

SIGNIFICANCE OF THE FILES V. EXXON DECISION ¹ SEPARATE INTEREST QDRO

To guarantee that a Former Spouse will not lose her pension benefit because of the death of the participant/retiree, the informed attorney representing this non-participant spouse inserts into the Marital Settlement Agreement language creating a "Separate Interest QDRO" for the benefit of the Former Spouse in the participant's Qualified Defined Benefit Plan. The result of use of the *Separate Interest* is that an enforceable right is created at the time of divorce. The sole function of the Qualified Domestic Relations Order is "enforcement of an existing right of the Former Spouse."

The "Separate Interest" QDRO, "carves out" a portion of the Qualified Defined Benefit Plan for the Former Spouse (Alternate Payee). The significant result of this Format is:

from the time of divorce forward the Former Spouse is possessed of an enforceable right that is not subject to loss because of the death of the participant/retiree.

Use of the Separate Interest QDRO, eliminates the need to guarantee benefit payments to the Former Spouse by inserting Joint and Survivor Annuity language into the Marital Settlement Agreement.

In addition to the enforceable right created by the Separate Interest QDRO, it also renders moot any need to debate which spouse is to pay the substantial costs associated with a Former Spouse Survivor Annuity. There will be no Former Spouse Survivor Annuity. The Former Spouse now has a Separate Interest.

Further note that a Separate Interest QDRO may be enforced after the death of the participant. However, the remarriage of the participant, and the creation of "vested rights" in a new spouse, suggests that delay is not supportive of the Former Spouse.

In the Third Federal Circuit, the Files decision controls. Attorney failure to understand Files and its ramifications and to continue to argue for a Former Spouse Survivor Annuity evidences failure to understand the meaning of Files. By application of the Files/Separate Interest format, the property interest of the Alternate Payee is assured and the debate over allocation the cost of a Former Spouse Survivor Annuity is ended.

For drafting support regarding Files and "Separate Interest" Orders, consult TROYAN.

¹ Files v. Exxon, 428 F.3d 478, May 11, 2005.

Please visit www.TroyanLaw.com for additional learning tools.