



## WHY A QDRO IS NEEDED AND COMMON PITFALLS AWAITING THE UNWARY FAMILY LAW ATTORNEY

by Marc S. Schechter

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In most cases, a married couple's wealth is typically measured by their home, automobile, and pension assets. Because homes and automobiles are generally encumbered, a couple's pension is often the single most important marital asset. As the divorce rate continues to rise, so does the concern about the proper division of marital property. As a result, family law practitioners should be placing a high priority on pension issues when dividing the marital assets.

The Employee Retirement Income Security Act of 1974 ("ERISA") was enacted to protect the interests of participants in employer-sponsored pension plans. ERISA and the Internal Revenue Code ("Code") impose numerous requirements on most pension plans. One such requirement is that a participant's benefits cannot be assigned or alienated to another person. This antialienation provision and ERISA's broad preemption provisions often conflicted with state laws designed to ensure that individuals satisfy their family support obligations.

In response to this conflict, the Retirement Equity Act of 1984 ("REA") established the qualified domestic relations order ("QDRO") exception to the antialienation provisions of ERISA and the Code. The QDRO exception was intended to provide a means of dividing the community property interest in retirement benefits while maintaining a high level of equity regarding pensions for participants, their spouses and, in certain cases, dependents of the plan participant. REA recognized, at the federal level, the status of marriage as an economic partnership whereby the spouse who worked within and/or outside the home was considered to have made substantial contributions to that partnership, resulting in a community property interest in the benefits earned during the marriage.

When pensions are part of the marital assets, complex federal laws directly impact upon state court proceedings. Moreover, in addition to substantive state law issues, a QDRO must be prepared to satisfy certain federal requirements as a prerequisite to dividing pension benefits. In addition to being familiar with the federal laws that govern pensions, the family law practitioner must also possess a thorough understanding of both the plan document and the plan's QDRO procedures to be able to draft an order that the plan administrator will deem to be a "qualified" domestic relations order. For example, family law practitioners often utilize model QDRO language provided by the plan administrator which may expedite the QDRO review process, and yet such boilerplate language may not equitably secure the former spouse's or dependent's interest in the participant's benefits. Under the Code, the former spouse or dependent recovering a portion of the participant's pension benefits is referred to as the "alternate payee."

Retirement plans covering employees of federal, state, and local governmental entities are exempt from ERISA. Because governmental plans are not subject to ERISA, each governmental entity can establish laws and regulations that govern its pension plan. Additionally, each such plan has procedures that must be followed when pension benefits are assigned pursuant to a divorce. While the ERISA exempt plans are not subject to the

QDRO rules under the Code, most, if not all, such plans still require an order to divide the community property which, in almost all respects, essentially mirrors the provisions that must be contained in a QDRO.

Since the enactment of the QDRO rules thirty years ago (yes, thirty years now), there has been a remarkable increase in the complexity of QDROs, both because plan sponsors have become more sophisticated as to what their own procedures require and thirty years of litigation has added to what counsel drafting a QDRO needs to include to protect the client's interest. Due to the substantial dollar amount often involved, the numerous types of plans covering employees, the ambiguities in the QDRO statute, and the absence of regulatory guidance, it is not surprising that federal and state QDRO litigation have increased dramatically.

With careful drafting and an understanding of both how the community property interest is to be determined and the optional forms such benefits can take, much of the litigation could be avoided. Some of the frequent problems we encounter when retained to draft a QDRO post divorce include marital settlement agreements ("MSAs") which leave open the issue

of whether survivor benefits are to be elected and, if so, who, between the participant and alternate payee, bears the cost to provide the survivor benefit; use of the term "*Brown* formula" or "time rule" to divide the interest in retirement plans where the benefit is not based upon years of service; attempting to have the plan pay benefits at a time before benefits are actually payable under the terms of the plan; attempting to provide for attorneys' fees in the dissolution proceeding to be paid directly to family law counsel by the plan; and, in the case of a QDRO, to be drafted to provide dependents support, an improper attempt to transfer the income tax liability on payments received by a non-spouse alternate payee.

With the importance that the division of pension-related marital assets plays in most divorce proceedings, we suggest coordinating with benefits counsel at the MSA stage to minimize the post-divorce disputes and a return to court to clarify many of the pension division issues left unresolved by the MSA. While there may be other issues involving post-divorce proceedings to resolve, engagement of competent and experienced benefits counsel can prevent issues relating to retirement benefits from being one of these areas. ■

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