

ERISA, REA,
and
THE WACKY WORLD OF
QDROS

by

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I. DEFINITIONS, CITATIONS, AND BACKGROUND

Most private employee-benefit plans, or “pension plans”¹ in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as “ERISA,”² codified at 29 U.S.C. § 1001 *et seq.* The statute was enacted by Congress at about the same time that some states were coming to recognize the importance of pension, retirement, and other deferred benefits in divorce actions.³

The intention of the law was to ensure that employees actually received the deferred benefits that they were promised, due to the perception that there was widespread abuses of employees in the private sector. ERISA and the Internal Revenue Code (“IRC”) are the controlling regulatory bodies of law for most private plans. Those laws, and the regulations of the Department of Labor, IRS, and the Pension Benefit Guaranty Corporation, control nearly all pension, profit sharing, stock bonus, and other retirement plans provided by private industry employers.

Both federal and state courts are “of competent jurisdiction”: Under 29 U.S.C. §§ 1132(e)(1) & 1132(a)(1)(B), state and federal courts have concurrent subject matter jurisdiction over claims to ERISA benefits.⁴

A. The Evolution of ERISA

ERISA provided that pension benefits may not be “assigned or alienated.”⁵ This created a dilemma in jurisdictions recognizing that retirement benefits constituted valuable community or marital property rights. Many courts found a common law exception for domestic relations orders,⁶ but the legal landscape was confused until the passage of the Retirement

¹ A plan providing for retirement benefits or deferred income, extending to or beyond the end date of covered employment. *See* 29 U.S.C. § 1002(2)(A). This includes pension plans, profit sharing plans, “401(k)” plans, and some employee stock ownership plans. It does *not* include any kind of government plans – Civil Service, Military, state or local government, etc. It also does not include certain other types of private-employer benefits, such as severance pay benefits and vacation plans, or IRAs or SEP-IRAs, which are governed by other laws.

² Pub. L. No. 93-406, 88 Stat. 829 (Sept. 2, 1974).

³ *See LeClert v. LeClert*, 453 P.2d 755 (N.M. 1969); *In re Marriage of Fithian*, 517 P.2d 449 (Cal. 1974).

⁴ *See In re Marriage of Oddino*, 939 P.2d 1266 (Cal. 1997).

⁵ 29 U.S.C. § 1056(d)(1); Internal Revenue Code (“IRC”) § 401(a)(13)(A).

⁶ *See, e.g., American Tel. & Tel. Co. v. Merry*, 592 F.2d 118 (2nd Cir. 1979) (alimony order impliedly exempted from ERISA preemption).

Equity Act (“REA”),⁷ which provided that certain domestic relations orders, containing specific terms, must be accepted and honored by ERISA-qualified pension plans.

ERISA is organized into four Titles:

1. **Title I** addresses definitions⁸; reporting and disclosure requirements⁹; minimum participation and vesting standards and the form of benefit payments¹⁰; minimum funding standards¹¹; plan and trust requirements and related fiduciary responsibilities¹²; administration and enforcement, including claims procedures, enforcement, and remedies¹³; and group health plan and COBRA requirements.¹⁴
2. **Title II** addresses amendments to the Internal Revenue Code.¹⁵
3. **Title III** addresses Department of Labor jurisdiction and administrative provisions.¹⁶
4. **Title IV** addresses plan termination insurance and the Pension Benefit Guaranty Corporation.¹⁷

Under the federal ERISA/REA statutory scheme, *any* judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according

⁷ Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984).

⁸ See ERISA § 3 (29 U.S.C. §1002).

⁹ See Part 1, ERISA §§ 101-111 (29 U.S.C. §§ 1021-1031).

¹⁰ See Part 2, ERISA §§ 201- 211 (29 U.S.C. §§ 1051-1061); in particular, see ERISA § 206 (29 U.S.C. § 1056) regarding QDRO rules.

¹¹ See Part 3, ERISA §§ 301-308 (29 U.S.C. §§ 1081-1086).

¹² See Part 4, ERISA §§ 401-414 (29 U.S.C. §§ 1101-1114).

¹³ See Part 5, ERISA §§ 501-515 (29 U.S.C. §§ 1131-1145).

¹⁴ See Part 6, ERISA §§ 601-609 (29 U.S.C. §§ 1161-1169).

¹⁵ ERISA §§ 1001-2008.

¹⁶ ERISA §§ 3001-3043 (29 U.S.C. §§ 1201-1242).

¹⁷ ERISA §§ 4001-4402 (29 U.S.C. §§ 1301-1461).

to local domestic relations law is considered a “domestic relations order” under federal law.¹⁸ It becomes a *Qualified* Domestic Relations Order, or “QDRO,” and must be recognized and enforced by an ERISA-qualified pension plan, when it creates or recognizes one of the listed classes of persons as an “Alternate Payee” with a right to receive all or any portion of the benefits normally payable to a participant in that plan.

Although the term “QDRO” is often used for *all Orders* dividing retirement accounts, as a term of art, is it properly used only in reference to an ERISA plan and private plans which are tax “qualified” under the Internal Revenue Code (“IRC”).¹⁹ Other kinds of retirement benefits have their own specific vocabulary based on their peculiarities and requirements. Those retirement benefits may be distributable by court orders of various types, but not by “QDROs” because they are not subject to QDRO requirements. All that being said, various court orders might, in some instances, be treated as QDROs under the IRC.

There is more to the statutory scheme than just the stream of payments while all parties remain alive. In an effort to protect spouses, Congress made survivorship benefits for spouses *mandatory* in defined benefit plans unless the spouse voluntarily waived such benefits.

Although the rules set up by ERISA\REA permits multiple survivor beneficiaries, the cases discussed below (and many others) make it very apparent that the prospects for and ramifications of serial marriages and multiple former spouses was not thought through, either in 1974, or in 1984. Congress continued to tweak the rules for tax qualification, etc., in a variety of acronym-laden enactments, throughout the 1980s and into the 1990s.

Similarly, serial Congressional enactments made it more and more likely that a Qualified Joint and Survivor Annuity (“QJSA”) would end up being selected for defined benefit plans upon retirement, absent a specific waiver of that form of benefit by the plan participant’s spouse.²⁰ Under a QJSA, all or a portion of the benefit payable to a plan participant during life is automatically payable to the participant’s surviving spouse after the participant’s death. Usually, the sum payable to the survivor is either 50% of the lifetime benefit, or 100% of the

¹⁸ See 29 U.S.C. § 414(p)(1)(B). More specifically, it is a decree, judgment, or other order providing for payment of child support, spousal support, or marital or community property payment to a spouse, former spouse, child, or other dependent of a participant in a qualified retirement plan.

¹⁹ As discussed in another section of these materials, the Nevada Legislature used much of the ERISA terminology when providing for orders distributing benefits under the Nevada State Public Employees Retirement System – a move that has been more confusing than helpful for participants (and some lawyers and judges).

²⁰ See, e.g., Small Business Job Protection Act of 1996, Pub. L. No. 104-188, ___ Stat. ___ (Aug. 20, 1996).

lifetime benefit.²¹ Of course, since all such plans are actuarially adjusted, the larger the projected payout to the survivor, the smaller the lifetime benefit payable to the participant (and former spouse).

B. The Classification of Plans

Generally, ERISA-governed retirement plans come in the two varieties described in the Introduction – defined benefit plans and defined contribution plans. These plans include those from unions, large and small private companies, law firms and other professional enterprises, as well as individual Keogh plans, SIMPLE plans, and simplified employee pensions (SEPs). However, not all retirement benefits are included under the ERISA rules. For example, an IRA, unless it is employer-provided, or is a certain excess benefit plan, falls outside of ERISA.²²

Qualified private plans must honor QDROs which assign all or a portion of a participant’s benefits to a non-employee spouse, child, or other dependent. Different, special rules apply to *non-qualified* plans.

ERISA applies to both *retirement plans* and *welfare plans*; the words indicate the style of benefit. A “retirement plan,” referred to in the rules as an “employee pension benefit plan” or a “pension plan,” is a plan established or maintained by an employer, an employee organization, or both, to the extent that it provides retirement income to employees, or results in a deferral of income by employees for periods extending to the termination of covered employment or beyond.²³

A “welfare plan,” referred to in the rules as an “employee welfare benefit plan” or simply a “welfare plan,” is a plan established or maintained by an employer, an employee organization, or both to provide, for participants or their beneficiaries, any of a variety of benefits, including medical, illness, accident, disability, death, unemployment, and vacation benefits.²⁴

ERISA requires *most* retirement plans to be funded, with the assets held in trust. Such plans, and the related trusts, are subject to the fiduciary responsibility rules of Title I of ERISA, which include numerous rules designed to ensure the fairness of plans and the safety of the promised retirement benefits. Exceptions to these rules are made for some plans, most

²¹ See, e.g., Marvin Snyder, VALUE OF PENSIONS IN DIVORCE (3d. ed., Panel Publishers 1999), at 22.

²² See 29 U.S.C. §§ 1002, 1003(b).

²³ See ERISA §3(2)(A) (29 U.S.C. §1002(2)(A)).

²⁴ See ERISA §3(1) (29 U.S.C. §1002(1)).

notably “Top Hat” plans (unfunded plans of deferred compensation for a select group of management or highly compensated employees),²⁵ unfunded “excess benefit” plans, and government plans. Top Hat plans are subject only to ERISA reporting and disclosure obligations, and claims regulation. Government and unfunded excess benefit plans are exempted from ERISA coverage.

As noted above, every qualified retirement plan can be typed as either a “defined contribution plan” or a “defined benefit plan.” This distinction is important for purposes of QDROs and other retirement benefits orders because the type of plan will affect such considerations as the calculation of the community interest in the benefit, whether it is necessary to deal with survivor provisions, and the timing of the payout. Again, the practitioner should always verify whether an employer offers more than one type of plan, and should be aware that a single plan may be a hybrid of the two types.

1. Characteristics of Defined Contribution Plans

A defined contribution plan is one in which a specified amount is contributed annually by the employer, and sometimes also by the employee, into an individual account and invested on the employee’s behalf. Such plans usually provide a statement of each participant’s account at least annually. Defined contribution plans generally pay lump sums, but they may offer other forms of benefits.

