

# 401(k) Retirement Accounts In Texas Divorces

*“A House Divided” Property Division Seminar - April 29, 2014*

by Greg Enos

Retirement accounts, including the most common 401(k) accounts, can be divided in Texas divorces. A 401(k) account is a type of retirement savings account which takes its name from subsection 401(k) of the Internal Revenue Code, Title 26 United States Code Sec. 401(k). 401(k) plans are "defined contribution plans" with annual contributions limited currently to \$17,000. Contributions are "tax-deferred"—deducted from paychecks before taxes and then taxed when a withdrawal is made from the 401(k) account. An extra 10% penalty is applied to any withdrawals before age 59.5. Depending on the employer's program, part of the employee's contribution may be matched by the employer. Many 401k plans allow employees to make loans from their accounts at low interest rates which are repaid by payroll deductions. Each employee gets to decide how his or her 401(k) account is invested depending on the options offered by the particular plan. Most 401(k) accounts are invested in cash (money market accounts) and mutual funds, but some are invested in individual stocks, often the shares of the employer corporation.

Many attorneys and some judges do not understand some of the basic legal principles involved in dividing 401(k) accounts in divorces. This article addresses the five most common questions that arise in divorces regarding 401(k) accounts:

1. What is the proper method to determine how much of a 401(k) account is community property and how much is separate property?
2. Should the value of a 401(k) account be reduced because it has not yet been taxed?
3. How does the attorney show a 401(k) loan on the community property spreadsheet?
4. What is the correct way to word a settlement agreement that divides a 401(k) account?
5. What are the procedures and tax implications for dividing a 401(k) account in a divorce?

## Characterizing a 401k Account

Determining how much of an employee's 401(k) account is community property or the spouse's separate property can be an important issue in a divorce. Older appellate cases say that the separate property portion of a 401(k) account is calculated by subtracting the value in the account at the time of marriage from the value of the account at the time of divorce:

The proper value of a defined contribution plan, on the other hand, is not difficult to determine. An employee participating in a defined contribution has a separate account similar to a savings account into which the employee and employer make contributions. The value of this account can be readily ascertained at any time by simply looking at the account. Thus, in order to determine the community interest in a defined contribution plan, courts subtract the value of the plan at the time of marriage from the value of the plan at the time of divorce.

*Smith v. Smith*, 22 S.W.3d 140, 148-9 (Tex. App. - Houston [14th Dist. 2000, no pet.).

A few brilliant Texas lawyers criticized this simplistic approach and pointed out that it could easily arrive

at an incorrect result. See Mike Gregory, "Principles of Characterizing and Tracing," *2002 Advanced Family Law Course*, Chapter 17, and Dan Fowler and Jim Wingate, "Characterization of Retirement Assets: Divestiture of Separate Property Is Alive and Well in Texas," *Texas Bar Journal* (July 2002). Here is a simple example of the point these lawyers made:

At marriage, the 401(k) account contains:

Cash:	\$10,000.00	
Stocks:	<u>\$30,000.00</u>	(1,000 shares at \$30 per share)
Total	\$40,000.00	

At divorce, the 401(k) account contains:

Cash:	\$15,000.00	
Stocks	<u>\$50,000.00</u>	(Same 1,000 shares now at \$50 per share)
Total	\$65,000.00	

The subtraction method would lead to the conclusion that \$40,000.00 is separate property and \$25,000 is community property (\$65,000 at divorce minus \$40,000 at marriage). However, the account still holds the same 1,000 shares that have gone up in value. Under normal characterization rules, separate property stock that increases in value is still all separate property. *Bakken v. Bakken*, 503 S.W.2d 315, 317-8 (Tex. App. - Dallas 1973, no writ). Thus, the real result should be that \$60,000 is separate property and only \$5,000 is community property. Applying the subtraction method would rob one spouse of \$20,000 of his separate property in violation of the Texas Constitution.

Partially in response to these criticisms of the subtraction method, the Texas Legislature in 2005 added Sec. 3.007(c) to the Texas Family Code, which states:

*The separate property interest of a spouse in a defined contribution retirement plan may be traced using the tracing and characterization principles that apply to a nonretirement asset.*

In other words, Sec. 3.007(c) says that divorce courts may apply the usual rules for characterization and tracing to 401(k) accounts, such as the doctrine of inception of title, community out first rule, etc. So, funds added to the 401(k) account during the marriage through employee contributions, employer matches, interest and dividends would be community property. Appreciation in value of stock shares or mutual fund units owned before marriage would be separate property.

