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NEVADA FAMILY LAW REPORT

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Unreimbursed Medical Expenses And No Forum in Clark County To Litigate Them

By Ed Ewert, Chief Deputy DA, Clark County DA Family Support

CSEP	Child Support Enforcement Program
DAFS	Clark County D.A.'s Office, Family Support Division, a IV-D agency
"D" case	Family Court domestic relations cases (case number has a "D" prefix)
IV-D Program or "the Program"	The national child support enforcement program. The name comes from Title IV-D within the Social Security Act of 1974. Title IV-D created the CSEP
IV-D agency	An agency that is part of the IV-D Program
IV-D Court	Court dedicated exclusively to hearing IV-D cases
Parallel case	When DAFS is enforcing a D case order for the parties in the D case
"R" case	DAFS cases that require legal work are assigned a case number with prefix "R"
UMEs	Unreimbursed medical expenses

Some litigants here in Clark County are being left without a legal forum in which to press a claim for UMEs. It is an alarming situation that needs to be remedied as quickly as possible.

These litigants are people who happen to have a parallel "R" case with DAFS, which is enforcing the underlying child support order. Upon filing their motion for a judgment for UMEs in their Family Court "D" case these litigants are being told by their judge to, instead, seek their judgment in IV-D Court through the party's "R" case.

The situation is alarming because the IV-D Program hearing masters have refused to adjudicate the dispute, saying something to the effect that litigating unreimbursed medical expenses is "not a IV-D function" or not a service that Clark County's IV-D Program provides. The hearing masters are correct.

There are two major reasons why UME disputes should not be delegated to IV-D Court. One reason is largely legal in nature; the other is practical in nature. The legal reason is primarily a state regulation that exempts Nevada IV-D agencies from having to litigate unreimbursed medical expense disputes. The practical reason involves funding for Nevada's IV-D Program, program performance and related factors.

IN THIS ISSUE:

LEGAL-IN-NATURE REASONS TO STOP DELEGATING THE DISPUTES

The legal-in-nature reason to stop delegating UME disputes to IV-D Court has two components. One is regulation-related; the other has to do with funding.

Section 206(C) of Nevada's IV-D regulations exempts Nevada IV-D agencies from having to adjudicate unreim-

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A Note from the Editor

By Jessica Anderson

Road trip anyone?

Make certain your plans are set to attend the Section's Annual Family Law Conference in Ely, Nev., on March 3-4, 2016. We have an interesting line-up of family law focused trial prep programming. New this year will be a single fact pattern and mock case file that each presentation will utilize. To help your planning, we are again offering separate tracks for attorneys and paralegals.

Don't miss the Whiskey Tasting at the Postal Palace on Thursday evening of the conference. Learn about whiskey from the distillers, have some delicious food, and mingle with your colleagues. At the cocktail party Friday night prior to the annual banquet, in addition to libations and appetizers, you will have an opportunity to weigh in on the section's legislative efforts next session.

As you know from past conferences, please make sure that you make your room reservations in advance, as the town is almost always at capacity by the time we all get there.

My gratitude goes to the members of the Family Law Executive Council and State Bar for putting together the conference. It truly takes an enormous amount of time and energy to make the conference both interesting and fun year after year.

See you in Ely!

Jessica Anderson is Chair of the State Bar of Nevada's Family Law section. For the last five years Jessica has served on the Executive Council of the Family Law Section, a group that oversees the business of the Family Law Section with respect to important family law issues.

Jessica was the Lead Editor for the 2013 Nevada Family Law Practice Manual, which is the main treatise used by family law practitioners across the state.

Jessica began practicing family law in 2002 at Woodburn and Wedge. She was made partner in 2010. In 2012 she left Woodburn and Wedge in order to own her own practice, formerly known as Anderson Family Law, Chtd. In 2013, John Keuscher, a long time friend and colleague joined the firm, which is now known as Anderson Keuscher, PLLC. She can be reached at: jessica@andersonkeuscher.com.

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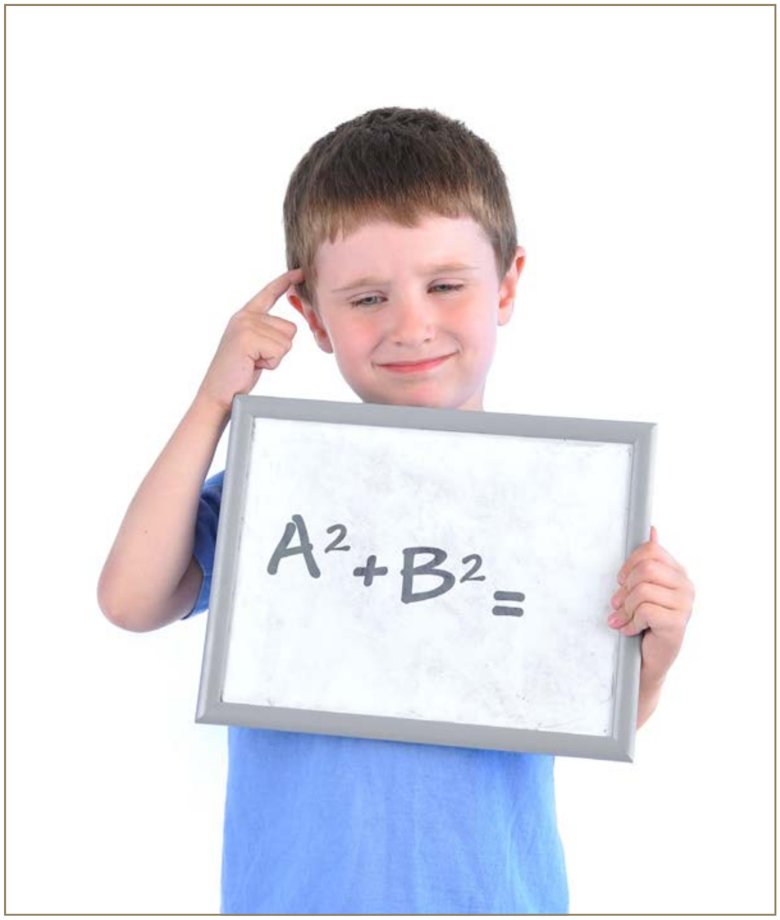
bursed medical expense disputes:[i]

