

Guardian ad Litem vs. Social Investigator

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| <ul style="list-style-type: none"> • Governed by Fla. Stat. §61.401, <i>et al.</i> • Serves to protect the best interest of the child as an investigator or evaluator. GAL's role is to "discover, analyze, and communicate facts to the court..." <i>Perez v. Perez</i>, 769 So. 2d 389, 396 (Fla. 3d DCA 1999) <ul style="list-style-type: none"> ○ GAL is <u>not</u> the child's attorney and <u>does not necessarily</u> represent the child's stated interest. ○ Contrast this role with an Attorney ad Litem, who is the child's attorney, responsible for representing the child's stated interest. • <u>May</u> be appointed in actions involving the creation or modification of a parenting plan. • <u>Shall</u> be appointed in actions involving well-founded allegations child abuse so long as allegations are verified. • Once appointed, the GAL is a <u>party</u> to the case. <ul style="list-style-type: none"> ○ But not a "party" in the traditional sense of the word. <i>Id.</i> at 394. • Persons certified through the GAL program, certified by a legal aid organization, or an attorney in good standing are qualified. <ul style="list-style-type: none"> ○ <u>Does not</u> serve in this role as a qualified expert or attorney. ○ Even though a GAL may be an attorney, he/she does <u>not</u> act as an attorney in this role, and although a "party" to a proceeding, is not a participant wherein he/she can call witnesses, etc. <i>Id.</i> • GAL <u>not</u> subject to the same discovery requirements as a litigant. <i>Metcalfe v. Metcalf</i>, 655 So. 2d 1251, 1252 (overruled on other grounds). <ul style="list-style-type: none"> ○ Therefore, the GAL has a strict duty to maintain all information received as confidential unless the GAL includes the same in his/her report. • <u>Files</u> written report/recommendation with the court. <ul style="list-style-type: none"> ○ Generally, contains hearsay. ○ A filed report <u>does not</u> place the report in evidence and therefore, hearsay objections may apply. | <ul style="list-style-type: none"> • Governed by Fla. Stat. §61.20(2) and Fla. Fam. L.R.P. 12.364 • Social Investigators investigate and make recommendations concerning the best interest of the child. <ul style="list-style-type: none"> ○ "When the issue of timesharing, parental responsibility..., or a parenting plan for a child is in controversy, the court... <u>may</u> appoint an investigator..." • Once the investigation is complete, the social investigator "<u>shall</u> prepare a written study concerning the issues relative to the best interest of the child along with the evaluator's recommendations." Fla. Fam. L.R.P. 12.364(e). <ul style="list-style-type: none"> ○ The investigator <u>must</u> provide a copy of the written study to all parties (including a GAL, if appointed) and <u>shall</u> likewise furnish a <u>copy</u> to the court. ○ Unlike a GAL report, the investigator's report <u>shall not</u> be filed. ○ The study <u>shall</u> be provided 30-days in advance of any hearing at which the Court is to consider the written report. Fla. Fam. L.R.P. 12.364(e). • The parties <u>may</u> require the social investigator to testify in the matter concerning his/her report. <ul style="list-style-type: none"> ○ Unlike GAL reports, the technical rules of evidence, such as hearsay, <u>do not</u> exclude the report from consideration. ○ This is because the investigator is deemed an expert as they only qualify for appointment as "qualified staff of the court, a psychologist, or a LCSW/LCHC." ○ GAL's are <u>not</u> deemed experts, hence the technical rules of evidence applying. • Ultimately, in determining the best interest of the child(ren), the Court must consider the totality of the evidence when rendering a decision. <ul style="list-style-type: none"> ○ Regardless of the contents of the study, its admissibility, or the investigator's testimony, the Court is not bound to adopt the recommendations of the investigator. <i>Bailey v. Bailey</i>, 176 So. 3d 344 (Fla. 4th DCA 2015). |
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CHEAT SHEET FOR DIVIDING RETIREMENT ACCOUNTS

***This cheat sheet is broken down into three parts. The first two pages deal with retirement accounts in general, which is part 1. The third page deals with federal civilian employee retirement, which is part 2. The fourth page deals with military retirement plans, which is part 3. This cheat sheet is not intended to constitute legal advice, and if you encounter a retirement plan in one of your cases, we suggest that you contact us immediately to discuss the issues specific to that account.