Depending on what the 401(k) account is invested in and what sort of transactions have taken place, it will usually be necessary to hire an expert to trace the 401(k) account to prove what is separate and what is community property. However, there are still recent appellate cases which apply the subtraction method to 401(k) accounts even after the adoption of Sec. 3.007(c) in 2005. e.g., *In re Marriage of Santopadre*, No. 05-07-00027-CV (Tex. App. - Dallas 8/19/08, no pet.)(mem. op.).

## **The 401(k) Account Balance Should Not Be Reduced Because of Taxes in Calculating the Value of the Account (Usually)**

In a divorce, the trial court usually should not reduce the value of a 401(k) plan (or other pre-tax retirement account) because the asset has not yet been taxed. When a worker and his employer contribute to the worker's 401(k) retirement account, the contributions are not taxed. The money is invested and only when the worker makes a withdrawal are the funds taxed. Under current law, 401(k) funds are subject to an additional 10% penalty if withdrawn before age 59.5.

Texas Family Code Sec. 7.008 states:

7.008. CONSIDERATION OF TAXES. In ordering the division of the estate of the parties to a suit for dissolution of a marriage, the court may consider:

- (1) whether a specific asset will be subject to taxation; and
- (2) if the asset will be subject to taxation, when the tax will be required to be paid.

Sec. 7.008 does not say a court can or should reduce an asset's value because it is subject to taxation. Sec. 7.008 only says a court may consider if an asset is subject to taxation and when the taxes would be due. In the case of a 401(k), the funds are taxed only when withdrawals are made. One idea behind 401(k) accounts was that retirees receiving 401(k) withdrawals would be paying a lower tax rate because they earn less in retirement. A 58 year old man who is awarded half of his wife's 401(k) pays no taxes at the time of divorce. Years later, when he starts to withdraw that money, he would pay taxes, but presumably at a lower tax rate than he pays now. Of course, tax rates change and there is no way of knowing when the spouse would withdraw the 401(k) funds or what tax rate he or she would pay then. A husband who in 2012 earned \$170,000 and was in the 28% tax bracket may not be in the 28% tax bracket when he is 65 in 14 years. But, he might not even start withdrawing money until he is 70 (mandatory minimum withdrawals are required at age 70.5). At that age, the husband may well be in the 15% tax bracket because he earns so little in retirement. How could the trial judge possibly know now what tax rate to apply to the 401(k) balance or when it would be withdrawn?

It seems to me that the best approach is to do what the vast majority of divorce lawyers and judges do – consider the entire 401(k) balance and do not reduce it by some speculative income tax rate. The only exception should be a case where you know the spouse must cash in the 401(k) immediately upon divorce, for example to pay off the mortgage on a house she cannot otherwise afford. If the divorce occurs in 2013 and the wife intends to withdraw the \$62,000 in 401(k) funds she is to be awarded that year, the divorce judge will know her tax rate under current law and the judge will know the wife is not really getting \$62,000.

This does not mean that a divorce judge cannot consider tax implications in determining a fair and just division of the community property (or in comparing the husband's separate property to the wife's separate property).

Consider this example: the community estate consists of a checking account, a 401(k) account and a truck.

*Scenario 1*

<u>Asset</u>	<u>Value</u>
Checking Account	\$22,000.00
401(k) account	\$30,000.00 (balance shown on 401(k) statement)
Ford F150	<u>\$ 8,000.00</u>
Total	\$60,000.00

*Scenario 2*

<u>Asset</u>	<u>Value</u>
Checking Account	\$22,000.00
401(k) account	\$30,000.00
Less 25% tax	(\$7,500.00)
Less 10% penalty	(\$3,000.00)
Ford F150	<u>\$ 8,000.00</u>
Total	\$49,500.00

Scenario 1 is the analysis that should be used in the vast majority of divorces. Scenario 2 would be appropriate only if it was very certain the 401(k) would be cashed in right after divorce. Otherwise, the trial court would have no way of knowing when the funds would be withdrawn or what tax rate would be owed at the time of withdrawal.