> *"The IV-D agency is only required to petition for and enforce health insurance coverage and cash medical support in lieu of health insurance as opposed to obtaining judgments for past medical bills. The exception is a prior child support order setting a specific dollar amount to be paid by the [obligee] for medical expenditures. In these cases, the enforcing authority must enforce the payment for the medical expenditures."* [emphasis added]

This Nevada State regulation reflects the rule in federal regulations governing the IV-D Program. The federal rule on this subject is explained as follows in the Federal Register:

> *State IV-D agencies are not responsible for determining the amount of unreimbursed or uncovered medical expenses if the support order only addresses how such unquantified expenses are to be shared by parents. * * * If the support order does not designate a specific dollar amount for medical purposes (e.g., absent parent is ordered to pay for child's orthodontia), enforcement of that aspect of the order is not a required IV-D function.* [Section 303.31, Comment #6, 73 FR 42423, July 21, 2008]

A Nevada IV-D agency complies with Nevada IV-D regulations if it pursues an order that one or both parents provide medical insurance for the child if it is available at reasonable cost through employment or if the agency



seeks an order for the noncustodial parent to contribute to the custodial parent's cost of insurance for the child.

The other legal-in-nature component involves funding of the IV-D Program, which includes the salaries of IV-D hearing masters.

The reasoning here goes like this:

- The IV-D Program funds the salaries of the hearing masters for performing their judicial duties within the parameters of the IV-D Program;
- If Family Court judges assign work to a IV-D hearing master that is not a "IV-D function" then the money to pay the hearing master for the time dedicated to that non-IV-D function must come from judiciary funds, not from the IV-D Program. Note: a task that the IV-D Program performs, if within the parameters of the Program, is a "IV-D" function; if the task is not a service provided by the Program it is not a "IV-D" function.

To summarize, from a legal perspective alone it

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should be apparent that Family Court judges may not delegate to Clark County's IV-D Program UME disputes. Nevada IV-D regulations governing the Program exempt Nevada's IV-D agencies from the task of litigating those disputes. Furthermore, the "IV-D Program" includes the hearing masters who do their judicial work on cases and issues within IV-D Program responsibilities. If Family Court judges assign to the hearing masters tasks that are not part of IV-D Program responsibilities the judges should be prepared to use judiciary funds, not IV-D funds, to pay for the time the masters spend on those non-IV-D matters.

PRACTICAL-IN-NATURE REASONING TO STOP DELEGATING THE DISPUTES

The practical-in-nature reasoning to stop delegating UME disputes to IV-D Court is essentially a request to the judges that they not do things that harm the Program.

- **Nevada's IV-D Program provides an extremely valuable service to the community and to Family Court**;
  - Without the IV-D Program many custodial parents would not receive their child support;
  - If Nevada's IV-D Program were to be eliminated Clark County's Family Court caseload would likely increase by the thousands;
  - **State IV-D programs rely on federal funding for their existence**; the federal government provides two-thirds of the funding needed to run the programs and the states provide the other one-third;
  - **Performance by state IV-D programs in several categories affects funding.** A state's poor performance reduces the funds the federal government provides; good performance increases the funding;
  - Fewer funds means less chance of increasing staff to better serve the public;
  - Fewer funds means the agencies cannot provide "extra" services above and beyond the basic services mandated by program regulations (examples of extra services: employment assistance, community outreach events, social worker assistance);
  - **Assigning non-IV-D tasks hurts performance.** Requiring Clark County's IV-D agency to adjudicate often complex and time-consuming medical expense disputes draws agency staff, staff time, court calendar space and hearing master time away from handling cases and issues that impact performance;
  - **Clark County's IV-D caseload, as of November, 2015, was approximately 54,000 cases**;
    - ✦ All cases within that caseload that require a court hearing must be accommodated within the two courtrooms available to Clark County's program;
    - ✦ It is critical that sufficient IV-D Court calendar space be kept available for cases and issues within IV-D Program parameters;
- Court calendar space is limited and **deadlines imposed by federal and state regulations and statutes loom** (every court calendar slot is valuable);[ii]
- Due to deadlines, time is a critical factor for IV-D Court. This explains why NRS 425.3835 states that IV-D proceedings are not to be stayed.
- Judges who delegate UME disputes to IV-D Court are reducing the availability of IV-D Court calendar time and slots that are needed for cases and issues within IV-D Program responsibilities.