The most common examples of defined contribution plans are: 1) Discretionary profit-sharing plans (with or without an IRC § 401(k) feature); and 2) Formula plans (e.g., money purchase and target benefit pension plans). Other examples are employee stock ownership plans (ESOPs), simplified employee pensions (SEPs), and SIMPLE 401(k) plans. Keogh (HR 10) plans for sole proprietors may be either defined contribution plans or defined benefit plans of any type, except ESOPs. Although SEPs are considered to be defined contribution plans, they are *not* qualified plans under IRC § 401(a) (*see* IRC § 408), and are not subject to the QDRO rules.

After 2002, defined contribution plans (as well as defined benefit plans) may contain one or more deemed IRAs established under IRC § 408(q), which nonetheless presumably must be divided as regular IRAs – not subject to the QDRO rules under IRC § 408(d)(6).²⁶

²⁵ *See, e.g.*, 29 U.S.C. § 1101(a)(1).

²⁶ *See* 29 U.S.C. § 1003(c).

2. Characteristics of Defined Benefit Plans

A defined benefit plan is the “gold watch” styled plan, whereby the recipient receives a flow of benefits, usually monthly, after retirement. The benefit may be ascertained by reference to factors specified in the plan, such as the employee’s age at retirement, years of service at retirement, and highest income level achieved, rather than the value of an individual account.

The “highest income level achieved” is often calculated by reference to the average or highest compensation over a specified period immediately before retirement (*e.g.*, last highest three years). The level of benefits from defined benefit plans, unlike that from defined contribution plans, does not depend on amounts contributed or the performance of investments made by the plan trustee. Defined benefit plans generally do not include an individual account feature.

Employees usually receive annual statements of their promised “accrued benefit” payable at retirement age. Unless subsidized, defined benefits are typically reduced by actuarial factors, if taken before normal retirement age. The accruals to an individual within the plan are based on a formula specific to that plan and are generally expressed as a monthly annuity beginning at an early or normal retirement age. Benefits payable under most defined benefit plans are guaranteed (to the extent funding is available) by the Pension Benefit Guaranty Corporation.

Historically, there have been three types of formulas applied in defined benefit plans to determine the amount of the monthly benefit payment:

1. *Unit benefit formula.* The monthly benefit is determined by multiplying the years of service, the applicable compensation figure, and a factor determined by the employee’s age at retirement.
2. *Career average formula.* The monthly benefit is determined by taking a percentage of each year’s compensation, and then adding the resulting figures.
3. *Fixed dollar formula.* The monthly benefit is determined by multiplying a fixed dollar amount by the years of service.

However, a growing number of private companies are transforming their defined benefit plans into “cash balance plans,” primarily to reduce risks to both the company and the employees if economic conditions make it impossible to honor the terms of the outstanding defined benefit recipients.

Although characterized as defined benefit plans, they have many of the features of defined contribution plans. Under a cash balance plan, the accrued benefit for each employee is converted into a hypothetical lump-sum cash balance specific to that employee. Periodic

contributions to the cash balance account are credited based on a formula specified in the plan, *e.g.*, a percentage of the employee's compensation. Earnings on the resulting balance will usually be deemed to accrue at the long-term treasury bond rate, or some other rate specified in the plan. The employee is guaranteed that rate, regardless of the plan's actual earnings.

Examples of defined benefit plans can be found among federal, state, and private plans, including the Civil Service Retirement System plan (federal), the Nevada Public Employees' Retirement System plan (state), and various employer and union retirement plans (private).

After 2002, defined benefit plans (as well as defined contribution plans) *may* contain one or more deemed IRAs established under IRC § 408(q), which presumably must be divided *as* IRAs (and which are therefore not subject to the QDRO rules) under IRC § 408(d)(6).

C. Internal Revenue Code Governance of Plans

1. Qualified Plans

A qualified plan under the IRC is one that meets the requirements for qualification regarding nondiscrimination, coverage, participation, vesting, contributions, and payment of benefits. A qualified retirement plan enjoys certain favorable tax treatment, primarily a current deduction of the employer's contributions to the plan and a deferral of tax to the employees on the plan benefits until they are actually received.

Most qualified plans are required to contain an anti-alienation provision;²⁷ that was, after all, ERISA's original purpose. QDROs are an allowed exception to such provisions and are binding on qualified plans and on plans that were once qualified, but have been disqualified. Special distribution provisions apply under the IRC to QDRO dispositions from qualified plans.²⁸

Although technically not qualified plans, tax-sheltered annuities and custodial account plans maintained under IRC § 403(b) are also covered by the QDRO rules, including the special rules relating to the taxation of distributions to the alternate payee. In this same category are governmental deferred compensation plans under IRC § 457(b), although the requirements for QDRO eligibility are abbreviated.²⁹ Private IRC § 457(b) plans can distribute under the

²⁷ See IRC § 401(a)(13).

²⁸ See, *e.g.*, IRC § 402(e).

²⁹ IRC § 414(p)(11)-(12).

rules for QDRO taxation; however, it appears that a spousal alternate payee may not be able to qualify for a rollover election.³⁰

2. Non-Qualified Plans

By using a non-qualified plan – for example a plan of deferred compensation that has never met the requirements for achieving qualified status³¹ – an employer may typically provide preferential benefits to executives and certain key employees that cannot be provided under the rules restricting qualified plans. Non-qualified plans are essentially unilateral contracts for the payment of deferred compensation. They are generally unfunded, e.g., no funds are required to be set aside for the payment of benefits into a separate trust that is protected from the employer’s creditors. Although unfunded, non-qualified plans nevertheless can be worth substantial amounts if and when benefits are paid.

Although a judgment in a marital action may award a community interest in benefits under a non-qualified plan to the non-employee spouse, federal law has not expressly extended the QDRO taxation rules to such plans, nor clarified whether QDRO status is required for a state court award of benefits to be enforceable in the face of ERISA’s broad preemption provisions.

Consequently, a non-qualified plan sponsor *may decline* to recognize the non-employee’s interest, leaving the other spouse (and court) with the pre-ERISA remedies of offsets, contempt sanctions, etc. The plan itself must be scrutinized, of course, as how best to deal with it might be set out in its contractual provisions. An attorney for a non-employee spouse with respect to a non-qualified plan might consider exploring approaches to the division of such plans with counsel who specializes in ERISA and other retirement benefits.

Examples of non-qualified plans include the following:

1. Top Hat plans, or supplemental executive retirement plans (SERPs), are unfunded, non-qualified plans used to provide deferred compensation benefits for a select group of management or highly compensated employees.³² A so-called “Rabbi Trust” will typically not cause such plans to be considered “funded” because the trust assets remain subject to the employer’s creditors.
2. Excess benefit plans are plans maintained by the employer solely for the purpose of providing to employees retirement benefits that are in excess of the allowable benefits and contributions for an individual under the limits of IRC § 415 for qualified plans. These plans are not subject to ERISA if unfunded and thus do not involve preemption issues. They need not be limited to executives, but often are so.

³⁰ See IRC §§ 402(e)(1)(A); 414(p)(10)-(11).

³¹ See IRC § 401(a).

³² See ERISA §§ 201(2), 301(a)(3), 401(a)(1) (29 U.S.C. §§ 1051(2), 1081(a)(3), 1101(a)(1)).

D. Survivorship Benefits

As discussed in much greater detail in the death benefits portion of these materials, there has perhaps been more litigation concerning survivorship benefits relating to ERISA-governed retirement benefits than any other aspect of the plans. This section of the materials discusses the options that are available, and what must be done to identify, obtain, and enforce survivorship benefits in ERISA-governed plans.

It is incumbent on the practitioner to be conversant regarding the details of the working spouse's status, in order to determine what tasks are required, or even possible, at the time of divorce.

For example, since retirement options usually need to be selected at the time of retirement, it is important to know during the divorce litigation whether the employee has already retired. If the worker has *not* yet retired, then all options should remain available – whether to divide the retirement interest itself, or just the payment stream, whether a Qualified Joint and Survivor Annuity (“QJSA”) is called for, or should be waived, etc. If the retirement is in pay status, however, then many options are probably foreclosed, since it is not possible to change those options under most ERISA-governed plans (the plan having committed to a payment stream calculated to reflect the actuarial projections of the options selected).

For example, in the common situation of a divorce occurring after the worker had retired, and already selected a QJSA, it is no longer possible to divide the retirement *interest*, providing one pension stream to the worker (as to whom the spouse's continuing life or death would be irrelevant), and another to the spouse (as to whom the worker's continuing life or death would be irrelevant). Rather, counsel would only have the lifetime *benefit stream* to divide, keeping in mind whatever QJSA option was selected at retirement. Some plans, further, override choices, providing for automatic reversion of the spousal interest if she predeceases the member, irrespective of any court orders, and refusing to qualify court orders providing otherwise.

1. Beneficiary Designations

The retirement benefits order should address what happens if the non-employee spouse dies before receipt of his or her full benefit share under the plan. A retirement benefits order prepared to secure the non-employee spouse's interest in a pension should address what happens in the event of the death of *either* spouse:

1. If the non-employee spouse predeceases the employee spouse before either party has begun receipt of retirement benefits.

2. If the parties are dividing the benefit stream and the non-employee spouse predeceases the employee spouse.³³
3. If the non-employee spouse is to receive a separate interest benefit for his or her life, but dies before that benefit commences.

All of these questions should be investigated through the plan documents or administrators, to learn how it would administer the rights of the alternate payee with respect to beneficiaries pending further clarification by the courts of whether and under what circumstances an alternate payee can name a beneficiary.

For example, some plans require that the benefit “reverts” to the employee if the former spouse predeceases the employee before either has begun receipt of benefits. From a broader, community property perspective, such a reversion would result in an unequal division of the community interest in the plan. The underlying decree or Property Settlement Agreement can compensate for such a forfeiture by, for example, actuarially adjusting the pension formula, or through the award of other property, or contingencies for reservations of jurisdiction within the divorce documents.

The beneficiary problem typically does not arise under a separate-interest QDRO because the right to name a beneficiary is part of the benefit choices. In other words, if the plan can be divided into two separate interests – one for the life of each party – the continued survival of the other party may not make any difference.

Even when a plan implementing a shared-interest QDRO (as opposed to a separate-interest QDRO) will allow a former spouse to transfer his or her interest at death, it will probably limit the potential beneficiaries, most likely to the choices within the definition of an “alternate payee” of the participant. If the plan will reject a desired beneficiary provision, the client must decide whether the right to name a beneficiary is worth a court battle with the plan, or with other prospective takers.