However, Sec. 7.08 says the trial court may consider the fact that an asset is subject to taxation. In this example, if the husband were awarded the checking account and the truck (total value \$30,000) and the wife were awarded the 401(k) (current statement value \$30,000), would it be a 50-50 division? The checking account and the truck are after taxes and the 401(k) is before taxes. A trial judge could never exactly calculate what taxes will eventually be paid on the 401(k), but she might reasonably say this is not really a 50-50 split. So, the judge might well decide it would be more fair to split both the checking account and the 401(k), that way each spouse would be awarded some before tax dollars that can be spent now without any tax consequences.

### **How To Show 401(k) Loans On The Property Division Spreadsheet**

Most 401(k) savings plans allow participants to make loans to themselves. The loan is repaid to the participant's account with interest via paycheck deduction. If the participant leaves employment before repaying the loan, it is then considered a taxable withdrawal and a 1099 is sent to the participant. The question presented for the divorce attorney is how to show the 401(k) loan on the community property spreadsheet?

The statements from 401(k) plans often add to the confusion because the statements list an account balance and a loan balance. However, the balance of the employee's 401(k) plan is the amount he or she actually has in the account and does not include the amount of the loan.

One problem attorneys encounter is that 401(k) plans use different formats for their statements. Here is an example of a very clear 401(k) statement printed by the employee from the Internet:

<b>AT&amp;T RETIREMENT SAVINGS PLAN (74375)</b>		<h2>Summary</h2>	
View	Account:	<b>AT&amp;T RSP (74375)</b>	<input type="button" value="v"/>
Summary	Data as of 09/12/2012		
Investment Choices and Research	<b>Current Balance</b>	<b>\$219,093.66</b>	
Transaction History	<b>Vested Balance</b>	<b>\$219,093.66</b>	
Online Statement	<b>Outstanding Loan Balance</b>	<b>\$30,000.00</b>	
Plan Information and Documents	This amount is not included in your current balance. <a href="#">View existing loan(s)</a>		
Act			

*Note: In most 401(k) plans, all funds are immediately vested, so the “vested amount” is usually the same as the “current balance” (also called “closing balance” or “ending balance” in some statements).*

This employee has \$219,093.66 in his 401(k) and owes himself a \$30,000.00 loan. The amount he owes himself is an asset (a receivable) and the fact he owes the loan also makes it a debt to list (a debt we know will go under his column since he is required to pay back the loan through paycheck deductions). So, the property division spreadsheet should look like this:

Property or Debt	Value	Husband	Wife
AT&T Retirement Savings Plan	\$219,093.66	\$119,093.66	\$100,000.00
AT&T Retirement Savings Plan loan - debt	(\$30,000.00)	(\$30,000.00)	
AT&T Retirement Savings Plan loan - receivable	\$30,000.00	\$30,000.00	

Some lawyers make the mistake of deducting the loan balance from the current or closing balance, but that is not what an 401(k) plan administrator would tell you is the actual balance in the account. Unlike a loan owed to a bank or credit card, a 401(k) participant owes a 401(k) loan to herself. Thus, a 401(k) loan is like a loan owed to a credit union (a debt) and a receivable like a loan owed to the employee by his uncle (an asset).

**The correct balance to show for this 401(k) is the current balance of \$219,093.66.** So, to show this 401(k) account on a property division spreadsheet, you need to list the 401(k) balance as an asset and then account for the loan. Since the loan is both an asset and debt (plus and minus) of the same amount, the actual net value of the loan is zero. However, the loan should be listed to give the judge a complete picture of the community estate.

A somewhat confusing 401(k) statement involved in a recent divorce case of mine showed:



THE TRUSTEES OF CARPET GIANT, INC.  
401(K) PROFIT SHARING PLAN

Contract Number: 15373

**Retirement Account**

Your retirement account value as of 12/31/2012  
**\$23,968.58**

October 01, 2012 - December 31, 2012

**Your personal rate of return**

This period	1.95%
For last 12 months	13.21%
Since your account inception (Annualized)	7.09%

**This period**

<b>Beginning balance</b>	<b>\$22,292.51</b>
Money in	
Employee money	1,231.16
Net change*	444.91
<b>Ending balance</b>	<b>\$23,968.58</b>
Outstanding loan balance	3,517.38
<b>Total value including loans</b>	<b>\$27,485.96</b>
<b>Estimated vested balance</b>	<b>\$23,968.58</b>

The amount this employee has in her 401(k) account is \$23,968.58. She also owes herself a loan of \$3,517.38. This statement confusingly adds an extra line called “Total value including loans” which is the amount in the account plus the outstanding loan balance. That is not the correct amount to show on the property division spreadsheet because it ignores the fact that the loan is owed and is a debt.

