

**Dividing Retirement Assets:  
Information Every Attorney Should  
Gather Before  
Settling or Trying a Divorce Case**

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# **Emily W. McBurney**

Kegel McBurney, LLC

3565 Piedmont Road

Two Piedmont Center, Suite 735

Atlanta, GA 30305

(404) 228-0556

[Emily@kegelmcburney.com](mailto:Emily@kegelmcburney.com)



Kegel McBurney LLC

# (1) What kind of retirement assets are involved?

- Qualified vs. Non-Qualified Plans
- Defined Contribution (401(k))
- Defined Benefit (Pension)
- IRA v. 401(k)
- Hybrid
- Government: Federal Civil Service  
Military  
State and Local

# Qualified vs. Non-Qualified Plans

## Qualified Plans

**Examples:**

**401(k) Plan**

**Traditional Pension**

- Protected under federal law – ERISA
- Benefits subject to QDRO
- Benefits protected in the event of the employer's bankruptcy

## Non-Qualified Plans

**Examples:**

**SERP**

**Supplemental Plan**

**Excess Benefit Plan**

- Not protected under federal law – employer has discretion
- Tied to continued employment
- Rarely divisible or transferable in the event of divorce
- Benefits are unsecured and generally forfeited in employer bankruptcy

# Defined Contribution vs. Defined Benefit

## Defined Contribution

- Most common example: **401(k)**
- Defined = amount going into account (“contribution”)
- Funds are in an individual account for the employee
- Funds fluctuate with the market
- Benefits are usually payable immediately with QDRO

## Defined Benefit

- Most common example: **Pension**
- Defined = amount coming out of account at retirement (“benefit”)
- Funds are in a trust fund for all participants
- Not subject to market forces
- Benefits may not be payable until retirement age

# IRA vs. 401(k)

## IRA

- Not a qualified plan; NO QDRO should be required
- Divorce Decree, Settlement Agreement, and Letters of Instruction should suffice
- Generally will NOT make calculations – specify exact amount to be transferred
- Account holder must initiate
- Eligible for tax-free rollover, but NOT a cash distribution without penalty

## 401(k)

- Qualified plan; QDRO required for transfer of funds to non-employee
- Most Plan Administrators will calculate earnings and losses, etc.
- Either party can initiate QDRO
- Eligible for tax-free rollover, AND cash distribution without 10% penalty

# Hybrid Plans

- Some plans, such as Cash Balance Plans, are hybrids and contain elements of both defined contribution and defined benefit plans.

# Government Plans

- Federal Civil Service: Divisible, but complex – requires careful handling. (FERS, CSRS, TSP)
- Military: Divisible, but complex – requires even more careful handling!
- State and Local: Most state and local government retirement plans in Georgia are NOT divisible by QDRO.



## **(2) What information can be obtained from account statements?**

- Legal name of Plan – identifies the type of Plan
- Existence of loans
- Vested vs. Non-vested – the transferable account balance may be smaller than it appears!
- Benefit Estimates (defined benefit plans) - explains form and timing of future benefits

### **(3) What information can be obtained from the employer *or* Plan Administrator?**

- Contact information for Plan Administrator
- QDRO Procedures and Model Orders
- Disclosure of QDRO Processing/Administrative fees
- Summary Plan Description

# **(4) What questions should be asked of the Plan Administrator of a defined contribution plan in advance?**

- Does the Plan permit immediate lump sum rollovers or cash distributions?
- Will the Plan Administrator calculate earnings and losses from a specific date forward?
- Are loans treated as an asset of the account?
- Are there any restrictions on the funds (particularly with 457 and 403(b) plans)?

# **(5) What questions should be asked of the Plan Administrator of a defined benefit plan in advance?**

- Does the Plan permit “Separate Interest” QDROs?
- What is the “Earliest Retirement Date” under the Plan?
- What is the “Normal Retirement Date” under the Plan?

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