A QDRO that allows the alternate payee to designate a beneficiary for his or her interest in the event of the alternate payee’s death should specify:

1. The beneficiary’s name and address, or a requirement that the plan provide forms for designating a beneficiary.
2. A direction or mechanism for determining an alternate beneficiary if the chosen beneficiary predeceases the alternate payee.
3. That the burden is on the alternate payee, or his or her successor in interest, to keep the plan informed of status changes.

³³ *Branco v. UFCW-N. Cal. Employers Joint Pension Plan*, 279 F.3d 1154 (9th Cir. 2002) (ERISA preempted state community property law permitting former wife’s interest in husband’s pension benefits to pass to her heirs when she predeceased him; her pension benefit share was payable to husband under plan when, after her death, divorce order was not a valid QDRO within exception to ERISA’s anti-alienation provision).

2. “Surviving Spouse” Provisions

If a QDRO so provides, the surviving former spouse of a participant must be treated as the participant’s surviving spouse for purposes of any qualified pre-retirement survivor annuity, or qualified joint and survivor annuity, and any spouse of the participant must not be treated as the participant’s surviving spouse for such purposes, to the extent of the deemed surviving spouse’s interest in those benefits.³⁴

If the QDRO provides a separate interest division of the benefits, it is not necessary in most cases to deem the former spouse as the “surviving spouse” – the former spouse will have her own benefit stream, unaffected by the participant’s continued survival. Where, for whatever reason, it is advisable or unavoidable to have a shared-interest division (for example, when the divorce is after retirement, and a form of benefit was already selected), it *is* necessary to deem the former spouse as the “surviving spouse” in order to secure any payments to the former spouse if the participant dies first.

Of course, to the extent that a former spouse is deemed the “surviving spouse” under the terms of a QDRO, an *actual* current spouse will *not* share in survivor benefits. The QDRO may altogether exclude a current spouse from sharing in survivor benefits, or it may provide for a sharing of benefits between former spouses or between a former spouse and a current spouse. For example, a former spouse’s survivor benefits may be limited to those accrued during the employee’s marriage to that spouse. Under an optional ERISA provision, the plan may require that a former spouse must have been married to the participant for at least one year to be eligible for any of the qualified survivor benefits.³⁵

3. Qualified Pre-Retirement Survivor Annuity (QPSA)

In the case of a married and vested participant who dies before his or her annuity starting date, ERISA and the IRC require that a Qualified Pre-retirement Survivor Annuity (QPSA) be provided to the surviving spouse.³⁶ This requirement applies to all defined benefit plans,

³⁴ On the importance of obtaining a timely QDRO, see *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997) (order directing that former spouse be designated as surviving spouse rejected because surviving spouse benefit had vested in subsequent spouse on employee’s retirement); see also *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999); *Rivers v. Central & SW Corp.*, 186 F.3d 681 (5th Cir. 1999) (former spouse who neglected to obtain QDRO before employee’s retirement “forever barred” from acquiring interest in his pension plan). But see *Trustees of Directors Guild v. Tise*, 234 F.3d 415, 421 n5, 422 n6 (9th Cir. 2000) (dicta calling *Hopkins* and *Rivers* analysis into question). See also *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002) (“nunc pro tunc” QDRO entered as of date preceding employee’s death not preempted by ERISA when plan was missed asset, plan proceeds not disbursed, and competing “alternate payee” not identified); *Hogan v Raytheon*, 2001 US Dist. LEXIS 10595 (ND Iowa, July 9, 2001, No. C00-0026) (QDRO allowed within 18 months of employee’s death even though survivor benefits not mentioned in judgment).

³⁵ 29 U.S.C. § 1056(d)(3)(F).

³⁶ 29 U.S.C. § 1055(a)(2); IRC §§ 401(a)(11)(A)(ii), 417.

all defined contribution plans that are pension plans (*e.g.*, money purchase pension plans), and some profit-sharing, employee stock ownership (ESOPs), and 401(k) plans.³⁷ Such an annuity continues for the life of the surviving spouse.³⁸

If applicable to a plan, the QPSA requirement will be specified in the plan document and in the Summary Plan Description. This form of benefit may be waived by the participant with the consent of the current spouse, so that a non-spouse beneficiary may be named. In addition, a plan may permit the surviving spouse to elect payment of the benefit in some form other than an annuity. If applicable, such waivers and any alternative forms of benefit will be detailed in the plan document.

A former spouse may be treated as a surviving spouse, but only if a QDRO so provides.³⁹ Consequently, it is essential that the attorney ascertain the manner in which the plan recognizes the rights of a former spouse if the employee dies before retirement, and specify those rights in the QDRO. This is particularly important in defined benefit plans that offer no pre-retirement death benefit other than the QPSA. In such plans, if the participant is not married and dies before entering pay status, his or her entire benefit will revert to the plan and be lost.⁴⁰

In a defined contribution plan, there is no danger of the benefit being lost on the participant's death in the absence of a surviving spouse. The plan will pay out the full vested account balance (reduced by any security interest held by the plan by reason of an outstanding loan to the participant), to one or more persons in the form of a QPSA, if offered by the plan, a death benefit, or both. If, for example, the plan provides for a QPSA with a 50% survivor benefit and a former spouse is the only "spouse" eligible for it, the former spouse will receive half of the account balance as of the date of death and the participant's designated beneficiary will receive the other half.

Most often, a former spouse's benefit is stated in the plan as a specified fraction of whatever is payable under the plan. Consequently, if the employee dies before retirement under a defined benefit plan that offers only a 50% QPSA, the former spouse's fraction may be applied, unless the QDRO specifies otherwise, against a survivor benefit that is only half of

³⁷ 29 U.S.C. § 1055(b)(1); IRC § 401(a)(11)(B).

³⁸ 29 U.S.C. § 1055(e).

³⁹ 29 U.S.C. § 1056(d)(3)(F).

⁴⁰ See, *e.g.*, *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999). In *Samaroo*, the employee died before retiring. His ex-spouse obtained a *nunc pro tunc* amendment to their divorce decree, providing for benefits under the employee's QPSA. The Third Circuit held that the amended decree was not a QDRO because, by conferring survivor's benefits after they had lapsed, it impermissibly increased the plan's liability. Although there may be a way to distinguish the facts on this issue (see, *e.g.*, *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002), in which the post-death QDRO was for a missed asset), the case stands as a warning for counsel to not agree to a termination of marital status until appropriate provision has been made to protect the survivor benefit. An interim QDRO may be used for this purpose if the divorce is to occur before information is available to accurately determine the parties' respective interests.

the benefit that would have been payable had the employee lived. One approach to this problem is for the QDRO to provide that in the event of the death of either spouse before the commencement of benefits, that spouse waives his or her portion of the community share in favor of the survivor spouse.

4. Qualified Joint and Survivor Annuity (QJSA)

In the case of a vested participant who survives to his or her annuity starting date, ERISA and the IRC require that the accrued benefit be provided in the form of a Qualified Joint and Survivor Annuity (QJSA).⁴¹ This requirement applies to all defined benefit plans, all defined contribution plans that are pension plans (for example, money purchase pension plans), and some profit-sharing, employee stock ownership (ESOPs), and 401(k) plans.⁴²

A QJSA provides an annuity for the life of the participant, with a survivor annuity for the life of his or her spouse that is at least 50% of the amount payable during the joint lives of the participant and the spouse.⁴³ A former spouse may be treated as a current spouse as of the annuity starting date, but only if a QDRO so provides.⁴⁴ In plans that allow for the QJSA form of benefit to be waived with the consent of the current spouse, or deemed current spouse under a QDRO,⁴⁵ an alternate form of benefit may be elected. No waiver or consent is necessary when an alternate form of benefit is specified in the QDRO.

ERISA and the IRS allow payment to a non-employee spouse, under a QDRO that provides for a separate interest for the non-employee spouse, in any form in which such benefits could have been paid under the plan to the participant, other than in the form of a joint and survivor annuity over the life of the non-employee spouse and his or her current spouse.⁴⁶

For example, a former spouse should be able to elect a lump-sum payment, periodic payments, or a single life annuity, if those options are offered under the plan. Once the former spouse has elected to begin receipt of benefits, the participant's death should not affect the continued stream of payments to the former spouse.⁴⁷

⁴¹ 29 U.S.C. § 1055(a)(1); IRC §§ 401(a)(11)(A)(i), 417.

⁴² 29 U.S.C. § 1055(b)(1); IRC § 401(a)(11)(B).

⁴³ 29 U.S.C. § 1055(d).

⁴⁴ 29 U.S.C. § 1056(d)(3)(F).

⁴⁵ See 29 U.S.C. § 1055(c).

⁴⁶ 29 U.S.C. § 1056(d)(3)(E)(i)(III).

⁴⁷ *Some* defined benefit plans, however, have refused to pay a single life annuity based on the former spouse's lifetime, thereby forcing election of a shared-interest joint and survivor annuity with the participant as the only device by which the former spouse's benefit would continue under the plan if the employee spouse dies first. With the issuance of the IRS QDRO guidelines, this practice should end. See IRS Notice 97-11,

When a QDRO is not prepared until after the employee has retired, options that will guarantee a continued benefit to the former spouse in the event of the participant's death may be severely limited. The former spouse can request that the plan convert the alternate payee's share of the employee's benefit into a single life annuity for the alternate payee, but the plan may not make that accommodation, particularly if the retirement has been in place for a significant period of time.

If the employee selected a single life annuity, the former spouse might request that the plan allow the employee's form of benefit to change to a joint and survivor annuity, in accordance with a court order. If the employee has already selected a joint and survivor annuity with a subsequent spouse when that request is made, however, it may be too late for the former spouse to be named even a partial beneficiary of that survivor option.⁴⁸

Under these circumstances, the former spouse may be limited to a resulting trust interest (sometimes called a constructive trust) in the survivor benefit received by the subsequent current spouse. Unfortunately, it is not clear that even a resulting trust will serve.⁴⁹

It is hard to see why, but even some persons claiming to be knowledgeable regarding ERISA have expressed difficulty comprehending a pretty simple difference in result in the case law. Several courts have found an absence of a constructive trust remedy against an actual surviving spouse (widow), as in *Hopkins*, in favor of a former spouse who had some claim against the participant. The cases have been pretty clear, however, that a constructive trust is perfectly permissible in the reverse situation, extending a constructive trust remedy against a *former* spouse who happened to be married to a participant when he elected a joint and survivor annuity, in favor of a surviving spouse and widow.