In other words, delegating such disputes to Clark County's IV-D agency undermines the agency's performance and could negatively affect funding of Nevada's IV-D Program.

CONCLUSION

Family Court judges who see a parallel "R" case for parties to a UME dispute must stop delegating those disputes to IV-D Court. The practice conflicts with applicable regulations and poses a threat to Nevada's IV-D Program and its funding. Perhaps more importantly, judges who refer these UME disputes to IV-D Court here in Clark County are effectively depriving litigants who are owed a portion of those expenses of a legal forum in

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which to press their claims.

Endnotes

i The IV-D Program does not provide the service of enforcing <u>all</u> of a custodial parent's rights relating to child support. Rights for which services are not provided must be pursued by the individual. An example of another limitation of IV-D services is a Nevada regulation relating to arrears in cases involving establishment of a child support order. Although NRS 125B.030 and .040 entitle a custodial parent or other caretaker to seek up to four years of pre-Complaint arrears, IV-D regulations in Nevada – Section 501(C) – provides that a Nevada IV-D agency will seek for the custodial parent-customer only such arrears as may have accrued from the date the customer applied for IV-D services. The rationale for this limitation is similar to why Nevada IV-D agencies need not litigate UME disputes: Seeking four years of pre-Complaint arrears often becomes a time-consuming, complex matter as parents disagree about where the children lived, when they lived with whom and what, if anything was paid and even whether a payment was child support or something else.

ii Example of deadlines: ***NRS 3.415 Time for disposition of cases.*** *To the extent necessary to comply with the requirements of the Federal Government concerning the enforcement of the obligation of support of a child, to avoid jeopardizing the receipt by the Division of Welfare and Supportive Services of the Department of Health and Human Services of money from the Federal Government and to avoid subjecting the Division of Welfare and Supportive Services to other sanctions by the Federal Government, the disposition of cases to establish an obligation for support of a child must:*

1. *Be 75 percent completed within 6 months after service of the notice of the proceedings; and*
2. *Be 90 percent completed within 12 months after the service of the notice of the proceedings.*

Ed Ewert is a Chief Deputy D.A. in the Family Support Division of the Clark County District Attorney's Office. He earned both his B.A. in journalism and his J.D. from the University of Washington. He joined the D.A.'s Office here in 1990 and has worked in the Family Support Division since 1993. He has presented on interstate child support law and analysis locally, as well as in Chicago, San Diego and Kansas City, Mo. He has authored child support-related articles for*Nevada Lawyer* magazine and the *Communique*. Mr. Ewert is also a contributing author to the State Bar's Family Practice Manual. He is a co-author of the section on Child Support and author of the sections on Government Involvement in Child Support Enforcement and on Interstate Child Support Enforcement: UIFSA and FFCCSOA.

The Underutilization of Qualified Domestic Relations Orders in Child Support Collection Cases

By Trevor M. Creel, Esq.

I. A Brief History

Most people in this country earning retirement benefits work for private employers. Most private employee-benefit plans, or "pension" plans[i] in the United States today are qualified under, and governed by, the Employee Retirement Income Security Act of 1974, known as ERISA,[ii] codified at 29 U.S.C. 1001 *et seq*.

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 abuse of employees in the private sector. ERISA and the Internal Revenue Code (IRC) are the controlling 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.

But ERISA, as originally enacted, did not explicitly contemplate divorce. ERISA provided that pension benefits could not be assigned or alienated.[iii] 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,[iv] but the legal landscape was confused until the passage in 1984 of the Retirement Equity Act (REA),[v] which provided that certain domestic relations orders, containing specific terms,

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must be accepted and honored by ERISA-qualified pension plans. It was that law that created QDROs, - Qualified Domestic Relations Orders.

Virtually ***any*** judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent made according to local domestic relations law is considered a domestic relations order, or DRO under ERISA/REA.[vi] It becomes a ***Qualified*** Domestic Relations Order, or QDRO, and must be recognized and enforced by an ERISA plan, when it creates or recognizes one of the listed classes of persons[vii] as an "Alternate Payee" with a right to receive all or any portion of the benefits normally payable to a participant in that plan, contains the various required terms for such an order, and omits anything that would ***dis***-qualify it from qualifying.

At about the same time (the 1980s), similar (but not identical!) developments were altering divorces for those working in the ***public*** sector.

On June 26, 1981, the United States Supreme Court issued its opinion in *McCarty v. McCarty*.[viii] The Court determined that state community property laws conflicted with the federal military retirement scheme, and thus were impliedly pre-empted by federal law. The majority held that the apparent congressional intent was to make military retirement benefits a personal entitlement and thus the sole property of individual service members, so the benefits could not be considered as community property in a California divorce. The Court invited Congress to change the statutory scheme if divisibility of retired pay was desired.[ix]

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act (USFSPA) on September 8, 1982.[x] The declared goal of the USFSPA at the time of its passage was to reverse *McCarty* by returning the retired pay issue to the states.[xi] By fits and starts, every state in the union eventually permitted military retirement benefits to be divided as property.[xii]

The primary purpose of the USFSPA was to define state court jurisdiction to consider and use military retired pay in fixing the property and support rights of parties to a divorce; the point here is that the federal statute

was essentially an enabling act permitting States to address the subject, so treatment of retired pay was again made dependent on State divorce laws. There is no specific title required for a military pension division order, but an order dividing military retirement benefits has come to be known as a Military Benefit Division Order (MBDO) or more technically as labeled in 10 U.S.C. 1408(a)(2), Order Incident to Decree.