The proper way to show this loan on the property division spreadsheet is as follows:

Property or Debt	Value	Husband	Wife
Carpet Giant , Inc. 401(k)	\$23,968.58	\$10,000.00	\$13,968.58
Carpet Giant , Inc. 401(k) loan - debt	(\$3,517.38)		(\$3,517.38)
Carpet Giant , Inc. 401(k) loan - receivable	\$3,517.38		\$3,517.38

A really misleading 401(k) statement from Southwest Airlines shows the following on the first page of the 401(k) statement:

Portfolio-at-a-Glance	
<b>Beginning Balance</b>	<b>\$148,488.56</b>
Money In	1,975.42
Money Out	(5.87)
Investment Gain/(Loss)	(5,611.93)
<b>Ending Balance</b>	<b>\$144,846.18</b>
Vested Balance	\$144,846.18

If you only looked at the first page and did not know there was an outstanding loan, you would probably list the Ending Balance of \$144,846.18 as the 401(k) balance on your spreadsheet. However, the second page of this statement which shows details for that month shows:

Your Investment Summary						
Asset Class	Fund Name	Number of Shares/Options	Share Price	Ending Balance	Investment Gain/(Loss)	
<b>89.97% Stocks</b>						
<b>89.97% U.S. Stocks</b>						
28.52%	Dodge & Cox Stock	373.8862	110.47	41,303.20	(1,228.89)	
31.01%	Vngrd Ist Ix-Ist Pls	360.0737	124.75	44,919.19	(1,198.01)	
30.44%	Harbor Cap App-Inst	1,077.4512	40.92	44,089.31	(3,185.03)	
<b>1.73% Other</b>						
1.73%	Unfunded Profit Shar	2,501.0000	1.00	2,501.00	0.00	
<b>8.30% Loans</b>						
8.30%	Loan	N/A	N/A	12,033.48	N/A	
<b>Ending Balance</b>				<b>144,846.18</b>	<b>(5,611.93)</b>	

So, the reality is that the \$144,846.18 shown as the “Ending Balance” includes a 401(k) loan owed of \$12,033.48. You need to pull out a calculator and determine that the actual balance is **\$132,812.70** (\$144,846.18 - \$12,033.48). The lesson from this statement is to carefully check to see if the Ending Balance does or does not include any loans owed. This Southwest Airlines 401(k) should be shown on the property spreadsheet as follows:

Property or Debt	Value	Husband	Wife
Southwest Airlines 401(k)	\$132,812.70	\$32,000.00	\$100,812.70
Southwest Airlines 401(k) loan - debt	(\$12,033.48)		(\$12,033.48)
Southwest Airlines 401(k) loan - receivable	\$12,033.48		\$12,033.48

The inconsistency in 401(k) formats can be maddening for a divorce lawyer. It is imperative that the attorney carefully examine the statement and not just the summary on the front page to determine if there is an outstanding 401(k) loan and, if there is a loan, to determine whether the “Ending Balance” shown on the statement includes the loan or not. On the property division spreadsheet, the loan is shown as a debt and receivable and always goes in the column of the employee because he or she will be the one who must pay

the loan back through payroll deduction.

So, what if the employee is fired or laid off or quits and defaults on the 401(k) loan? The 401(k) loan cannot be repaid via payroll deduction so the plan declares the loan to be a withdrawal and sends a 1099 form to the employee who must pay income tax and the 10% penalty on the amount of the unpaid loan. The loan itself is wiped off the books and is no longer a receivable or a debt. Then, the only debt to show on the property division spreadsheet is the income tax liability.

## **How to Word the Settlement Agreement When Dividing a 401(k) Account**

Weeks and often months can pass between the time a divorce case is settled and the time a plan administrator actually divides a 401(k) account. In the meantime, the value of the account may go up or down depending on the stock market and the employee and employer will continue to make contributions. It is very important that the settlement agreement accurately and specifically describe how much of the 401(k) is being awarded. Correct wording of a settlement agreement will prevent disagreements when it is time to enter the divorce decree or Qualified Domestic Relations Order (QDRO).