The public policy reason for the difference in result is pretty clear – the stated purpose in ERISA to protect surviving spouses, and the legal doctrine that a former spouse who has waived benefits should not be permitted to be unjustly enriched. But there are attorneys, and even some plan administrators, who disingenuously pretend that there is no difference in the two lines of cases.

If the QDRO is not prepared until after the participant has died, the options may be even more limited, or even nonexistent. The attorney faced with this situation might consider the following steps:

1997-2 Int. Rev. Bull 49.

⁴⁸ See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997) (order directing that former spouse be designated as surviving spouse rejected because surviving spouse benefit had vested in subsequent spouse on employee's retirement); *Rivers v. Central & SW Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) (following *Hopkins*).

⁴⁹ *Boggs v. Boggs*, 520 US 833, 138 L. Ed. 2d 45, 117 S. Ct. 1754 (1997). See also *Barnett v. Barnett*, 62 S.W.3d 107 (Tex. 2001).

1. Request a copy of the plan retirement election forms to ascertain whether the plan inquired under penalty of perjury regarding the interests of a former spouse and, if not, explore possible actions against the plan.
2. If no other form of survivor coverage is available for the former spouse, have an actuary calculate how much will need to be paid to the former spouse to result in an actuarially equal division of the community interest, given the different life expectancies of the parties, and seek court orders accordingly.
3. Seek a *nunc pro tunc* order.⁵⁰

II. THE CORE CONCEPT OF PREEMPTION

As a general rule, ERISA preempts any “state law”⁵¹ that “relates to” employee benefit plans.⁵² Further, ERISA contains the basic prohibition that a court may not order a plan to provide any benefit not explicitly permitted by its plan documents.

The driving concept is one of national uniformity in administration of pension plan benefits, part of the larger movement toward both nationalization, and federalization, of family law matters that has been picking up speed since the 1970s. For the family law practitioner, the importance of this central aspect to all ERISA-connected cases is that otherwise-applicable law might be completely irrelevant when dealing with ERISA-governed pension plan benefits, which must be understood, and dealt with, in accordance with the federal regulatory scheme, no matter what state law would otherwise do with the benefits at issue. An extended discussion of federal preemption as it relates to survivorship benefits is set out in the death benefits section of these materials.

A good example of just how convoluted the preemption analysis can get is found in the multiple decisions issued over most of a decade in the *Guidry* case.⁵³ *Guidry II* was the final chapter in the saga of an individual who was both an employee of a pension plan and a participant in that plan, who had embezzled money from the plan. Mr. Guidry was a judgment debtor of the union; the federal district court had ordered the plan to pay Mr. Guidry’s back and future pension benefits after the plan’s unsuccessful attempt to impose a constructive trust on pension benefits held by the plan (this was the subject of the original appeal and decision in *Guidry I*).

⁵⁰ See *Trustees of Directors Guild v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Hogan v. Raytheon*, 2001 US Dist. LEXIS 10595) (ND Iowa, July 9, 2001, No. C00-0026).

⁵¹ Meaning statute, rule, or order of any state court.

⁵² 29 U.S.C. § 1144(a).

⁵³ *Guidry v. Sheet Metal Workers’ Nat’l Pension Fund*, 641 F. Supp. 360 (D. Colo. 1986), *aff’d*, 856 F.2d 1457 (10th Cir. 1988), *rev’d*, 493 U.S. 365, 107 L. Ed. 2d 782, 110 S. Ct. 680 (1990) [*Guidry I*], *decision after remand*, 10 F.3d 700 (10th Cir. 1993); *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 39 F.3d 1078 (10th Cir. 1994, *en banc*) [*Guidry II*].

The plan then sought to collect its judgment through garnishment of a bank account in Colorado, and through attempted seizure of funds tendered to Mr. Guidry at his home in Texas. Eventually, all the disputed funds were placed in an account in Colorado, and litigation was commenced as to whether those funds could be garnished by the plan. The United States District Court for the District of Colorado, reading *Guidry I* broadly, concluded the anti-alienation provision of ERISA continues to protect pension benefits from garnishment “so long as the proceeds are clearly identified as such and have not been commingled with other funds or used for the acquisition of assets.”⁵⁴

A three-judge panel reversed the district court, with one judge dissenting.⁵⁵ It was that decision that came before the entire court *en banc* on rehearing. The court framed the issue succinctly: “whether the anti-alienation provision, ERISA 206(d)(1), barred post-payment garnishment.”⁵⁶

The court ruled that there was no ERISA bar to garnishment of the funds in the constructive possession of the embezzler. Specifically, upon review of ERISA, its legislative history and interpretive regulations, and other benefit protection statutes, the court found that the scope of section 206(d)(1) did not extend to protect private pension benefits once paid to and received by the beneficiary, which therefore can be reached by garnishment, or constructive trust.⁵⁷

Explaining its ruling, the court noted that the “applicable administrative regulations show that the provision was not intended to apply to benefits following distribution to and receipt by the beneficiary,” because the anti-alienation provision was intended to ensure that the benefits “will be available for retirement purposes,” which purpose is fulfilled as soon as the money is distributed.⁵⁸

The court found agreement for its reasoning when it compared ERISA with the “more specific language found in other income protection statutes” such as the Social Security Act, because “ERISA lacks any provision prohibiting garnishment or attachment of benefits once they have been received by the beneficiary.”⁵⁹ The court noted that “Congress knew how to

⁵⁴ 39 F.3d at 1081.

⁵⁵ *Guidry II*, 10 F.3d 700 & 717 (10th Cir. 1993).

⁵⁶ 39 F.3d at 1081.

⁵⁷ 39 F.3d at 1081-83. Other courts have, similarly, found that ERISA has no preemptive effect regarding any funds once they are distributed by a plan. *See, e.g., Carbaugh v. Carbaugh*, ___ B.R. ___ (No. KS-01-029, B.A.P. 10th Cir. Kansas, May 1, 2002), 28 F.L.R. 1317 (BNA May 21, 2002) (“Nothing in *Boggs* suggests that uncommingled monies distributed from pension plans and placed in accounts not under the auspices of ERISA remain protected by it”); *Central States Pension Fund v. Howell*, 227 F.3d 672, 678-79 (6th Cir. 2000); *Sun Life v. Dunn*, 134 F. Supp. 2d 827 (S.D. Tex. 2001).

⁵⁸ 39 F.3d at 1081-82.

⁵⁹ 39 F.3d at 1083.

draft a statute protecting benefits that had left the pension plan [as in the Social Security Act], and did not use similar language with ERISA.”⁶⁰

Having held that the funds were within the normal reach of court process, since there was no ERISA preemption regarding the funds once they were paid out, the remainder of the opinion dealt with the Colorado state law of garnishments in eminently quotable language useful for family court practitioners.⁶¹

One commentator described the state and federal roles in such disputes as being that “applicable state law governs the division of the marital asset contained in the ERISA plan; ERISA governs whether the domestic relations order is acceptable to divide the benefit in the manner decided under state law.”⁶²

Matters relating to ERISA preemption of state law is neither simple nor terribly clear. There is, however, no avoiding the necessity of dealing with the question in every case in which there is any question as to whether state law, or state court orders, can be used to effect a particular result having to do with ERISA-governed plan benefits. Since ERISA preempts all state law that “relates to” such plans, but federal common law (which may, by coincidence, happen to be identical to state law) can equitably supersede the terms of at least some ERISA beneficiary designations, the answer to many technical preemption questions is “maybe.”

III. A CHECKLIST OF QDRO REQUIREMENTS; “DOS” AND “DO-NOTS”

⁶⁰ *Id.* at 1083. For example, the Social Security Act, 42 U.S.C. § 407(a) “prohibits the attachment or garnishment of the right to future benefit payments as well as the ‘moneys paid or payable’ to the beneficiary.” *Guidry* at 1083; *see Philpott v. Essex County Welfare Bd.*, 409 U.S. 413, 93 S.Ct. 590, 34 L.Ed.2d 608 (1973) (Social Security funds on deposit retain protection under § 407 as “moneys paid.”)

⁶¹ The only reason the dissenting justices dissented at *all* was that the majority’s reading of Colorado’s garnishment law permitted Mr. Guidry, the wrongdoer, to shield part of his stolen money from garnishment. The dissenting justices stated that they would not read Colorado law “as mandating this bizarre result,” stating that: “It is nonsensical to assume Colorado would want a thief to keep ill-gotten gains. Like Mr. Bumble of *Oliver Twist*, I believe ‘if the law supposes that, ... the law is a ass--a idiot,’ and I am not willing to believe Colorado law to be either. *See Oliver Twist*, Charles Dickens 520 (Dodd, Mead & Co. 1941) (1838).” 39 F.3d at 1089.

⁶² Michael Snyder, *QUALIFIED DOMESTIC RELATIONS ORDERS* (2d. ed., West 1998), at § 1:06. In that author’s opinion, it is “anomalous” that state courts should address questions under ERISA: “State court judges (and, more specifically, their clerks) are therefore left with entering into the area of tax-qualified employee benefit plans and the complications and nuances of distributions options, actuarial reductions, and preretirement survivor annuities – not exactly the normal fare for a sitting state court judge.” *Id.*

An order or judgment filed before the January 1, 1985 (the effective date of the REA) may be accepted as a QDRO without strict adherence to the ERISA QDRO requirements, since they did not yet exist when the order was written.⁶³

As to orders entered from 1985 on, the REA⁶⁴ made it possible for payment of benefits by a private, qualified plan to a former spouse, dependent, or child of a participating employee in accordance with state marital property and support laws, and without causing an immediate tax impact. This was done by creating the QDRO, the mechanism through which the right to payment may be implemented.

As defined in both ERISA and the IRC, a QDRO is a judgment, decree, or order, made under a state domestic relations law, that creates, acknowledges, or assigns to an “alternate payee”⁶⁵ a right to receive benefits under the plan.⁶⁶ In the absence of a QDRO, qualified private plan benefits may only be paid to a participant or beneficiary.

For a DRO to be a QDRO, it must contain some information, and must *not* contain certain other terms.