Also outside the scope of ERISA are retirement benefits of federal Civil Service employees. Those working in the U.S. Civil Service have had a retirement system in place in some form since 1920, which is the date from which the "old" system (Civil Service Retirement System, or CSRS) for those who began service before January 1, 1984, can be traced. The retirement system is essentially a defined benefit plan, which takes into account years of service and highest salary in determining a monthly sum to be paid to an employee from the date of retirement until death.

The entire system was altered for incoming employees in a new system (Federal Employees' Retirement System, or FERS), for those who began service on or after

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January 1, 1984.[xiii]

Those defined benefit plans are administered by the Office of Personnel Management (OPM) under extensive separate federal regulations.[xiv] An order dividing Civil Service retirement benefits is required by regulation to be titled a Court Order Acceptable for Processing (COAP).[xv]

The new system also created a defined contribution retirement account called the Thrift Savings Plan (TSP).[xvi] In 2001, the defined contribution program was also made available to those in the armed forces. An order dividing a TSP account is a Retirement Benefits Court Order (RBCO).

And, virtually simultaneously with the federal efforts in the 1980s, various states actively cooked up new or refined retirement schemes for those employed by state governments.

In Nevada, state public employees fall under the Public Employees Retirement System (PERS), which in its modern form has existed since 1975, but was entirely revised and reorganized in 1993. Those who put the Nevada PERS regulations together chose to (confusingly) use the same titles, etc., as are in the federal ERISA law, and even copied some of the statutory language from the far larger, and more complex, federal law. However, a state pension plan (such as PERS) does ***not*** fall within ERISA, and the federal statutes do ***not*** apply to the plan, or to the benefits. Instead, there is an entirely different set of (State) laws that govern distribution of PERS benefits outlined in Chapter 286 of the Nevada Revised Statutes.

II. Why Family Law Practitioners Should Care

Many practitioners fail to pay sufficient attention to pension and retirement plans when evaluating the community or other property available for distribution upon divorce, let alone think of that property as a valuable mechanism for collecting child support arrears. This a huge mistake, as the clear language of ERISA, noted above, provides that DROs are ***any*** orders relating to the provision of child support, alimony, or marital property rights to an alternate payee, which can be a spouse, former spouse, child, or other dependent.

Pursuant to 29 U.S.C. 1056, a retirement plan can be used for purposes of satisfying a child support arrearage through the use of a QDRO, as a retirement plan is not a party to the litigation that produces the QDRO; instead, it is simply a stakeholder, or a source of wealth to which the holder of a judgment may turn for satisfaction so long as the requirements outlined above are met under ERISA.[xvii] Indeed, ERISA does not even permit a retirement plan to look beneath the surface of an order so long as the basic requirements of the law are met; compliance with a QDRO is ***obligatory***.[xviii]

In *Trustees of Directors Guild of America v. Tise*, the 9th Circuit Court of appeals awarded Suzanne Tise, the mother of the plan participant's child, $226,701.04 in child support arrears, coupled with an attorney's fee award of $97,367.81.[xix] The Court also agreed with the Superior Court's determination that a QDRO could be utilized for purposes of collecting the ***entirety*** of the awards made to Ms. Tise, including her award of attorney's fees. Since the order stated a specific lump sum was owed to Ms. Tise, the statutory requirements that the order include the amount owed and the number of payments were satisfied.[xx]

In *Blue v. UAL Corporation*, the retirement plan participant, Robert Blue, contested an Illinois District Court judgment allowing his ex-wife to collect the attorney's fees she was awarded, as part of her child support collection case, from his United Airlines pension. Robert contended that affording his ex the opportunity to collect attorney's fees from his pension was a specific violation of ERISA's anti-alienation clause. The District Court, and the Seventh Circuit disagreed, under the premise that the pension fund was simply a source of wealth to which the holder of a judgment may turn for satisfaction by way of a QDRO.[xxi] Since alternate payees are narrowly defined, only a specific group of people are eligible to request such relief. In other words, domestic relations creditors, commonly former spouses and dependent children, do not fall under the category of third party creditors.