The language of settlement agreements is much more likely to cause problems than the wording of divorce decrees because most attorneys use the divorce decree form from the Family Law Practice Manual, which addresses most of the following concerns. Settlement agreements are usually more brief and informal and detailed forms are seldom used.

If a 401(k) account is being divided, it must be clear whether the total balance of the account is being divided or whether only the community portion is being divided. Wording options include:

Wife shall receive 32.5% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

Wife shall receive 32.5% of the community portion of Husband's Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney. The parties stipulate that the separate property portion of Husband's Acme Oil Savings Plan is \$102,340.00 [OR: The Parties stipulate that the community portion of Husband's Acme Oil Savings Plan is \$88,712.00]

The agreement may divide a 401(k) account based on percentages or on specific dollar amounts, such as:

Wife shall receive 32.5% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

Wife shall receive \$22,500.00 of Husband's Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.



Wife shall receive exactly \$22,500.00 of Husband's Acme Oil Savings Plan (401(k)) as of April 10, 2013, which amount shall not be adjusted for investment earnings and/or losses from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

The settlement agreement must say what the date of division is. The account could be divided as of the date of the mediation, the date the divorce is granted or the date the divorce decree is signed.

Wife shall receive 50% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

Wife shall receive 50% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of the date of divorce, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

Wife shall receive 50% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of the date the Final Decree of Divorce is entered (signed by the judge), including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

The settlement agreement must specify how decreases and increases in the account should be handled. Language choices include:

Wife shall receive 50% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of April 10, 2013, including investment earnings and/or losses on that amount from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

Wife shall receive 50% of Husband's total account balance in Acme Oil Savings Plan (401(k)) as of April 10, 2013, which amount shall not be adjusted for investment earnings and/or losses from that date until the date the funds are completely distributed to Wife, as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney.

If there are any outstanding 401(k) loans, it is usually wise to add this language:

...Such total account balance shall be determined without regard to any outstanding loan owed the plan by the plan participant, meaning the total plan balance shall not be reduced by the amount of any outstanding loans. Husband shall be solely liable for any loans owed to the plan.

Finally, the settlement agreement should specify which party is responsible for drafting the QDRO.

...., as set forth in a Qualified Domestic Relations Order to be drafted by Wife's attorney

A wise attorney will educate his or her client before mediation or settlement on how 401(k) plans are characterized and valued and divided. The client needs to consider his or her need for after-tax cash now versus tax deferred retirement in formulating a settlement strategy. Most clients benefit from consulting a

financial planner before settling.

Each client needs to understand the above options for dividing a 401(k) and what the implications are. For example, a client with a specific, immediate need for cash might not trust stock market fluctuations and would want a specific dollar amount without any adjustments for market losses or gains. Every client must understand what the QDRO process is, how long it will take and how much it will cost.

It is vital to obtain the most recent 401(k) statement or a current Internet printout from the plan just prior to mediation or settlement conference.

A fill-in-the-blanks form which mediators might use for agreements that divide 401(k) plans might look like this:

1. \_\_\_ Husband \_\_\_ Wife is awarded the following portion of his/her spouse's 401(k) plan account in the \_\_\_\_\_ [full name of plan]:

[check one of the following]

\_\_\_ % as of the following date: \_\_\_\_\_  
(Specific date, date of divorce, or date of entry)

The above percentage is of: \_\_\_\_\_ the total account balance  
OR  
\_\_\_\_\_ the community portion of the account, which the parties stipulate is \$ \_\_\_\_\_  
(or the parties stipulate that the separate property portion of the plan account is \$ \_\_\_\_\_)

Such total account balance shall be determined without regard to any outstanding loan owed the plan by the plan participant, meaning the total plan balance shall not be reduced by the amount of any outstanding loans. The plan participant shall be solely liable for any loans owed to the plan.