1. Mandatory Terms

By statute, a QDRO must contain the following information:⁶⁷

1. The name and last known mailing address of the participant and each alternate payee addressed by the order (it is helpful to list relationship, social security number, age, etc., and a phone number if one is available).
2. The exact name of the specific plan(s) to which the order relates.

⁶³ See *Metropolitan Life Ins. Co. v Bigelow* 283 F.3d 436 (2d Cir. 2002).

⁶⁴ Retirement Equity Act of 1984, Pub. L 98 - 397, 98 Stat 1426.

⁶⁵ A spouse, a former spouse, a child, or another dependent of a participant.

⁶⁶ 29 U.S.C. § 1056(d)(3)(B); IRC §414(p).

⁶⁷ 29 U.S.C. § 1056(d)(3)(c); IRC § 414(p)(2). For an extensive discussion of how courts construe these requirements, see *Stewart v. Thorpe Holding Co. Profit Sharing Plan*, 207 F.3d 1143 (9th Cir. 2000) (courts liberally construe criteria by which domestic relations order will qualify as QDRO). See also *Trustees of Directors Guild v. Tise*, 234 F.3d 415, 426 (9th Cir. 2000) (when domestic relations order directed that pension plan satisfy child support judgment from plan funds accruing to employee’s benefit, and order was served on plan before employee’s death, immaterial that QDRO only issued after his death); *Hogan v. Raytheon*, 2001 US Dist. LEXIS 10595 (ND Iowa, July 9, 2001, No. C00-0026) (former spouse’s interest survives death of participant spouse); *In re Williams*, 50 F. Supp. 2d 951, 957 (CD Cal. 1999). But see *Samaroo v. Samaroo*, 193 F.3d 185 (3d Cir. 1999); *Rivers v. Central & SW Corp.*, 186 F.3d 681 (5th Cir. 1999).

3. The amount or percentage of the benefits to be paid to alternate payee, or the manner in which the amount or percentage of benefits payable is to be calculated. If a specific number of payments, that number, and if there is a specified period (for example, the life of the participant), that period. If it is a formula order, include information regarding the marriage sufficient to show the length of marriage to be used in any calculations, as effective dates vary from state to state. It is also helpful to explicitly provide just what is being paid – alimony, child support, marital or community property, etc. In some plans, the benefits to be paid to the participant and each alternate payee may be segregated into separate accounts.⁶⁸
4. The starting, or “commencement” date for payments. If the participant has already retired, and no specific date is required, then just “as soon as practicable after service of this order” or similar term is sufficient. If the participant has *not* yet retired, however, then the order *might* be a “separate interest” pension payable to the alternate payee on the earliest retirement date possible for the worker, whether or not he retires, or as of the date that payments to the worker begin, or some other (generally, later) time dependent on the plan terms and the terms of the court order.

In addition to the absolutely mandatory terms, there are a number of “good idea” terms that should be included in a QDRO, to resolve uncertainties, assist in chances of obtaining approval, and decrease the odds of further litigation:

Any mandatory or prohibited elections imposed upon the participant, if not yet retired (for example, requiring the election at retirement of a straight life annuity, or a lump sum payout at eligibility).

What to do upon the death of the participant (obviously, other choices will guide the available options here). For example, whether some form of contingent annuity naming the former spouse is required.

What to do upon the death of the alternate payee, if before the death of the participant (again, other choices will guide the available options here). For example, the alternate payee’s interest could revert to the participant.

2. Prohibited Terms

An order is *not* “qualified” if it requires a plan to provide a type or form of benefit not otherwise available under the plan,⁶⁹ or requires the plan to provide a greater (actuarially

⁶⁸ IRS Letter Rulings 8334088, 8330119.

⁶⁹ An exception exists, however, for payment to an alternate payee before the participant actually separates from service but after the participant attains or would have attained “the earliest retirement age,” as long as such payment is made: 1) as if the participant had retired on the date on which payment is to begin, but taking into account only the present value of benefits actually accrued on the early retirement date and not the present value of any employer subsidy for early retirement; and, (2) in a form in which it could have been paid

computed) sum of benefits than it would otherwise provide, or requires payment of benefits to an Alternate Payee that are required to be paid to *another* Alternate Payee under a prior QDRO.⁷⁰

The things to *not* include in a proposed QDRO would be items prohibited by ERISA. In addition to not actually doing any of the following in the terms of the order, most QDROs contain a series of mantra provisions explicitly providing that they are not *trying* to do any of the prohibited items, and some plan administrators look for the following boilerplate as part of their checklists to qualify proposed orders:

“This order does not require the plan to provide any type or form of benefit or option not otherwise provided under the plan.”

“This order does not require the plan to provide increased benefits (determined on the basis of actuarial value).”

“This order does not require the payment of benefits to an alternate payee that are already required to be paid to another alternate payee under the terms of a previously issued QDRO.”

“This order does not require the plan to provide benefits to an alternate payee in the form of a joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse.”

This list is by no means comprehensive, and does not address *all* the things that must be known about, and looked for, in each case, such as plan loans, early retirement subsidies, post-divorce plan increases, COLA provisions, etc.

One thought that should be repeated here, to avoid much grief, is that the QDRO should be completed on the same date as the divorce decree if at all possible, or at least as close in time to it as is possible. Every day that the parties are divorced without an order in place securing benefits is an invitation to disaster should a significant event (retirement, death of a party, etc.) occur. That gap in time between divorce and QDRO entry is the root cause of a great deal of malpractice litigation.

It is also worth repeating the warning that a practitioner should never use the forms supplied by a plan administrator to just “fill in the blanks” and complete a QDRO, at least when representing the alternate payee. The sample forms are designed for administrative convenience only, and while they will (presumably) be adequate to qualify an order as a QDRO (so as to protect the *plan* from any disqualification) they are *not* designed to protect the rights of either party, and are surely not designed to look out for the best interest of the former spouse/alternate payee. Some are better than others, of course, but typically, such

under the plan to the participant, other than a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse.

⁷⁰ 29 U.S.C. § 1056(d)(3)(D)-(E); IRC § 414(p)(3)-(4).

forms do not provide at all for things of great importance to one or both parties, and should be referenced only as one source of information for what is required in a particular QDRO.

IV. THE PRACTICAL SIDE OF APPROVAL OF QDROS

In practice, addressing retirement benefits can be challenging. This is because resolution of retirement benefits issues (e.g., discovery characterization, valuation, and division) is often time-consuming and complex, and the requirement of obtaining approval of the plan administrator can be daunting.

This latter step of obtaining approval (or, better, pre-approval) is often a quirky excursion into the realm of Human Resources Departments, in which sometimes unidentified individuals with varying degrees of skill make sometimes questionable judgments. It can take multiple drafts for approval of a proposed order, and sometimes previously approved orders going to the very same plan (with changed names of the parties) may be denied by the same department.

The appearance of subjectivity in these instances usually arises from the many different “cooks in the kitchen” in the approval process. This section provides a guide for obtaining relevant information, and drafting provisions for division of ERISA-governed retirement benefits, and then preparing an order designed to implement those terms.

A. Initial Steps

1. Identify and Locate the Plans

The first step in addressing retirement benefits in a marital action is to identify and locate all retirement plans in which the spouses have interests. This can be performed at the *Early Case Conference*, or in later requests for discovery information.⁷¹ In an ERISA covered plan, the plan administrator’s cooperation can be enforced through the penalty provisions of 29 U.S.C. § 1132(c) (up to \$110 per day for unexcused failure to comply with valid information request). Alternatively, the information may be sought from the employer or plan sponsor, either by informal request or by a deposition subpoena for production of business records. Note that such discovery orders may be subject to ERISA preemption to the extent that they seek plan-specific information.

2. Contact With Plan Administrators

The attorney should telephone each plan administrator and speak to the person handling divorce matters. The person’s name and address can sometimes be found in the Summary Plan Description (“SPD”), if there is one. The attorney should be prepared to provide the names of the employee and the party whom the attorney represents. A social security

⁷¹ See Practice and Procedure section for examples of requests.

number, or employee identification number, may be requested so the Plan may properly identify the employee-spouse in question.

Some plans may treat such a call from the non-employee spouse's attorney as a notice of adverse interest and put a hold on the employee's file or benefit, but this is only a temporary measure. In our experience, the service of a *Joint Preliminary Injunction* upon the Plan is sufficient, although some may request a formal order from the District Court.⁷²

The attorney should ask general questions about the plan. Although it may not be appropriate to ask for information regarding a particular employee without the employee's written authorization or a subpoena, the attorney may request the SPD and general informational pamphlets about the plan. This information is often freely released. A copy of the plan's QDRO procedures should also be obtained at this time, if available. ERISA-covered retirement plans are required to have written QDRO procedures.⁷³

3. Notice of Adverse Interest

"Notice of an Adverse Interest" may be served on a retirement plan to give notice that a non-employee spouse claims an interest in payments to be made under the plan. Such notice may be given to all types of retirement plans, including those governed by ERISA. Although it is not clear whether ERISA preempts any available statutory procedure for a notice of adverse interest, plans typically do not object to this procedure. In fact, Plans often cooperate simply to avoid being named as a third party to the divorce action. In Nevada, the simple Joint Preliminary Injunction for has, in our experience, usually proven sufficient.

If a retirement plan is uncooperative and also will not be joined as a party at the commencement of a marital action,⁷⁴ a notice of adverse interest may help to protect the non-employee spouse's interest in benefits to be paid under the plan and should be served. A notice of adverse interest may be served even before an action is commenced, when protection is desired during that period.

Depending on the plan's QDRO procedures, it may even be prudent to obtain a formal injunctive order prohibiting the plan from honoring any election by the employee spouse which would diminish the non-employee spouse's benefits in the plan. As a practical matter, because plans have a fiduciary duty to beneficiaries as well as to participants,⁷⁵ and non-

⁷² We note here that some Plans require a "Judge signed" subpoena for a release of information, rather than the Clerk of the Court issued subpoena.

⁷³ See 29 U.S.C. § 1056(d)(3)(G)(ii).

⁷⁴ See discussion of joinder, below.

⁷⁵ ERISA § 404(a)(1); see 29 U.S.C. § 1104(a).

employee spouses are considered beneficiaries,⁷⁶ an un-joined private plan would likely freeze the benefits if it received such an order.