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Numerous other states agree with the conclusion of the *Blue* and *Tise* Courts and there appears to be a nearly universal consensus, per the relatively clear language of ERISA, that a QDRO may not only be used to collect child support arrears, but also ***any*** attorney's fees and costs related to that collection effort, which are mandatory under Nevada law pursuant to NRS 125B.140(2)(c)(2).[xxii] The Massachusetts Supreme Court explained it best in *Silverman v. Spiro*,

> The issue of the validity of a QDRO to recover attorney's fees is one we have not decided. ERISA itself does not expressly permit an assignment of retirement funds pursuant to a QDRO to satisfy an award of attorney's fees. The requirement that a QDRO relate to alimony, child support, or the division of marital property seeks to ensure that assets protected under ERISA will be used for the benefit of a former spouse or a dependent, and then only for specified purposes. Necessarily implicit, however, in the Federal law's recognition of a QDRO is authorization for the reimbursement of attorney's fees incurred in obtaining a proper order. Were it otherwise, a former spouse or party who succeeded in obtaining an appropriate QDRO would have the order reduced by the necessity of paying attorney's fees. In some circumstances, a former spouse or party might even forgo seeking a needed QDRO because of the prohibitive nature of unreimbursed attorney's fees. These results would undermine the intent of Congress in establishing the QDRO exception by denying deserving parties and children a recovery to which they are entitled.

III. Other Items to Consider

As payment of child support is considered non-taxable, it is essential that any resulting QDRO be drafted in such a way so as to make the obligor responsible for paying all income taxes associated with the distribution(s) from the retirement benefits.

The costs associated with collecting child support arrears should also be addressed in the QDRO, which necessarily includes attorney's fees and costs, costs relating to the preparation of a QDRO, and any fees associated with the retirement plan's review and implementation of an approved QDRO.[xxiii] As noted above, nearly every state that has addressed this issue has determined that an

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obligee can pursue reimbursement of fees and costs through a QDRO.

Finally, it is important to remember that nothing in ERISA prevents an alternate payee from utilizing multiple QDROs to enforce multiple judgments. As an example, just because a former spouse has already received her community property share from a 401(k) does not prevent her from coming back in the future to utilize that same 401(k) to collect on a judgment for child support, alimony, and attorney's fees.

IV. Conclusion

The use of QDROs for the collection of child support and attorney's fees is an often overlooked tool, despite the reality that an obligor's pension or deferred compensation account is likely the largest asset they have. It is essential for every family law practitioner to be familiar with the retirement plan involved, what benefits are payable, and whether or not those retirement benefits can be used as an immediate source for the satisfaction of both child support arrears and prospective payments.

Citations

i. 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.

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

iii. 29 U.S.C. 1056(d)(1); Internal Revenue Code (AIRC@) 401(a)(13)(A).

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

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

vi. 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.

vii. Normally, any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

viii. McCarty v. McCarty, 453 U.S. 210, 101 S. Ct. 2728 (1981).

ix. 453 U.S. at 235-36, 101 S.Ct. at 2743.

x. Also commonly known as the "Federal Uniformed Services Former Spouses Protection Act," or FUSFSPA, or as "the Former Spouses Act," or in some references simply as "the Act." 10 U.S.C. 1408 (amended every year or two since 1983).

xi. The purpose of this provision is to place the courts in the same position

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that they were in on June 26, 1981, the date of the McCarty decision, with respect to treatment of nondisability military retired or retainer pay. The provision is intended to remove the federal pre-emption found to exist by the United States Supreme Court and permit State and other courts of competent jurisdiction to apply pertinent State or other laws in determining whether military retired or retainer pay should be divisable [*sic*]. Nothing in this provision requires any division; it leaves that issue up to the courts applying community property, equitable distribution or other principles of marital property determination and distribution. This power is returned to the courts retroactive to June 26, 1981. This retroactive application will at least afford individuals who were divorced (or had decrees modified) during the interim period between June 26, 1981, and the effective date of this legislation the opportunity to return to the courts to take advantage of this provision. S. Rep. No. 97-502, 97th Cong., 2nd Sess. 15, (1982), *reprinted in* 1982 U.S. Code Cong. & Ad.News 1596, 1611. *See also Steiner v. Steiner*, 788 So. 2d 771 (Miss. 2001), *opn. on rehg*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

xii. Legislative History, Pub. L. No. 97-252; S. Rep. No. 97-502. As of June 26, 1981, all community property states, and most equitable distribution States, treated military retired pay as marital property subject to division. The two last "title" states, Mississippi and West Virginia, have since then adopted equitable distribution schemes.

xiii. *See* 5 U.S.C. '8331, 8401; Pub. L. 99-335 (1986).

xiv. *See* Court Orders Affecting Retirement Benefits, 57 Fed. Reg. 33,570 (July 29, 1992) (codified at 5 C.F.R. Parts 831 *et seq*.) The new regulations addressed the employee annuity (the pension), refunds of employee contributions, and survivor's benefits, but not the Thrift Savings Plan (ATSP), which was set up to work like a 401(k), and is administered separately.

xv. 5 C.F.R. 838.803.

xvi. Created by the 1986 statute creating FERS, the TSP is a defined contribution type of plan for federal employees. The TSP is expressly ***excluded*** from the regulations governing the CSRS and FERS retirement benefits. 5 C.F.R. 838.101(d). Instead, it is administered by a Board entirely separate from the OPM (the Federal Retirement Thrift Investment Board). 5 U.S.C. 8435(d)(1)-(2), 8467; 5 C.F.R. Part 1653, Subpart A.

xvii. *See Blue v. UAL Corporation*, 160 F.3d 383 (7th Cir. 1998). *Also see* 29 U.S.C. 1056(C) and 1056(D). To be clear, QDROs can be used to collect arrearages in divorce cases, child custody cases, guardianship cases, and even probate matters. There are numerous examples of obligees seeking the implementation of a post-death QDRO to collect child support arrears.

