, a QDRO is a "judgment, decree, or order (including approval of a property settlement agreement) which relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant, and **is made pursuant to State domestic relations law.**" [29 USC sec. 1056\(d\)\(3\)\(B\)\(ii\)](#); [Internal Revenue Code sec. 414\(p\)\(1\)\(B\)](#).

This means the division order must be entered in an action brought "pursuant to State domestic relations law." When does State domestic relations law allow North Carolina judges to enter property division orders?

NC Claims that Authorize Property Division

Clearly the court can enter the division order when an ED claim has been filed. To be a valid ED order, the claim must be filed before the entry of a judgment of absolute divorce. [GS 50-11\(e\)](#). So when parties are able to resolve all of their issues by separation agreement, an ED claim can be filed for the limited purpose of giving the court jurisdiction to enter the QDRO, as long as the claim is filed before divorce is granted. If the parties consent, the court can enter whatever consent order is necessary to accomplish the division of the pension. If the parties do not consent, the court can determine the equitable distribution of the retirement account in accordance with ED law. [See Hamby v. Hamby, 143 NC App 635 \(2001\)](#) (agreement controlled classification and distribution of some assets but court could classify and distribute those not covered by the agreement by

application of the ED statute).

Because the North Carolina State Employees Retirement Plan only can be divided “in connection with a court-ordered equitable distribution”, [G.S. 135-9](#), this seems to be the only way to divide that specific government plan.

However, in [Gilmore v. Garner, 157 NC App 664 \(2003\)](#), the court of appeals upheld the entry of a QDRO by a trial court entered as part of an order requiring specific performance of a separation agreement. In that case, the separation agreement provided for the division of the pension. When ex-husband disagreed with ex-wife over the meaning of the separation agreement, wife filed action alleging breach of the contract and requesting specific performance. The trial court decided in favor of wife and entered the QDRO. The court of appeals affirmed. That case did not involve a claim for equitable distribution but obviously a claim for breach of a separation agreement is a claim made pursuant to State domestic relations law.

In addition, North Carolina law allows separation agreements to be incorporated into judgments of absolute divorce. See blog post [What's the Law About Incorporating Separation Agreements?](#) Most if not all incorporated agreements involve property division and incorporated agreements are treated as court orders for all purposes. See *Walters v. Walters*, 307 NC 381 (1983). No ED claim is required. A property division made in an incorporated agreement clearly would be an order entered pursuant to State domestic relations law.

What about a motion in the cause in a divorce action after a divorce judgment has been entered?

I have not been able to identify a cause of action for property division that can be made by motion in the cause in a divorce action after the entry of the judgment of absolute divorce. An ED claim cannot be asserted at that point and at least to date, we have no case law indicating a property settlement agreement can be incorporated at any time after the entry of the divorce judgment. A breach of separation agreement claim must be filed as a separate proceeding.

Yet it is common for parties to file a request for entry of a QDRO in divorce cases long after the entry of the divorce judgment. If the QDRO is signed by the court, is it a valid order? Is it a division made pursuant to State domestic relations law?

In [Whitworth v. Whitworth, 222 NC App 771 \(2012\)](#), the court reminded us that a court has no subject matter jurisdiction to act in a case after the final resolution of all pending claims “absent an appropriate post-trial motion.” As there is no “appropriate post-trial motion” for property division, it appears the court has no jurisdiction to enter a QDRO or other division order.

We're not limited to an ED claim

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So while an ED claim will work and probably is the best way to go about obtaining a QDRO, a breach of contract claim or a request for incorporation of an agreement into a divorce judgment both also give the court authority to enter the division order. But it is best to avoid trying to enter a QDRO by motion in the cause after divorce.