For private plans, where the attorney does not serve a notice of adverse interest, obtain an injunction, or join the Plan as a party, the non-employee spouse could end up with no recourse against a plan that pays the entire community interest to the employee spouse either: (1) before the court determines the parties' respective interests in pension benefits; or, (2) after the determination and before service of an effective QDRO. The attorney should not *rely* on a notice of adverse interest or joinder for this purpose unless the plan's written QDRO procedures state that such notice will freeze any payout under the plan. If not, it may be necessary to obtain a temporary injunction or a court order under the QDRO rules restraining the plan from paying out benefits before receipt of an order confirming the non-employee spouse's interest.

There is no statutory format for such a notice. The attorney should prepare a letter that clearly identifies the retirement plan, the participant (and his or her employee or social security number, if known), and the party claiming the interest by virtue of his or her marriage to the participant. The letter should indicate that an interest is being claimed in the plan and should cite authority for the notice. The notice should normally be directed to and served on the plan administrator (usually the sponsor), and service should be effected in a manner that will facilitate proof of receipt, *e.g.*, personal service, service by mail and acknowledgment of receipt, or service by mail and return receipt (signed by the addressee only). Many plans will execute and return an acknowledgment of receipt.

4. The Issue of Joinder

Under the law of some states – notably California – an order or a judgment is not enforceable against a retirement plan unless the plan has been joined as a party to the proceeding. For this reason and unless other measures for payment have been arranged, practitioners in such states uniformly join pension plans as a party at the commencement of a marital action. The practice is so common in California that pension plan administrators located in that state occasionally claim an inability to honor QDROs entered in actions to which they were not joined.

However, a private pension plan governed by ERISA *need not* be joined as a party to the marital action in order to be bound by a restraining order, or a QDRO dividing a community interest in the plan, as long as the order meets the requirements for a QDRO.⁷⁷ A practitioner running into a plan administrator who claims otherwise should calmly respond – in writing – that the requirement is actually one of state law, and encourage the administrator to re-check the matter with his or her ERISA legal consultant to confirm that there is no such requirement in the federal law. Remind them that you will be expecting enforcement of the QDRO if it is confirmed to be adequate in form.

⁷⁶ ERISA § 206(d)(3)(J); *see* 29 U.S.C. § 1056(d)(3)(J).

⁷⁷ *See* 29 U.S.C. § 1056(d)(3)(A).

As noted above, where the employee has not yet retired, protection against payment by the plan of the benefits to the employee spouse before or during litigation can usually be achieved by sending a notice of adverse interest to the Plan. If the member is already in pay status, the notice or restraining order should be tailored to only a portion of the benefit being paid, so that a retiree's income stream is not interrupted by an overly broad demand, particularly if the retiree is paying support or sharing the allowance with the other party. Obviously, where counsel can agree to an informal, pre-divorce division of the payment stream, no formal interruption of payments may be necessary at all.

Just because joinder is not required, however, does not mean that it is always inappropriate. Joinder of a private pension plan may protect the non-employee spouse's interest in the pension benefits, pending issuance of a QDRO, in the same manner as a notice of adverse interest.

Where the Plan is small, for a family business, for example, it is not unusual for the opposite party to be the plan administrator; in those cases, joining the plan actually gives the non-employee spouse additional leverage, since ERISA provides strict penalties for betrayal of fiduciary duties to beneficiaries, so there may be more than one way to compel the employee's compliance with court orders to hold or distribute funds. If an ERISA plan *is* joined, the family law attorney may have to face a petition for removal of the action to federal court at some point in the proceedings.

A practitioner should never attempt to join federal retirement plans, such as DFAS (the military retirement system), or the OPM (the Civil Service Retirement System and Federal Employees Retirement System). The federal plans will, almost universally, move to quash service of the summons or initiate proceedings in federal court to remove the cause of action asserted against it, or even the entire action, from the state court. Fortunately, joinder of a federal plan is unnecessary, so long as the statutes that provide for the division of a community interest in federal pension benefits can be satisfied, and when they cannot be satisfied, joinder will not help.

It is still possible to serve a notice of adverse interest when a non-employee spouse has an interest in federal pension benefits, although the federal plans all have their own rules for when benefits can, and cannot, be withdrawn or otherwise affected prior to issuance of a final order.⁷⁸

As a technical matter, nonresident pension plan may be joined as a party to a marital action only if the state court can obtain personal jurisdiction over the plan, i.e., the plan has sufficient minimum contacts with Nevada to justify Nevada's exercise of personal jurisdiction over it. As noted, joinder is not usually necessary, and in many cases where it is, nonresident pension plans will satisfy the minimum contacts requirement and be subject to joinder.

⁷⁸ See detailed discussion in the military and Civil Service sections of these materials, especially as to the Thrift Savings Plan withdrawal rules.

5. Discovery

Please refer to the *Practice and Procedure* section for a detail of examples of discovery requests. These examples address some suggested minimum information and methods.

Suggested minimum information to obtain from *all plans* includes the following:

1. The Summary Plan Description.
2. The Plan Document and all amendments.
3. Plan QDRO procedures and model orders, if available.
4. Explanations of any special retirement offers or programs, with printouts of calculations.
5. Employee benefit records.

Additionally, suggested minimum information for *defined contribution plans* includes the following:

1. A statement of account as of the date of marriage.
2. Last couple of annual or monthly statements of account to determine current value.
3. Loan and withdrawal information.
4. Beneficiary designations.

Suggested minimum information for *defined benefit plans* includes the following:

1. The latest accrued benefit statement.
2. Factors used in calculation of the benefit (e.g., years of service, compensation).
3. When applicable, records necessary to trace the community interest into a successor plan or annuity. (If the employee participated during marriage in a plan that is now terminated, plan assets may have been frozen or transferred to a successor plan or an annuity may have been purchased on behalf of individuals in the plan.)
4. Information regarding the funding status of the plan.
5. Information regarding any outstanding participant loans.

Discovery may be directed to the employee spouse, the employer, or the plans. Standard formal and informal discovery methods are available, including the following:

1. **Authorization.** Ideally, the employee spouse will execute an authorization for release by the plan of the plan documents, both general documents and those pertaining specifically to the employee. The non-employee spouse's attorney should agree to provide the employee spouse's attorney with copies of all documents received.
2. **Subpoena.** If an authorization from the employee spouse cannot be obtained, the attorney might use a subpoena for production of business records.
3. **Document production** demands and other formal discovery methods available against parties. When a plan has been joined, and therefore has become a party, available discovery tools that may be directed to the plan are broadened to include,

e.g., demands for production of documents, interrogatories, and requests for admission.

Requests for information from ERISA-covered plans may be limited by federal preemption to that necessary to satisfy ERISA reporting and disclosure requirements with respect to participants and beneficiaries.⁷⁹ In dealing with such plans, it is usually sufficient to point out that the Department of Labor has taken the position that a plan administrator is under a duty to provide the information necessary to assess the alternate payee's interest and to complete the QDRO.⁸⁰ Under ERISA § 502(c), a plan administrator that fails, without reasonable cause, to provide the information disclosures required by Title I of ERISA within 30 days is subject to penalties of up to \$110 per day.

B. Characterization

The initial step in addressing any property issues in a marital action is to characterize the individual property items held by the parties as community property or separate property. It is not unusual for retirement benefits to have both community and separate property components, and require an apportionment of the two.

To the extent that the work done to earn them is performed between the date of marriage and the date of divorce, retirement benefits are community property. Conversely, to the extent that the work is performed before the date of marriage or after the date of divorce, the benefits are the employee spouse's separate property.

As detailed in the Introduction, the most common approach in apportioning retirement benefits in defined benefit plans between community and separate property is the "time rule." However, as discussed there, apportionment on the basis of the time rule is appropriate only when the amount of the retirement benefits is substantially related to the number of years of service, and practitioners should not blindly assume that all retirement benefits should be allocated by a rote application of the time rule. Rather, each plan at issue should be examined and understood, to ascertain the precise relationship between the time of service and the amount of the benefits.

In some circumstances, it might be appropriate to tailor application of the time rule. For example, we have seen several retirement systems in which the retirement plan did not come into existence until sometime mid-stream in the worker's employment. In those cases, the proper denominator would not be the "total term of employment," but "the total term of employment while participating in the plan."

As discussed in the introduction, although the matter has not yet been raised in any Nevada appellate case, it is possible that the time rule might be entirely inappropriate for certain

⁷⁹ *See, e.g.*, 29 U.S.C. §§ 1023-1025.

⁸⁰ *See* "QDRO Handbook," available on the Department of Labor website: <http://www.dol.gov/ebsa/publications/qdros.html>.

kinds of retirement benefits. For example, in a defined contribution plan, as a matter of community property theory, the community is entitled to only the contributions between the date of marriage and the date of divorce (and any gains or losses through the date of distribution).

A regular application of the time rule might, or might not, correspond to an actual tracing of contributions and investment gains, particularly when the contributions to the account varied from time to time. For example, an individual might have had an IRA account throughout a marriage, but only contributed to it during certain years. If that account had been started and regularly contributed to before marriage, a time rule calculation would lead to an unfair distribution.

The defined benefit plans being converted to cash balance plans analyze much the same way. For plans utilizing the fixed dollar formula, the community's share is generally the fixed dollar amount per year of participation, multiplied by the years of participation occurring between the date of marriage and the date of separation. On the one hand, because the plans are technically defined benefit plans, application of some version of the time rule might appear to be appropriate. On the other hand, because cash balance plans operate in many respects like individual account plans, dividing the plans based on accruals during the marriage only, seems to be more fair.

A practitioner facing such a situation, for whom the math seems intimidating, might consider the possibility of consulting with an actuary about the different results that would be achieved by applying a pure time rule to apportion such interests, versus a direct tracing approach, to see if the differential warrants a request to the court to alter the normal time rule division.

C. Valuation

As discussed at some length in the Introduction, it might not be necessary to value the community property component of retirement benefits in every case. When the retirement will be divided by way of a percentage or in-kind division, valuation may not be required, except as it relates to the value of overall distributions.

Where negotiation or litigation is leading to an award of the entire community interest to the employee spouse, in exchange for an award of other community property to the non-employee spouse, or an equalizing payment, valuation of the interest is presumably necessary, including consideration of issues relating to the trading of taxable for nontaxable assets.