xviii. *Supra*, 160 F.3d at 385.

xix. *Trustees of Directors Guild of America v. Tise*, 234 F.3d 415 (2000).

xx. *Id.*

xxi. *See Blue v. UAL Corporation*, 160 F.3d at 385. *Also see Turner v. Turner*, 622 S.E.2d 263, 265 (Va. App. 2005) ("[the] QDRO simply was an administrative mechanism to effectuate the intent and purpose of the final decree's award."); *Trustees of Directors Guild of America v. Tise*, 234 F.3d at 420 ("State family law can ... create enforceable interests in the proceeds of an ERISA plan, so long as those interests are articulated in accord with the QDRO provision's requirements."); *Hogle v. Hogle*, 732 N.E.2d 1278, 1284 (Ind. App. 2000) ("We find the Hogle QDRO ... to be an appropriate mechanism for enforcement of Shirley's support arrearage judgment, and we affirm the trial court's entry of a QDRO for that purpose."); and *Mackey v. Lanier Collection Agency*, 486 U.S. 825 (U.S. 1988) (Since ERISA does not provide an enforcement mechanism for collecting judgments, state law methods for collecting money generally remain undisturbed by ERISA; otherwise there would be no way to enforce a judgment won against an ERISA plan).

xxii. These other states, obviously in addition to California, include Alabama, Arizona, Colorado, Florida, Illinois, Indiana, Iowa, Maryland, Massachusetts, Michigan, Missouri, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, and Virginia. *See Stamm v. Stamm,* 922 So.2d 920 (Ala. Civ. App. 2004); *Johnson v. Johnson*, 523 P.2d 515 (Ariz. Ct. App. 1974); *In re Marriage LeBlanc*, 944 P.2d 686 (Colo. App. 1997); *Self v. Self*, 2005 Fla. App. Lexis 8875, 3 (Fla. 2nd Dist. Ct. App. 2005); *In re Marriage of Thomas*, 789 N.E.2d 821 (Ill. App. 2003); *Hogle v. Hogle*, 732 N.E.2d 1278, 1284 (Ind. App. 2000); *In re Marriage of Rife*, 529 N.W.2d (Iowa 1995); *Rohrbeck v. Rohrbeck*, 566 A.2d 767 (Md. 1989); *Silverman v. Spiro*, 784 N.E.2d (Mass. 2003); *Galenski v. Ford Motor Co. Pension Plan*, 421 F.Supp.2d 1015 (E.D. Mich. 2006); *Baird v. Baird*, 843 S.W.2d 388 (Mo. App. 1992); *Miko v. Miko*, 661 A.2d 859 (N.J. Super. App. Div. 1994); *Palmer v. Palmer*, 142 P.3d 971 (N.M. Ct. App. 2006); *Adler v. Adler*, 224 A.D.2d 282 (N.Y. 1996); *Evans v. Evans*, 434 S.E.2d 856 (N.C. App. 1993); *Taylor v. Taylor*, 541 N.E.2d 55 (Ohio 1989); *Stinner v. Stinner*, 554 A.2d 45 (Pa. 1989) *Turner v. Turner*, 622 S.E.2d 263, 265 (Va. App. 2005).
Georgia appears to be the only state that has squarely addressed and denied the use of a QDRO for purposes of collecting child support arrears under the premise that such action would constitute an impermissible modification of a final divorce decree. *See Friday v. Friday*, 755 S.E.2d 707 (Ga. 2014). However, none of the cases cited above were ever referenced in the Court's decision, and no mention of ERISA or the REA was ever made, lending to the conclusion that the matter may not have been properly briefed.

xxiii. Some plan administrators charge fees to review a QDRO prior to its acceptance. In some cases, these fees are in excess of $1,000.

Trevor M. Creel, Esq., is an associate attorney at the Willick Law Group and its subsidiary, QDRO Masters, and a native of Las Vegas. Mr. Creel has handled hundreds of cases involving the division of retirement benefits, primarily through QDRO Masters. QDRO Masters' primary service involves the drafting of retirement division orders for a flat fee for private retirement QDROs under ERISA, Civil Service retirements under FERS and CSRS, military retirement benefits, and Nevada PERS retirements. If you have a retirement order to draft, or other pension-related problem, do not hesitate to contact me at (702) 438-4100.

Interest and Penalties on Child Support Arrears: Another Malpractice Trap

By Marshal S. Willick, Esq.

One of a domestic relations attorney's biggest responsibilities is to ensure that minor children of a marriage are cared for after a divorce. It is also the paramount concern of the Court; NRS 125.450 requires child custody and support to be dealt with *before* a divorce can be granted.

Once an order for support is in place, the paying parent must pay what is owed when it is owed or the minor children may suffer. The Legislature saw this as a major problem and took action to not only apply statutory interest to any arrearage, but instituted a 10% per annum penalty for all sums that remain unpaid after one month as an incentive to make the payments on time. Unfortunately, the calculations for this can be complicated, especially for arrearages that span multiple years.

This article will provide a little history of child support in Nevada and the challenges for the legal practitioner.

