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NEVADA FAMILY LAW REPORT

A Publication of the State Bar of Nevada

Volume 9, Number 1 Summer , 1994

Family Lawyers Learn to Use QDROs for Child-Support and Spousal as well as the New QMSCO for Child Medical Care

A Solution to Child-Support and Spousal-Support Problems

By Victor B. Meyen and Mark W. Dundee

Most family lawyers know that the Employee Retirement Income Security Act of 1974 ("ERISA") requires that a "Qualified Domestic Relations Order" ("QDRO") be obtained before a qualified plan such as a pension, profit-sharing, or Section 401(k) plan pays benefits to a spouse who is divorced or separated (referred to in this article as the "alternate payee" or "nonparticipant spouse") from the plan participant (referred to herein as the "participant spouse"). Internal Revenue Code ("IRC") Section 401(a)(13).[1] The QDRO rules are found in IRC Section 414(p).[2] Because every retirement plan is different, most family lawyers find the preparation of a QDRO to be very difficult, because the order must be approved by the court and then the plan.

A number of articles and publications have discussed the large number of complex issues that confront a family lawyer in the course of preparing a QDRO,[3] or a plan administrator in reviewing a QDRO.[4] Some recent articles also have made it clear that family lawyers do not have the expertise to prepare their own QDROs because the QDRO rules are so esoteric. As a result, family lawyers always should delegate the preparation of a QDRO to an ERISA lawyer or a paralegal who works under the supervision of an ERISA lawyer.[5]

The vast majority (99% or so) of all QDROs are used to transfer to the nonparticipant spouse (the alternate payee) her share of the participant spouse's pension benefits. To most family lawyers the term "QDRO" itself brings to mind a pension benefit that is being split up in a divorce. What almost all family lawyers in the United States do not realize, however, is that a QDRO can also be used to take the pension benefit of the participant spouse and use it to meet (1) child-support obligations, (2) spousal-support obligations or (3) both. It is surprising that family lawyers seldom use a QDRO to resolve these kinds of problems and that so little has been written about this.[6] Depending on the interaction of the QDRO rules and the family law rules of the various states, QDROs can be a very effective means of providing for child support and spousal support.[7]

USING QDROS FOR CHILD-SUPPORT

The nonpayment of child support is a well known national problem. Estimates in the United States of unpaid child support range as high as $27 billion and currently as many as 17,000,000 chil-

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NEVADA FAMILY LAW REPORT is a quarterly publication of the Family Law Section of the State Bar of Nevada.
Subscription price for non-section members is $35 payable in advance annually from January 1 to December 31. There are no prorations.
The *NEVADA FAMILY LAW REPORT* is intended to provide family law related material and information to the bench and bar with the understanding that neither the State Bar of Nevada, Family Law Section editorial staff nor the authors intend that its content constitutes legal advice. Services of a lawyer should be obtained if assistance is required. Opinions expressed are not necessarily those of the State Bar of Nevada or the editorial staff.
This publication may be cited as Nev. Fam. L. Rep, Winter, 1993, at ____.
Nevada Family Law Report is supported by the Family Law Section of the State Bar of Nevada and NFLR subscriptions.

Fall, 1994

From the Editor

by Marshal S. Willick

THE PROBLEM; SOME EXAMPLES

In my opinion, we have a problem in family practice, at least in Las Vegas, and perhaps statewide. Three separate cases in the past two months illustrate it. I've just spent over a half hour of my time responding to a three-page letter from a highly-respected practitioner in this city that primarily relates to an immediate return of a few items of children's clothing, a scale and Christmas tree, and other non-emergency matters that were scheduled to be addressed at the next court hearing any way. The letter threatened a motion on Order Shortening Time absent immediate response, with resulting attorney's fee demands, etc.

Some weeks ago, I spent three hours responding to an *ex parte* motion for temporary exclusive possession, temporary child custody, support, etc. The facts showed the parties separated many months earlier to two separate houses, the "child" was 17_ and finishing the last couple of months of school while living with mom, and dad had been voluntarily making all payments for the mortgage and utilities on mom's house (and her car) since they separated. Mom made over $40,000.00 at her job, and every single item requested in the emergency motion had been agreed to months before counsel had been retained (except the prayer for temporary spousal support and attorney's fees). The Affidavit of Financial Condition mom's counsel filed neglected to show that dad was making all the payments.

Not long ago, I actually found myself forced to explain to the Discovery Commissioner why I thought that the other side was abusing the discovery process when both parties acknowledged that "the property issues of this case are not complicated and should be resolved expeditiously" (they both worked at roughly comparable jobs), but when settlement was not reached on the terms demanded (the wife refused to drop her request to bring before the court her tort claims against the husband for threatening to kill her, pointing guns, etc.), husband's counsel responded with an "Individual Case Conference Report" followed by nine pages of primary text, accompanied by three exhibits, one of which was a 26-page listing of detailed discovery requests, down to and including all documentation of "any consumer expenditures," all check registers and check copies, records relat-

Articles, Case Summaries Wanted for NFLR

The Nevada Family Law Report seeks to provide interesting and substantive family law material to educate both the bench and the bar. NFLR needs articles for upcoming issues. If you are interested in writing critiques of pertinent cases, reports/opinions of family law legislation or discussions of family law trends and issues, please request authors guidelines from Editor Marshal Willick, 330 S. Third St., #960, Las Vegas, NV 89101. Telephone, 384-3440.

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The Section's publication needs your input and contributions. Please contact an editor to discuss any article topic, critique or book review.

ing to the dog's kennel registration, and the operating instructions on the washing machine.