Defined contribution benefits are always in individual accounts and are thus readily susceptible to accurate valuation. Defined benefit plans, however, are substantially more difficult to value with accuracy. The goal in valuing a defined benefit plan is to ascertain the present value of a stream of expected future payments, for which the actuarial method has traditionally been used.

The actuary first calculates the value of the future benefits payments as a lump sum, computed as of the date on which the employee will retire (or is assumed to retire) or the date on which the benefit will otherwise mature. The sum is then reduced by various discounts, such as present value with an assumed interest rate, and by some risk factor for death or termination before the maturity date. In short, the eventual number arrived at is essentially an educated guess based on assumptions about a number of future possible events. The number, almost by definition, can *never* be completely accurate. And the caution in the Introduction about not being snookered by any attempted confusion among value, contributions, and benefits, applies whenever present value calculations are at issue.

D. Division

Once the community interest has been determined (and valued, if appropriate), it may be offset or divided as part of the overall distribution of the community estate. Where necessary, counsel may have to consult or retain ERISA attorneys, actuaries, or financial experts to deal with the mathematical, tax, and other issues present in the case. It is not unusual to stipulate to retention of a single expert for valuation, or drafting, with an eye toward maximizing benefits for both parties under a retirement benefit order.

1. Distribution of Defined Contribution Plans

Almost always, these are the simpler and more straightforward plans to actually divide, since there is a specific plan balance. Usually, that balance is simply divided. The payout to the non-employee spouse could be immediate, if allowed under the terms of the plan, but there are still some fine points to watch for and consider when ordering distribution.

For example, the plan in question might not accrue earnings daily, or even monthly – some plans have an *annual* earnings allocation date. Earnings become part of the accrued benefit only when they are allocated. Distributing 50% to the spouse the day prior to an annual allocation could deprive the spouse of a considerable sum of community property accrual. Additionally, failure to conform the correct procedures could result in disastrous tax and other effects for one party, the other, or both.⁸¹

Those procedures include not only the preparation and court approval of an appropriate order, but also the completion and return to the plan administrator of any necessary election forms by or on behalf of the alternate payee, the plan's receipt and approval of the court

⁸¹ See IRC § 402; *Jerry L. Burton*, TC Memo 1997-20 (when, in absence of QDRO, employee spouse withdrew pension to pay amounts owed to non-employee spouse, employee spouse liable for tax and penalties on entire amount) *see also Hawkins v. Commissioner*, 86 F.3d 982 (10th Cir. 1996) (marital settlement agreement incorporated into dissolution decree was QDRO; non-employee spouse was liable for tax on distribution she received under decree); *Mario Rodoni*, 105 TC 29 (1995) (tax-free rollover status was denied when distribution was not made under QDRO); *Robert L. Kareem*, 100 TC 521 (1993) (when judgment did not meet QDRO requirements, portion of distribution paid to non-employee spouse was taxable to employee spouse).

order, and proper distribution of the funds (ensuring that they are not transferred in any way that would constitute a taxable event).

If, for any reason, there is not to be an immediate distribution, it is usually possible to segregate the non-employee spouse's interest into a separate account, over which he or she should have the same degree of investment control as a plan participant or beneficiary.

As detailed in the Introduction, the alternative to division of the retirement benefit is to offset it for cash or other property, which requires both a valuation of the community interest in the retirement, and consideration of tax effects (many defined contribution accounts are in tax-deferred accounts, and it is somewhat complicated to offset pre-tax and post-tax assets).

2. Distribution of Defined Benefit Plans

As with defined contribution plans, there are two methods for dividing the community interest in a defined benefit plan: (1) an in-kind division of the interest (or the benefit stream); or offset for other property or an equalizing payment. But the matter is usually considerably more complicated for defined benefit plans, in either case.

For an in-kind division, the practitioner must be aware of all the matters discussed above regarding available plan options (usually these are fixed at the moment of retirement, so when the retirement precedes the divorce, usually only the benefit stream can be divided), limitations in the plan documents, etc. A detailed QDRO, generally separate from the divorce decree itself, is prepared, directing the plan to make distributions as specified.

If an offset or equalizing payment is desired, the practitioner must be aware of, and deal with, are all the uncertainties regarding valuation and actuarial value discussed above. Again, pre-tax and post-tax values must be accounted for. Because of the inherent uncertainty of actuarial valuations, many believe it is preferable to divide the asset in kind, and Nevada law makes it clear that such is the preferred approach in this State.⁸² Whenever an offset is considered, counsel should explicitly consider the possibility that there could be future enhancements to the benefit, or an early retirement subsidy.

3. Timing of Distribution

Whether the plan is a defined benefit or a defined contribution plan, the court should not postpone division of pension benefits. Important features of the ERISA/REA statutory scheme make it imperative that an approved pension order be entered *concurrently* with entry of the divorce decree if at all possible.

⁸² See *Sertic v. Sertic*, 111 Nev. 1192, 901 P.2d 148 (1995).

For example, it is not until a QDRO has been ordered, submitted, and approved that the non-employee spouse's eligibility for survivor benefits is protected.⁸³ If the employee should die after the decree is filed, but before the QDRO is entered, there may be no survivorship interest, and the disappointed former spouse will eventually discover that the only way to be made whole is by way of a malpractice suit against counsel.

Further, by definition, a QDRO cannot award benefits that have been awarded to another alternate payee.⁸⁴ In other words, benefits are paid to former spouses on a first-come, first-served basis, i.e., favoring the first-approved QDRO to be entered and served.⁸⁵ We have seen cases in which an enterprising employee has rushed a sham divorce from a later spouse (or even recruited a prior ex-spouse) in an effort to divert money away from a former spouse who is trying to get a QDRO drafted and approved.

It should be remembered that retirement benefits are subject to distribution upon divorce regardless of whether they are in pay status, or matured but not in pay status (where the employee has an unconditional right to retire and obtain immediate payment of benefits, but has not yet done so), or have not yet matured, and whether or not they are "vested." Each of these possible stages of accrual of benefits has a value that can be distributed by way of an in-kind division or by an award to the non-employee spouse of offsetting or equalizing payments, but (of course) the stage of the accrual of benefits will affect the value of the award to the non-employee spouse.

Normally, an estate cannot qualify as an alternate payee under a QDRO. Divorce settlements or orders should specifically address both the amount of survivor's benefits payable to the non-employee spouse, *and* the possibility that the non-employee spouse will predecease the employee spouse before benefits are commenced. In the latter case, some plans force a reversion of the spousal share to the employee; others do not. In any event, it is a very good idea to get the QDRO signed the same day as the decree, because it is extremely difficult to get the non-employee spouse's estate compensated for his or her community property interest in the retirement if the spouse dies before the benefit is awarded.

A subset of "timing" issues concerns the possibility of early retirement. In the PERS and military retirement systems, for example, the retirement systems will not pay anything to the non-employee former spouse until the employee actually retires, so the non-employee spouse must demand payments from the employee spouse directly.

⁸³ See *Bailey v. New Orleans S.S. Ass'n*, 100 F.3d 28 (5th Cir. 1996); see also *Samaroo v. Samaroo*, *supra*, 193 F.3d 185 (3d Cir. 1999); *Rivers v. Central & S.W. Corp.*, 186 F.3d 681 (5th Cir. 1999). But see *Trustees of Directors Guild v. Tise*, 255 F.3d 661 (9th Cir. 2000); *Patton v. Denver Post Corp.*, 179 F. Supp 2d 1232 (2002); *Hogan v. Raytheon*, 2001 US Dist LEXIS 10595 (ND Iowa, July 9, 2001, No. C00-0026).

⁸⁴ ERISA § 206(d)(3)(D); 29 U.S.C. § 1056(d)(3)(D).

⁸⁵ IRC § 414(p)(3)(C). See *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153 (4th Cir. 1997) (order directing that former spouse be designated as surviving spouse rejected because surviving spouse benefit had vested in subsequent spouse on employee's retirement).

Under ERISA, however, when benefits in a defined benefit retirement plan are matured and the employee has an unconditional right to retire and obtain immediate payment of benefits, but the employee chooses to continue working, there is authority that the non-employee spouse is entitled to demand payment of his or her share without waiting for the employee spouse to retire. This is a “divided interest” order, and the sum of the benefits payable is calculated actuarially in accordance with the age, etc., of the non-employee spouse.⁸⁶

One issue that appears repeatedly in the case law regarding ERISA plans is what to do about early retirement subsidies. Under private plans, the non-employee spouse’s early retirement rights are specifically recognized,⁸⁷ so the plan must compute and pay the accrued benefit awarded to the non-employee spouse without regard to any early retirement subsidy for which the participant has not yet become eligible by retiring.⁸⁸

E. Drafting the Order

In approaching the drafting of retirement benefits orders, attorneys for parties in divorce actions often rely on other attorneys who are retirement benefit “experts” and some professional service groups and drafting companies. The expert can be used either to draft the order, or to assist the attorney in drafting it, and in most places, including Nevada, there are attorneys who claim to specialize in ERISA or have specialized knowledge regarding it, and who draft, or consult on retirement benefits orders in family law actions. As with most things, divorce counsel should remember the maxim of *caveat emptor*.⁸⁹

1. Potential Complications

As explored in some detail above, defined contribution plans are most often divided by means of a formula. Although reliance on a model may often be sufficient for preparation of an order for this type of plan, there are a large variety of subtle issues that might need to be addressed in orders distributing such benefits, including:

⁸⁶ See 29 U.S.C. § 1056(d)(3)(G); IRC § 414(p); Retirement Equity Act of 1984 (REA) (Pub L. 98-397, 98 Stat. 1426).

⁸⁷ See 29 U.S.C. § 1056(d)(3)(E)(i).

⁸⁸ See 29 U.S.C. § 1056(d)(3)(E)(i)(II) and IRC § 414(p)(4)(A)(ii) (plan may make early retirement payment to nonparticipant spouse as if participant had retired on date on which payment is to begin, but taking into account only present value of the benefits actually accrued and not present value of any employer subsidy for early retirement).

⁸⁹ We have observed an alarming increase in the number of self-proclaimed “experts” regarding retirement benefits of various sorts, including both attorneys and “companies” of various sorts. In our experience, altogether too many of these persons are, in reality, clueless as to the actual law, and certainly as to any in-depth understanding of public policy and case law addressing the subject matter.