Definitions:

- **Participant:** The employee/party in whose name the retirement account is maintained
- **Alternate Payee:** The beneficiary of a QDRO or similar order; can be the spouse, former spouse, child or other dependent of the participant
- **Qualified Domestic Relations Order ("QDRO"):** technically an order used to divide an ERISA-based retirement plan, although the term is often used liberally to refer to any order used to direct a retirement plan administrator to pay all or a portion of a participant's benefits to an alternate payee

Step 1. Get the answers to these preliminary questions first:

- 1) Who is the employer who gave the participant a retirement plan?
- 2) What is the name of the plan?
- 3) Has the participant provided a summary plan description and account statement(s)?
- 4) What type of plan is it?
 - a. Defined Contribution (401(k), ESOP, Savings/Investment Plan, Thrift Savings Plan)
 - b. Defined Benefit (traditional or cash balance pension plan)
- 5) What are both parties' full names, dates of birth, addresses, social security numbers, dates of marriage, and dates of employment with companies providing the qualified plans?

Step 2. Valuation:

1) **Defined Contribution Plans:** When valuing defined contribution plans, be very precise as to the date and time at which the account is to be valued; markets fluctuate throughout the day, and values of defined contribution plan accounts can be volatile. The values of these plans often are readily available online or from the plan administrator. Make sure that your client understands that just because they are dealing with a defined contribution plan, that they may not be able to get paid out until sometime in the future if that is what the plan requires.

2) **Defined Benefit Plans:** Sometimes the plan will provide valuations, and that is always the best place to start. This may require a subpoena. However, sometimes you will need independent valuation services, which we provide. You should also understand the following terms:

- a. **Shared Interest:** A valuation of the pension based on the life expectancy of the participant as of a date certain
- b. **Separate Interest:** A valuation of the pension based on the life expectancy of the alternate payee as of a date certain
- c. **Present Value/Lump Sum Estimate:** A valuation of a defined benefit pension plan reduced to a present-day dollar amount, which is typically based on the life expectancy of the participant, prevailing interest rates, and certain other pension factors

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CHEAT SHEET FOR DIVIDING RETIREMENT ACCOUNTS

Step 3. Drafting Settlement Agreements and Final Judgments:

- 1) Pick a valuation/assignment date and specifically state it in your agreement or final judgment
- 2) Provide who should be responsible for obtaining the QDRO (should usually be the alternate payee with a right of reimbursement from the other party for at least half of the fee since the alternate payee generally has more to lose if the QDRO is not entered in a timely manner)
 - a. If it is the participant, give them a deadline subject to a right of the alternate payee to obtain the QDRO if the participant fails to act within the specified timeframe
- 3) Specifically reserve jurisdiction for the Court to enter and enforce QDROs and any other order necessary to effectuate the intent of the parties or the Court with respect to the account
- 4) Defined Contribution Plans: Always address—
 - a. How benefits will be paid: Specify a dollar amount or a percentage of the account as of a certain date
 - b. Passive Earnings and Losses from the valuation/assignment date through the date of segregation (such as market fluctuations, payment of dividends, stock splits, and other economic conditions that are not the result of any action by the parties)
 - c. Effect of loans against the account (they may be marital liabilities)
 - d. Administrative fees charged by the plan (how and by whom they will be paid)
- 5) Defined Benefit Plans: Always address—
 - a. Pre- and post-retirement survivor benefits (unless we expressly advise you that you do not need to do so)
 - b. How the benefits will be paid: shared interest, separate interest, lump sum payout
 - i. Specify a dollar amount or a percentage of the account as of a certain date
 - ii. Using a coverture formula (marital portion) may be advisable, but please consult with us before doing so, since some plans will not honor this language
 - c. Unless we expressly advise otherwise, provide the alternate payee with a pro rata share of any i) cost of living adjustments; ii) economic improvements provided by the plan; and iii) early retirement subsidies and supplements
 - d. You will also want to address what will happen if the pension is converted into a disability benefit (common for government plans), which are generally not divisible by QDRO

Miscellaneous:

- 1) Municipal Pensions (i.e. government pensions) are generally not divisible by QDRO as part of property division, so you will need to make provision for direct payment and the tax effects of any payments when equitably distributing these accounts
- 2) It may take several months for the alternate payee to receive their share of benefits, and they should be advised accordingly
- 3) Non-Attorney QDRO service providers cannot shield an attorney from legal malpractice, so it is best to engage a company or firm that employs attorneys in order to receive the maximum protection from potential liability
- 4) Every plan is different, and dividing them always requires plan-specific information
- 5) Make sure that the person preparing your QDROs is getting the work done timely

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CHEAT SHEET FOR DIVIDING FEDERAL EMPLOYEE RETIREMENT BENEFITS

Definitions:

- **CSRS:** Civil Service Retirement System; the original federal employee annuity, created in 1920, prior to social security; generally only applies to employees who began service prior to 1983; participants in CSRS generally do not participate in social security
- **FERS:** Federal Employees Retirement System; replaced CSRS; consists of a defined benefit annuity, social security, and the thrift savings plan
- **Thrift Savings Plan:** a defined contribution plan; the federal government's equivalent of a 401(k)
- **COAP:** Court Order Acceptable for Processing; the order used to divide CSRS and FERS annuities, and to secure survivor benefits
- **RBCO:** Retirement Benefits Court Order; the order used to divide thrift savings plans
- **OPM:** Office of Personnel Management; the primary administrator of federal government civilian retirement benefits; for most branches of the government, the OPM is the body responsible for receiving and reviewing COAPs

Step 1. Get the answers to these preliminary questions:

- 1) Who is/was the employer? For which branch of the government does/did the employee work?
- 2) When did employment commence? When, if ever, did employment terminate? Were there any gaps in employment?
- 3) Was the employee ever a member of the military? If so, for how long?
- 4) Has the employee commenced benefits under CSRS or FERS? What is the minimum retirement age for the employee?
- 5) In what plan(s) is the employee participating? Annuity? Social Security? Thrift Savings Plan?
- 6) What are both parties' full names, dates of birth, addresses, social security numbers, date of marriage?

Step 2. Valuation and Payout:

- 1) **Thrift Savings Plans:** Be precise as to the date and time at which the account is to be valued as these accounts can be volatile. Be sure to ascertain whether there are any outstanding loans against the TSP.
- 2) **Federal Pensions:** Federal Pensions only provide for a shared interest payment. Thus, a payee spouse cannot receive any benefits until the participant begins receiving benefits.

Step 3. Secure Miscellaneous Benefits:

- 1) **Cost-of-Living Adjustments:** you must state the payee spouse's award as a percentage/formula and not as a dollar amount in order to secure COLAs
- 2) **Survivor Annuity:** available to a payee spouse who has been married to a federal employee for 18 months or more; maximum is 55% under CSRS and 50% under FERS; cost is paid by a reduction of the annuity; if the payee remarries prior to age 55, they lose entitlement to a portion of the survivor annuity
- 3) **Refund of Employee Contributions:** a separated employee can apply for a refund of their contributions prior to commencement of benefits, and this refund is subject to division by the government if such division is properly ordered

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CHEAT SHEET FOR DIVIDING MILITARY RETIREMENT BENEFITS

Definitions:

- **Order for Division of Military Retirement Pay:** the order utilized to effectuate the division of a military member's military pension; under these orders, the maximum payment to a payee spouse is 50% of the member's disposable retired pay (unless there is also a garnishment for support in addition to division, in which case it can be up to 65%)
- **10/10 Rule:** found in 10 U.S.C. 1408(d)(2); states that in order to require payment directly from DFAS to a payee spouse of a portion of a member's military pension *for purposes of property division*, the payee spouse must have been married to the member for ten years while the member was serving 10 years of creditable military service; does not apply to payment for purposes of *support*
- **Thrift Savings Plan:** a defined contribution plan; the military's equivalent of a 401(k)
- **DFAS:** The Defense Finance and Account Service; the primary administrator of federal government military retirement benefits
- **Deemed Election:** a process by which a payee spouse makes direct application for a portion of a survivor benefit plan

Step 1. Get the answers to these preliminary questions:

- 1) For which branch of the military does/did the member work? Is/was the member full-time, or are/were they a reservist?
- 2) On what date did the member commence service? When, if ever, did service terminate? Has the member commenced benefits?
- 3) What is the member's rank? If they are a reservist, how many reservist points have they accrued during the marriage?
- 4) In what plan(s) is the employee participating? Pension? Thrift Savings Plan?
- 5) What are both parties' full names, dates of birth, addresses, social security numbers, date of marriage?

Step 2. Valuation and Payout:

- 1) Generally, it is not possible to say exactly what a member's benefits will be as of his date of retirement while the member is still actively employed by the military; thus, the use of a formula is necessary, although projections under certain assumptions can be made.
- 2) Military pensions only provide for a shared interest payment. Thus, a payee spouse cannot receive benefits until the Member begins receiving benefits.

Step 3. Miscellaneous Benefits:

- 1) **Cost-of-Living Adjustments:** you must state the payee spouse's award as a percentage/formula and not as a dollar amount in order to get COLAs.
- 2) **Survivor Benefit Plan:** cost is paid by a reduction of the annuity; if the payee remarries prior to age 55, they lose entitlement to a portion of the survivor benefit plan; must be secured within one year of the entry of a final judgment or decree
- 3) **Voluntary Separation Incentive/Special Separation Benefits:** incentives for members to retire early
- 4) **Mergers:** if a member who is entitled to a military pension retires or separates and begins working for the federal government as a civilian, the member's entire pension may merge into a civilian pension