



# Being Mindful in Divorce

*Helping to create the life you choose*

## 5 Tips for making a 401K Division successful in divorce

Specificity is **KING!** Questions and tips to help ensure the bases are covered.

**1. Was part of the [401\(k\)](#) earned before marriage (separate property)?**

If so, just taking the starting balance of the 401K at the beginning of the marriage and designating that “separate property”, or subtracting that beginning balance from the ending balance at date of separation to determine the marital portion is not always enough. As marital deposits are added to the account (and exceed any marital withdrawals), the separate property portion actually decreases. You could wind up awarding more in separate property and reduce the marital estate to be divided. So ensure all (as many as possible) deposits and withdrawals after marriage are recorded as part of the analysis. A CDFA ([CERTIFIED Divorce Financial Analyst](#)) can help you with this.

**2. Is the marital portion set on a set “percentage” or a “fixed dollar value”? Does it specify what date will be used for the valuation; “date of separation” or “date the judgement for divorce is signed”?**

Because market conditions can change rapidly, Ensure the settlement specifies a percentage of the total account value or of each position in the account to be divided, not a fixed dollar amount as a specific date (date of separation” or “date the judgement for divorce is signed”). If for example, an agreement called for one spouse to give the other “\$50K of the 401k”, and it was valued at 100K on a specific date, or for just” 50K”. Effectively, “attempting to divide” the account 50/50. Well if the market goes up and the account value is greater than \$100K on the date of the division, the non-employee ex-spouse will receive less than the 50% intended by the agreement. Conversely, if the market went down, the non-employee ex-spouse will receive more than the 50% intended.

**3. Has the [qualified domestic relations order \(QDRO\)](#) be drafted and presented to the employee spouse’s 401(k) [plan administrator \(TPA\)](#) for approval BEFORE it is presented to the judge for sign-off?**

Do your due diligence!

A QDRO is a separate document from the divorce settlement and must be created to divide a 401(K). Typically a Family Law attorney will not handle this as it is a law specialty. Have the QRDO drafted, and submitted to the plan administrator for review BEFORE your divorce settlement has been submitted to the court for approval. If the QDRO has not at least been submitted for approval to the plan administrator before your settlement, and it is subsequently denied by the plan because it is not in compliance with the plan rules, you are out of luck because your Divorce settlement cannot be rewritten.



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The 401k plan rules are governed by the [SPD \(summary plan document\)](#), and the SPD NOT the QDRO dictates the division of the 401K. The plan has the final say. Without this preliminary review, you could be cutting yourself out of the distribution of assets you are rightly entitled to under your agreed upon divorce settlement because you did not ensure our QDRO language complied with the plan rules.

**4. Does the agreement state what firm will be used for the QDRO drafting to divide the 401(K)? Does it specify who will pay the drafting & execution of the QDRO fees – as these are 2 different things?**

If costs are an issue, and even when they are not, this could be a bone of contention. You want to ensure the documents can be drawn up and paid for and not hold up the asset division process.

Although there may be a fee for processing the QDRO with the plan administrator, it may be small compared to what you will lose if the assets cannot be divided. Contact the 401K plan administrator or your spouse's Human Resources ASAP department to understand how to process the QDRO.

**5. Submit the QDRO to the TPA for execution and division as soon as the divorce is finalized.**

Don't wait. Paperwork can be lost or forgotten. It is not uncommon for plan administrators to change and there may be no record of your paperwork or copies on file.

Don't procrastinate; your attorney does not help you. or execute this for you. The engagement is over. For the most part, this falls on you. Any chance of help (which will be billable to your attorney) typically needs to happen before the divorce is finalized/signed.

What if your ex-spouse dies? The plan will follow the beneficiary paper on file and the new beneficiary gets 401K and you may be out of luck... as the division has not taken place. This can be additional cost and time to get your assets.

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