1. Non-liquid investments, for example real estate, limited partnerships, zero coupon bonds, life insurance, collectibles.
2. Participant loans.
3. Prohibited transactions.
4. Non-qualified plans.
5. Grandfather elections.⁹⁰
6. Owner-only plans.
7. Principals of the organization acting as trustees.
8. In-house, nonprofessional administration.
9. Excise and early distribution tax problems.
10. Beneficiary designations.⁹¹
11. ATROS (automatic temporary restraining orders in dissolution summons).⁹²

A defined benefit plan is typically even *more* complex than a defined contribution plan, because of the following kinds of difficult issues that might arise:

1. Early retirement subsidies.
2. Early retirement enhancements.
3. Survivor benefits.
4. Beneficiary designations.
5. Resulting trusts.
6. Form of benefit.
7. Over- or under- funding.
8. IRC § 415 limits.
9. Time-rule applications.
10. Floor/offset arrangements.
11. Involvement or potential involvement by the Pension Benefit Guaranty Corporation.

Both defined contribution *and* defined benefit plans can involve a wide assortment of difficult issues:

1. Bankruptcy of alternate payee.⁹³

⁹⁰ See, e.g., Tax Equity and Fiscal Responsibility Act of 1982 § 242(b)(2) (Pub L. 97-248, 96 Stat. 324); IRC § 4980A.

⁹¹ See, e.g., *Marriage of Egelhoff*, 532 U.S. 141, 149 L. Ed 2d 264, 121 S. Ct. 1322 (2001); *Trustees of Directors Guild v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Heggy v. American Trading Employee Retirement Account Plan*, 56 S.W.3d 280 (Tex. Ct. App. 2001).

⁹² See *Jones v Jones*, 789 A.3d 598 (Del. Fam. Ct. 2001) (state law prohibiting change in beneficiary designation did not affect change in beneficiary designation under employer-provided plan).

⁹³ See *Nelson v. Ramette (In re Nelson)*, 274 B.R. 789 (BAP 8th Cir 2002) (alternate payee's undistributed interest in former spouse's pension under QDRO is protected from inclusion in alternate payee's bankruptcy estate).

2. So-called “security QDROs”: A QDRO may be used to secure obligations under a dissolution judgment.⁹⁴

Too many attorneys involved in family court actions dealing with retirement benefits refuse to address the retirement benefits issues at all, either stating that they will be dealt with “later” or refusing to address them at all. This is a mistake, and as discussed in the Introduction, is no protection whatsoever from malpractice claims.

While it sounds like a commercial message, the bottom line to the risks involved lead to the conclusion that an attorney with limited knowledge and experience in dealing with retirement benefits issues in family law actions is usually well advised to obtain assistance from other attorneys who perform this work regularly. It may be expensive to the client, or require a lot of unbillable time for the attorney to start from scratch with each retirement benefits order, but the alternatives are worse.

The attorney should beware of simply adopting a plan’s model order, or a successful order from another case or plan. Simply because a plan accepts an order as satisfying the plan’s QDRO requirement does *not* ensure that the order will serve the client’s interests, or address the wide variety of possible hidden issues mentioned above. A model order should be used only when it adequately addresses every applicable issue and the drafting attorney understands every provision. Unfortunately, that seems to be the rare occasion.

If the order is not properly drafted, it may be rejected by the plan. Although a motion challenging the rejection may then be filed in the trial court, the plan may have the right to remove the action to federal court. In the event of rejection, the attorney will have to evaluate the validity of the plan’s action and decide whether the client is better served by making the changes required by the plan, or seeking an order from the court overriding the plan’s objections. Either of these alternatives will require substantial expertise.

2. Presence of Circumstances Suggesting Urgency

If either party is seeking a divorce, immediate action should be taken to draft and obtain a retirement benefits order if necessary to protect against the non-employee spouse’s loss of survivor benefits. The non-employee spouse’s attorney should not allow termination of the marital status without protecting survivor benefits for his or her client.

Many pension plans will deny a former spouse any share of the qualified pre-retirement survivor benefit (QPSA), if a QDRO is not entered before the death of a participant. In some

⁹⁴ See IRS Letter Rulings 200252093 and 9234014. See also *Mcintyre v. U.S.*, 22 F.3d 655 (9th Cir. 2000) (IRS may levy on ERISA regulated pension benefits to satisfy husband’s tax debt despite wife’s vested interest under state community property law). Each of the IRS letter rulings assumes that the QDRO satisfies the requirements of paragraphs 2 and 3 of IRC § 414(p). In the context of a security interest that is not currently payable or ascertainable in amount, some adept drafting may be required in order to meet the necessary specificity requirements for QDRO status. Of course, private letter rulings cannot be relied on by anyone other than the recipient; however, they are helpful to understanding current thinking of the IRS.

defined benefit plans, a QPSA for the current spouse (or deemed current spouse under a QDRO) is the *only* benefit available if a participant dies while still employed. In addition, the attorney may find that the QPSA has been waived in favor of another beneficiary designation for the pre-retirement death benefits. In either event, unless the former spouse's rights are preserved by an award of current or surviving spouse status in a QDRO, it may be very difficult to assert the former spouse's community interest in connection with the disposition of the participant's benefits.⁹⁵

Bifurcations are disfavored in Nevada divorce law.⁹⁶ If the parties proceed with a bifurcation which affects the marital status for purposes of entering the dissolution order earlier than the property division, then an interim QDRO appears to be necessary to preserve survivorship status. The interim QDRO should be entered at the same time as the judgment terminating marital status, to avoid any gap in surviving spouse status while the permanent QDRO is being prepared and approved.

Similarly, when retirement appears imminent (*e.g.*, the employee spouse is eligible to retire during the divorce proceedings), there is a danger that he or she might take action to the non-employee spouse's detriment before the retirement benefits order is entered, leaving the non-employee spouse at best with a right to litigate the propriety of the action. This danger is particularly acute with respect to a defined contribution plan, such as a 401(k) plan, because the employee who terminates employment, regardless of age, is usually able to receive distribution of the entire balance in the plan account.

A restraining order may be sought to prevent the employee spouse from making any choices or elections regarding retirement before entry of an appropriate domestic relations order. Whether or not the plan has been joined, a restraining order that satisfies any applicable QDRO requirements may include a directive that the plan not process any application for benefits before entry of an appropriate court order. Nevertheless, the attorney should not delay in obtaining entry of a court order dividing the benefits.

All private qualified and ERISA-covered pension plans are subject to the "18-month rule" found in IRC § 414(p)(7) and 29 U.S.C. § 1056(d)(3)(H). Under this rule, if within the 18-month period beginning with the date on which the first payment would be required to be

⁹⁵ See *Hearn v. Western Conf of Teamsters Pension Fund*, 68 F.3d 301 (9th Cir. 1995); *Ablamis v. Roper*, 937 F.2d 1450 (9th Cir 1991); see also *Trustees of Directors Guild v. Tise*, 234 F.3d 415 (9th Cir. 2000); *Patton v. Denver Post Corp.*, 179 F. Supp. 2d 1232 (2002) (nunc pro tunc QDRO entered as of date preceding employee's death not preempted by ERISA when plan was missed asset, plan proceeds not disbursed, and competing "alternate payee" not identified); *Hogan v. Raytheon*, 2001 US Dist LEXIS 10595 (ND Iowa, July 9, 2001, No. C00-0026) (QDRO allowed within 18 months of employee's death even though survivor benefits not mentioned in judgment).

⁹⁶ See *Ellett v. Ellett*, 94 Nev. 34, 593 P.2d 1179 (1978) (district court entered a "partial decree of divorce" terminating the marital relationship, but reserving jurisdiction to enter a subsequent decree regarding division of community property, debts, and alimony, which was entered four months later; on appeal, the Nevada Supreme Court considered the matter to lie within the sound discretion of the trial court, and approved the trial court's division of the husband's pension through the date of the later court order; *Gojack v. District Court*, 95 Nev. 443, 596 P.2d 237 (1979) (bifurcations disfavored).

made under the domestic relations order, the order is determined to not be a QDRO or that issue is not resolved, the plan administrator must pay the segregated amounts (including any interest) to the persons who would have been entitled to them if there had been no order.

F. Submitting the Order for Approval (or Pre-Approval)

If the parties are communicating and cooperative, the proposed order should be drafted by one side or the other (usually, by counsel for the non-employee spouse, because that side bears the greatest risk of loss if anything is not considered or done incorrectly). If necessary, it can be checked by an actuary for review of the mathematical correctness of the division, but this should not be needed in most cases.

It is an oddly persistent myth that a QDRO requires the signatures of the attorneys for both parties to be valid. In cases where there is no cooperation, or one side refuses to participate, there is no barrier to achieving a fully enforceable QDRO drafted and signed solely by the prevailing party. If the underlying order calling for entry of the QDRO is sufficiently clear as to terms, there does not even appear to be any need for a further hearing or other court proceeding; in such circumstances, several courts have expressed the willingness to sign off on the formal orders upon direct mailed submission.

Whether agreed or drafted by one side only, the proposed QDRO should be submitted to the plan for “preapproval” before submission to the court for signature and filing. This way, if the plan has technical objections or suggested amendments, they can be made efficiently without requiring the court to enter multiple successive orders.

After the QDRO is signed by the judge and filed, the attorney should send a copy (preferably, a certified copy) to the plan in a manner that creates a record of receipt by the plan, *e.g.*, by notice and acknowledgment of receipt or by certified or registered mail, return receipt requested. The QDRO cannot be considered really “complete” until the attorney or client has received written acknowledgment back from the plan that it has determined that the order qualifies as a QDRO.

V. CONCLUSION

While there are a great number of rules and technicalities that could come into play, the ERISA/REA statutory scheme is not really so complicated that attorneys working in this field cannot deal with it. In any event, it would be a mistake for counsel to simply abdicate responsibility for ensuring that ERISA-governed retirement benefits are secured by way of proper orders before closing a file – doing so leaves the clients exposed to significant loss, and leaves the attorneys open to possible malpractice repercussions.

Counsel must be prepared, in a case dealing with ERISA-governed retirement benefits, to perform adequate discovery, and think through the characterization, valuation (if necessary) and distribution questions, and then draft (or have drafted) the appropriate orders, seeing the

process through to obtain both filing of the order with the court, and plan approval. Those orders should be submitted, whenever possible, at the same time as the divorce decree.

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