A Little History

Nevada law mandates that unpaid installments in child support or spousal support become judgments as a matter of law as of the date they come due and remain unpaid.

The Nevada legal rate of interest

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was 7% from 1960 to 1979, 8% from 1979 to 1981, and 12% from 1981 to 1987, altered repeatedly in reaction to the hyper-inflation that raged periodically in that time. The Nevada Legislature had to keep amending the legal rate of judgment interest statute – NRS 17.130(2) (along with NRS 99.040(1), governing contracts) each session, and always "behind the curve" of whatever was happening in the economy, since the Legislature met only every two years.

In 1987, the Legislature decided to have the legal interest rate "float," self-adjusting every six months to the prime rate at the largest bank in Nevada, plus 2%. The legislation itself was devoid of details as to precisely how such calculations were to be done, but some instructions were supplied by Nevada Supreme Court decisions before and after the statutory change.

Unfortunately, the cases were not much studied by the Bar or their hired experts. Most lawyers simply ignored interest, except in the biggest cases. Others either developed the ability to perform the calculations by spreadsheet, or hired a local accountant to do the calculations for them. Most of those accountants, however, applied "generally accepted accounting principles" when they were hired to do such calculations – even when such principles directly conflicted with the controlling case law (which, of course, the accountants had never read).

This led to significant variability in whether, how, and how much interest was applied to judgments in Nevada cases. The multiple changes to applicable interest rates also made the calculations technically difficult. For example, pre-July, 1987, arrears had a "fixed" interest rate, while post-July, 1987, arrears "floated," and the number of changes increased every six months. Spreadsheets done by hand had to have separate columns tabulating interest for each "class" of arrearage, to determine when each individual dollar of arrears was paid. However, even with experience the supporting spreadsheets grew increasingly complex and difficult to follow within a year or so of the 1987 amendments.

In 1993, the Nevada Legislature tried to come up with some ***additional*** way of encouraging delinquent child support obligors to pay their back child support sooner rather than later. This ultimately became the "penalties provision," NRS 125B.095.

The Executive Council of the Family Law Section of the Nevada Bar followed and participated in the development of the new statute, but did not actually draft the language, which read:

> The amount of the penalty is 10 percent per annum, or portion thereof, that the installment remains unpaid. Each district attorney or other public agency in this State undertaking to enforce an obligation to pay support for a child shall enforce the provisions of this section.

A two-year deferral period was built into the effective date of the new "penalty" statute (from 1993 to October 15, 1995) – the idea was to give delinquent support obligors that long to catch up on their back support before the penalty began applying to them, and the Welfare Division claimed that it would take another couple of years before they could get NOMADS (the State's child support computer) programmed to calculate or track the penalty.

The private Bar began applying the penalty in late 1995 when it became effective, and the Family Courts uniformly included a penalty assessment per the statute whenever counsel requested (and calculated) it. The calculation was not particularly difficult. The statutory language directed assessing a penalty of "10 percent per annum, or portion thereof, that the installment remains unpaid."

That language on its face required calculation of an ***annual*** penalty, calculated by focusing on each "installment" to see if it had yet been paid and, if not, calculating a penalty at a 10% annual rate from the time that the sum went unpaid until the Court heard the case. The only information needed was whether a particular "installment" of child support "remains unpaid" (i.e., was in arrears), then multiplying the sum by 10% and figuring out how ***long*** the installment remained unpaid.

So if a $500 installment of child support remained

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totally unpaid for a month, a penalty of $4.17 ($500 x 10% ÷ 12) accrued. If it still remained unpaid the next month, another such penalty accrued, and so forth. Throughout the 1990s, such penalty calculations were done by spreadsheet and submitted as exhibits to child support motions. To our knowledge, every judge who ever heard a child support motion where a penalty was so calculated approved the reasoning, methodology, and totals, over all objections that have ever been made.

However, calculations done by hand and submitted to the courts were often wrong. Assessing simple interest to the arrearage was complicated enough, but then adding an additional penalty caused an increasing number of mistakes to be made.

The Malpractice Traps

There are several. Most obvious is the failure to do interest and penalty calculations, which deprives the party owed the arrears of the sums owed under law. The Nevada Supreme Court has made inclusion of statutory interest ***mandatory*** on arrears judgments. The Court found that the legislature did not intend for the district courts to have discretion to set interest rates on judgments, and reversed that portion of the judgment with instructions to amend the award by applying the statutory interest rate.

The following year, the Court decided *Schoepe*, in which it held that NRS 99.040(1) required calculation and recovery of interest as a matter of right, is not discretionary, and requires determination of only the rate of interest, the time it commences to run, and the amount to which interest applies. The Court added that these are factual, not discretionary, inquiries.

And the penalty statute – NRS 125.095 – states on its face that inclusion of the penalty is mandatory in any arrearage order.

A comprehensive redraft of the Eighth Judicial District Court Rules governing practice and procedure in Family Court (EDCR 5) has been completed and is now pending final approval. The proposed rules include new EDCR 5.507, "Schedule of arrearages required for motions seeking arrearages in periodic payments" (replacing existing EDCR 5.33).

