

DRAFTING TRAP
DEFINED CONTRIBUTION PLAN "SPECIFIC" DOLLAR AWARD

Consider the following.

At the time the parties divorced, the marital portion of this Defined Contribution Plan (401k) was valued at \$300,000.00. Pursuant to the Marital Settlement Agreement it was agreed to divide this asset equally.

The Judgment of Divorce, dated December 22, 2019 provided for distribution of participant's 401(k) retirement plan as follows:

ORDERED AND ADJUDGED, that the Alternate Payee shall receive the sum of \$150,000.00 as her equitable share of participant's 401(k) retirement plan, the transfer of the Alternate Payee's share is to be accomplished by a Qualified Domestic Relations Order.

A Qualified Domestic Relations Order ("QDRO"), was entered on January 15, 2021 which provided:

The Alternate Payee is awarded an amount equal to \$150,000.00, from the participant's Accrued Benefit and the Plan is ordered to pay to the Alternate Payee such amount (with earnings attributable to such amount from December 22, 2019 until the date of distribution) to the Alternate Payee in a single lump sum cash distribution. Such distribution shall be made at the earliest possible date permitted under the Plan.

The monies were transferred to plaintiff by the participant's plan administrator, on March 1, 2021. Due to adverse investment experience the value of this asset at the time of transfer to the Alternate Payee was \$88,724.61.

The Alternate Payee maintains that her award was determined as of December 22, 2019. Any diminution should not be charged to her. She argues that her attorney "told her" that she was awarded \$150,000.00.

There are several decisions that rebut the Alternate Payee's argument. The issue is not complex, however, attorneys are cautioned to make clear to their clients that awards fluctuate in value from the date the Alternate Payee's share is established to the time the asset is distributed. To preclude the situation discussed in this newsletter, it is suggested that as part of the attorney "sign-off" procedure, each spouse be clearly and fully cautioned that the worth of their interest could diminish between the determination of value date and the distribution date.