OR

\_\_\_ \$ \_\_\_\_\_ as of the following date: \_\_\_\_\_  
(Specific date, date of divorce, or date of entry)

2. The above percent award or specific dollar award [check one]:

\_\_\_ shall include investment earnings and/or losses on that amount from that date until the date the funds are completely distributed

OR

\_\_\_ shall not be adjusted for investment earnings and/or losses

3. The QDRO shall be drafted by \_\_\_\_\_' s attorney.

## Procedures and Tax Implications for Dividing a 401(k) Account in a Divorce

There are no tax consequences if a 401(k) account is divided as part of a divorce. The amount awarded to the other spouse is segregated into a separate retirement account in that spouse's name or more often transferred to an Individual Retirement Account in that spouse's name.

The attorney who represents the spouse who is to receive part or all of the other spouse's 401(k) account should start early on in the case to obtain the following information:

- Employee's full name, birth date and social security number.
- The actual full name of the plan. It is not the "Exxon 401k" but rather the "ExxonMobil Savings Plan."
- The name, address, phone number and fax number for the plan administrator. I strongly recommend that you make a few calls to find out the name, direct phone number and e-mail address for the person who actually handles QDRO's for the plan.
- If the plan uses a subcontractor to handle QDRO's, you need the contact information for that company.
- The employee's most recent 401(k) statement from the plan.
- A copy of the plan's procedures for QDRO's. You should find out if the administrator will pre-approve QDRO's.
- Any forms your client must fill out in order to get her portion of the 401(k) transferred to an account in her name.
- Any model QDRO which the plan recommends (they will usually e-mail it to you in Word format).

For most company's 401(k) plans, almost all of the above information is available on the Internet. You do not need an authorization signed by the employee to get the contact information for the plan administrator, the plan's QDRO procedures or its model QDRO. Form 25-1 in the Texas Family Law Practice Manual is a letter to the Plan Administrator, but it requests too much information and asks for documents which are not needed to prepare a QDRO (you do not really need the full, formal plan documents or its summary annual report to draft a QDRO). The QDRO Fact sheet (Form 25-2) suggested by the TFLPM is likewise too detailed and frankly most plan administrators will not go to the trouble of filling out the 70+ questions in the form. I recommend a letter or facsimile to the plan administrator that is short and to the point, like this:

Re: Plan: \_\_\_\_\_  
Employer: \_\_\_\_\_ Employee: \_\_\_\_\_  
Soc. Sec. No.: \_\_\_\_\_ Date of birth: \_\_\_\_\_

Dear Plan Administrator:

I represent, \_\_\_\_, the spouse of the above employee in a divorce lawsuit. We anticipate that a portion of the above 401(k) will be divided as part of the final divorce settlement or decree. I request the following general information regarding this plan to assist me in preparing a Qualified Domestic Relations Order:

1. A copy of the plan's procedures for QDRO's and specifically details on your process for pre-approval of QDRO's.
2. Any model QDRO which the plan recommends (I request that you e-mail it to me in Word format at [greg@enoslaw.com](mailto:greg@enoslaw.com)).
3. Any forms which my client, the alternate payee, must fill out in order to get her portion of the 401(k) transferred to an account in her name.

I thank you in advance for your cooperation. The attorney for the above employee is Ms. Jan Green,

14203 Lannister Way, Houston, Texas 77006, 713-230-0090. A copy of this letter is being sent to that attorney.

Sincerely,  
Greg Enos

Once a settlement is reached regarding the division of the 401(k) account(or you receive the judge's ruling dividing the account), work on drafting the QDRO should begin at the same time the divorce decree is drafted. The basic steps for dividing a 401(k) account once a settlement is reached are:

1. Obtain the above plan information, including the plan's procedures for handling QDRO's and any model QDRO the plan recommends. Model QDRO's are helpful but the careful attorney must realize: (a) the plan will accept variations to its model QDRO, and (b) most model QDRO's are not drafted to protect the non-employee spouse.
2. Draft the QDRO and send it to opposing counsel for approval and signature.
3. If the plan will pre-approve a QDRO, send the QDRO to the plan for pre-approval (but only do so after the opposing counsel has approved it otherwise you might be wasting your time).
4. Once the QDRO is approved by the plan, or if this particular plan does not pre-approve QDRO's, submit the QDRO to the court for signature. The QDRO should be signed by the attorneys and preferably the parties. No hearing is usually needed if the QDRO has been signed by all attorneys.
5. Once the QDRO is signed by the judge, obtain a certified copy and send it to the plan administrator.
6. Follow-up with the plan administrator until you have confirmation that the QDRO has been approved and your client has received her portion of the 401(k) in his or her own account.