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

I. A Brief History

Most people in this country earning retirement benefits work for private employers. 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 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But ERISA, as originally enacted, did not explicitly contemplate divorce.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."[3] 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,[4] but the legal landscape was confused until the passage in 1984 of the Retirement Equity Act ("REA"),[5] which provided that certain domestic relations orders, containing specific terms, 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.[6] 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[7] 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*.[8] 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.[9]

It was, and Congress reacted by enacting the Uniformed Services Former Spouses Protection Act ("USFSPA") on September 8, 1982.[10] 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."[11] By fits and starts, every state in the Union eventually permitted military retirement benefits to be divided as property.[12]

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 January 1, 1984.[13]

Those defined benefit plans are administered by the Office of Personnel Management ("OPM") under extensive separate federal regulations.[14] An order dividing Civil Service retirement benefits is required by regulation to be titled a Court Order Acceptable for Processing ("COAP").[15]

The new system also created a defined contribution retirement account called the "Thrift Savings Plan" ("TSP").[16] 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.

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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 a 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.[17] 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***.[18]

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.[19] 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.[20]

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.[21] 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.

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).[22] 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.[23] As noted above, nearly every state that has addressed this issue has determined that an 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), that 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.

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.

Additionally, QDRO MASTERS provides expert witness work via oral testimony, valuations, opinion letters, and consultations for attorneys, or attorneys with their clients, regarding any of those retirement systems, to assist with divorce planning or ongoing litigation. We also evaluate proposed

orders drafted by others, as issues such as survivor benefits, cost of living adjustments, early retirement subsidies, first eligibility issues, etc. can be complex. If you have a retirement order to draft, or other pension-related problem, do not hesitate to contact me at (702) 438-4100.

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

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

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

6. *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.

7. 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.

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

9. 453 U.S. at 235-36, 101 S.Ct. at 2743.

10. 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).

11. "The purpose of this provision is to place the courts in the same position 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 reh'g*; *Mansell v. Mansell*, 490 U.S. 581, 109 S. Ct. 2023 (1989) (some partial federal pre-emption may remain after passage of the USFSPA).

12. 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.

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

14. *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 ("TSP"), which was set up to work like a 401(k), and is administered separately.

15. 5 C.F.R. § 838.803.

16. 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.

17. *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.

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

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

20. *Id.*

21. *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).

22. 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); and.

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.

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