

So someone forgot to draft that QDRO. Now what?

An equitable distribution judgment was entered 11 years ago. The order states plaintiff is entitled to a percentage of defendant's retirement pay when defendant begins to receive it. The judgment also states that plaintiff's counsel will draft a QDRO. Now it is time for defendant to retire but no one ever drafted a QDRO. Is there a problem? Can the court enter one now?

Of course the first thought is the statute of limitations. Does [GS 1-47](#) - the 10-year limitation period for "actions upon judgments" - prohibit a court from entering the QDRO?

We do not have an appellate opinion that answers this question, but I don't think the statute of limitation bars entry of the QDRO. I can't see how a statute of limitations could bar a party from recovering payments not yet due and owing. Also, I don't think a QDRO is an "action upon a judgment"; rather it is the means of completing the ED judgment by accomplishing the actual division of the marital interest in the retirement account.

Here is why I think that is true.

What is a QDRO?

QDRO is not a term defined in state law. However, state law does define – sort of - a "DRO".

The equitable distribution statute provides that absent consent of both parties to another method of distribution, there are only two ways a vested retirement account can be distributed:

1. By giving the account to one party and awarding a larger portion of other assets to the other; or
2. By "appropriate **domestic relations order** as a prorated portion of the benefits" paid to the recipient spouse if and when that spouse begins to receive the retirement funds (a "DRO").

If the account is not vested, a DRO is the only option absent consent of the parties.

[GS 50-20.1.](#)

So a DRO appears to be an order entered in a domestic relations case which provides for the distribution of a retirement plan by requiring that a prorated portion of funds be distributed as those funds are received in the future.

ERISA

Federal law does define QDRO. ERISA - the [Employment Retirement Income Security Act, codified at 29 USC section 1001 et. seq.](#), (ERISA) – regulates all ERISA-qualified retirement plans, which

include most private, **nongovernmental** plans. These plans generally are protected from creditors by the broad anti-alienation provision in the federal statute. However, a state court can divide an ERISA plan if it enters a “Qualified Domestic Relations Order” (QDRO).

ERISA defines ‘domestic relations order’ as:

Any 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 a State domestic relations law.

[29 USC sec. 1056\(d\)\(3\)\(B\)\(ii\).](#)

In addition, the order must contain:

1. The name and address of the parties;
2. The amount to be paid to the alternate payee;
3. The number of payments; and
4. The name of the plan.

[29 USC sec. 1056\(d\)\(3\)\(C\).](#)

A domestic relations order becomes ‘qualified’ when it is accepted by a plan administrator. Once a DRO is qualified (i.e., becomes a QDRO), the plan will pay benefits directly to the alternative payee. [29 USC sec. 1056\(d\)\(3\)\(B\)\(i\).](#) If the DRO is not qualified, the retirement benefits are not divided.

Are QDROs required?

So both DROs and QDROs are the means of effectuating the division of a retirement account. [GS 50-20.1](#) requires a DRO for all retirement plans and ERISA requires a QDRO for ERISA plans. So yes, we must have them to divide a plan. But there is no requirement that the DRO or the QRDO actually be a document separate from the ED judgment itself; the ED judgment may contain all the necessary information to be the DRO or QDRO.

A QDRO generally is prepared as an order separate from the ED judgment because plan administrators prefer it when deciding whether to qualify a DRO. However, federal law does not actually require a separate order. The division can be accomplished in the ED judgment if all the requirements for the QDRO are met. See [US Department of Labor Frequently Asked Questions About QDROs.](#)

Patterson by and through Jordan v. Patterson, 137 NC App 653 (2000), held that a non-ERISA

plan – a governmental retirement plan – actually was distributed at the time the ED judgment was entered because the ED judgment itself clearly provided that the non-participant party was entitled to receive a percentage of amounts received by the other upon retirement. No separate order was required to accomplish this division, even though the court also acknowledged that a separate “QRDO” could be entered 5 years after the entry of the ED judgment to help “effectuate” the future division of the plan if requested by a party.

Back to our scenario.....

So it could be that a separate DRO/QRDO is not necessary at all in our scenario if everything required for distribution is in the judgment itself.

If the information is not in the judgment, the DRO/QDRO is necessary to complete the ED. While it may be appropriate to consider laches under some circumstances where a party actually can show some prejudice resulting from the delay in entry of the division order – see discussion about laches in *Patterson* – the 10-year statute of limitation in [GS 1-47](#) applies only to an “action upon a judgment.” It seems clear that a DRO/QDRO is not an “action upon a judgment.” Rather, it is a part of the ED judgment – the means of completing the judgment – and there is no statute placing a specific time limit on the ability of a court to complete this work.

But the 10-year limitation period could become an issue. The ED judgment will be enforceable as the retirement account payments become due and owing. It seems obvious that the 10-year statute of limitations will apply to bar recovery of any individual payment more than 10 years after it becomes due. See *Pruitt v. Pruitt*, 94 NC App 713 (1989)(10-year statute of limitations applies to child support order and begins to run when each payment becomes due rather than at time order requiring the future payments was entered).

Thoughts? Disagreement? Please comment by using the reply feature below.

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