The new rule ***requires*** that a motion for arrears in child support or spousal support "shall be accompanied by a separately-filed schedule showing the date and amount of each payment due, and the date and amount of any payments received." It further provides that the required schedule "may include a calculation of interest, any applicable penalties, and an explanation of how those sums were calculated."

Failing to provide for mandatory interest and penalties opens the practitioner up to liability by the shortchanged client.

Unfortunately, most Nevada attorneys are neither accountants nor calculation experts. The second malpractice trap is trying to do the calculations, but doing them incorrectly, or failing to include all the information required by the rule.

Practitioners should be careful to perform the calculations in accordance with all case law. For example, the Nevada Supreme Court has held that compounding is prohibited.

Another trap is misplaced reliance on calculations done by others. Never rely on calculations performed by the D.A.'s office. The State Welfare System computer (NOMADS) was ***never*** properly programmed to accurately compute the penalty, and its interest calculations are slightly inaccurate as

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Malpractice trap

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well. As such, the litigants who are having their child support arrearages calculated by the State are usually being shortchanged as well.

Your Responsibility

As a domestic relations practitioner, you have the responsibility to ensure that child and spousal support arrearages are calculated in accordance with Nevada Statutes and local rules and are correct. It is malpractice to submit an arrearage calculation that only provides the court with the principal arrearage without applying statutory interest and penalties.

If you are an accountant or are a whiz with spreadsheets, you can do the calculations on your own on a case by case basis. But if you are unable or unwilling to perform these calculations long hand, you will need to use a commercial interest and penalty calculator to ensure your submissions to the court are accurate.

It's also a good idea to do those calculations from a practical perspective – it can significantly increase the size of an arrearage judgment. A fully paid client is usually a happier client, who is more willing (and able) to pay an attorney's fee.

Don't get caught in a malpractice trap. If you have any questions concerning these calculations, feel free to contact our office for assistance.

Citations

1. NRS 125B.095.

2. NRS 125B.140(2)(c) (court orders for child support arrears shall in clude "interest upon the arrearages at a rate established pursuant to NRS 99.040, from the time each amount became due . . . interest continues to accrue on the amount ordered until it is paid.")

3. NRS 17.130(2) provides for interest when no rate is provided by contract, or by other statute, or otherwise specified in a judgment:

   > the judgment draws interest from the time of service of summons and complaint until satisfied, except for any amount representing future damages, which draws interest only from the time of the entry of the judgment until satisfied at a rate equal to the prime rate at the largest bank in Nevada, as ascertained by the commissioner of financial institutions, on January 1 or July 1, as the case may be, immediately preceding the date of the judgment, plus 2 percent. The rate must be adjusted accordingly on each January 1 and July 1 thereafter until the judgment is satisfied.

4. The cases are collected and analyzed in the article entitled "A Matter of Interest: Collection of Full Arrearages on Nevada Judgments," first published in the September, 1990, issue of the NTLA *Advocate*, and revised several times since then, most recently as CLE materials at the Twelfth Annual Family Law Showcase (Tonopah, Nevada, 2001). A copy of the article is posted in the Published Works section at www.willicklawgroup.com.

5. By 1989, it was obvious that an automated solution was necessary, and Marshal Willick began work on what ultimately became the Marshal Law ("MLAW") program.

6. NRS 125B.095(2).

7. Separate and apart from ***interest*** calculations, which were done by hand, by CPA, or by computer program.

8. For further background, see the explanation and materials posted and linked at http://willicklawgroup.com/interest-penalties/.

9. *See Gibellini v. Klindt*, 110 Nev. 1201, 885 P.2d 540 (1994).

10. *Schoepe v. Pacific Silver Corp.*, 111 Nev. 563, 893 P.2d 388 (1995).

11. Use of the MLAW Penalties and Interest Calculator makes it simple to do such a calculation, and shows on its face the dates and amounts due and paid.

12. *See Torres v. Goodyear Tire & Rubber Co.*, 30 Nev. ___, 317 P.3d 828 (Adv. Opn. No. 3, Jan. 30, 2014), as detailed in legal note Vol. 59, Calculating Judgment Arrearages, posted at http://willicklawgroup.com/full-list-of-newsletters/.

13. The Attorney General's Office is on record as disagreeing with this statement. They have supported the Welfare agency's methodology (which is actually based on the only calculation that they were able to make their outdated NOMADS computer do, rather than any actual effort to comply with the law), ignoring the plain language of "10% per annum" and applying a one time 10% penalty as soon as a payment is late. This results in the penalty being initially too high on each individual payment, but as time passes becoming too ***low*** as it is only applied once to each delinquent payment no matter how much time passes before it is paid. *See* Willick, *Why the Nevada Welfare Division is Calculating Interest and Penalties Incorrectly, and How It Injures Nevada Litigants*, 23 Nev. Fam. L. Rep., Winter, 2010, at 19, posted at http://willicklawgroup.com/published-works/.

14. The MLAW calculator is available for this purpose and can be found at mlawapp.com.

Marshal S. Willick, Esq., is the principal of the Willick Law Group, an A/V-rated Las Vegas family law firm. Mr. Willick can be reached at 3591 East Bonanza Rd., Ste. 200, Las Vegas, NV 89110-2198. Phone: (702) 438-4100; fax: (702) 438-5311; e-mail: Marshal @WillickLawGroup.com.