WHY THIS IS A PROBLEM

What these three cases have in common is gross waste of client funds, attorney time, and the courts' attention. Collectively, it is inexcusable that with parties truly needing the attention of the family courts, so much time and money is wasted on trivial matters designed primarily to maximize churning of attorney and staff time to pad billings to clients and manufacture a basis for attorney's fees requests. And the above come from what are regarded as three of the *better* law firms in this subject area. When those committing these abuses of the judicial process are called on it, they predictably get huffy and start spouting counter-accusations that identifying their behavior for what it is constitutes an "insulting and unwarranted" attack on them. The associates of the partners who routinely do these things cannot imagine how they can be criticized for emulating their mentors.

The tradition of complicity by silence by those who are well compensated in this field as to one another's over-indulgences is a shame to the profession. There is plenty of work that *must* be done to keep us all quite busy. The lawyer bashing that we all endure is reason enough to cry foul when an opponent files a frivolous motion.

Discovery matters are similar. We all know that with a talented staff, any of us can bill several hours for discovery preparation, and require at least that many on the side, for documents that will never be used relating to information that is neither relevant nor actually desired. The capacity to inflict distress through discovery is seen by some as an enviable capability.

The City of New York Department of Consumer Affairs published a study last year entitled "Women in Divorce: Lawyers, Ethics, Fees & Fairness." Meaningless, excessive discovery and refusal to stipulate to orders that will inevitably be granted are the leading causes of public backlash and castigation of the entire profession, and *especially* in family law. Insistence on formal compliance with the outer limit of discovery, motion churning, and paper-shuffling, while ignoring requests to minimize expenses and allow the inexpensive resolution of whatever is actually at issue, is the very *source* of public dissatisfaction.

Presumably, the Family Court judges, and their appointed Discovery Commissioners, know that family cases are inherently different from personal injury cases; where the parties are dividing a common pot, the proper measure of discovery is *not* the maximum discovery that *might* be done, the maximum production that fits within the legal definition of "relevant," but only that which is reasonably necessary to the issues of the case. The very process of discovery is often nothing but a means to harass and oppress the opponent, often a form of abuse by itself.

A SHORT SPEECH

It is not just discovery. In the name of "advocacy," some attorneys refuse to stipulate to simple procedural requests such as amendment of the pleadings, without any conceivable legitimate grounds. For some reason, counsel profess ignorance of the concept of "appropriate litigation" as the standard for all domestic cases. "Professional" litigation is not the same as "maximum" litigation. Maximizing discovery and motion practice in cases that do not warrant it on their facts is wasteful, vexatious, and does nothing for the parties but increase their expenses while maximizing revenues for the propagating attorney.

Today, a true "professional" takes as much pain to minimize costs to his client in a family law case, and even to the other side, as he does to make sure that the legitimate issues in a case are explored and presented to the court. That is a duty to both the clients and the justice system, and is fully as important as proceeding with maximum speed in careening through "discovery." Appropriate litigation of a case is *usually* at a level of less than full intensity. Commissioners and judges evaluating discovery in domestic cases must consider this reality, as well as the reality that every hundred dollars spent on wasteful discovery has a presumptive effect of costing each party $50.00, sooner or later, by lessening that which remains to be divided.

A PROPOSED SOLUTION

It is long past time for the judges to evaluate the reasonableness of the party having brought the matters before the court at all, as part of ruling on the motions, to stop this abuse of the judicial system and waste of limited resources. This must be done in a *uniform* way across departments, so as not to just increase confusion. It is not asking too much for the judiciary to, at least informally, adopt a policy on this matter and apply it. The judges would thus have a powerful means to control their own caseloads.

And judges should not think that sanctioning wasteful motion and discovery practice is unwarned. The widely circulated "Pledge of Professionalism" states: "I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate substantive interest of my client will not be adversely affected." The following paragraphs pledge to refrain from using abusive discovery to harass the other party, and to elevate substance over form. The problem is that for some lawyers, promises do not mean much when profit may be made.

The Bounds of Advocacy are now part of the Clark County rules and probably will soon be part of the Supreme Court Rules. They also provide a reasonable means for judicial review of wasteful litigation. Bound 3.6 reiterates the proscription on excessive and abusive discovery tactics. Bound 3.8 provides that attorneys should coordinate times for hearings and depositions with opposing counsel *before* setting them. Bound 3.10 provides that proposed orders should be submitted to opposing counsel *before* submitting them to the court for signature.

Where they are ignored by bench and bar, all of the pious propagation of "Pledges of Professionalism" and other statements of ethical behavior and practice improvement are worse than silence — they are cynical, hypocritical deceptions. Some method of enforcing even vague statements of ethical behavior is

necessary for the judiciary to maintain an appearance, and the substance, of intellectual honesty.

In those cases that I see obvious waste, fee-churning, and abusive discovery, I have begun filing countermotions for attorney's fees for this reason. For a short time, judges will face more work when they see such countermotions, and they will be tempted to disregard them since deciding such countermotions add burdens they do not wish to bear. To date, those judges that have seen these requests have actually taken the time to defend those doing the churning, under the rubric of "doing their job." And yet, I have also recently attended a meeting where the family bench declared that it was hopelessly buried. It remains to be seen if judges will take the long view, and decide that their own jobs will be performed better if they take the time now to determine whether what is before them belongs there.

Absent an active-case-management change in the entire paradigm of how domestic cases are handled, the only way to eliminate unnecessary motions is to eliminate the profit motion for filing them. This requires sanctions against the wasteful party, and/or the filing attorney, which will eventually result in such matters not being filed. It is a matter of operant conditioning — judges should expect to see more of rewarded behavior, and less of punished behavior. If lawyers will be hired, and paid, to bring frivolous motions, such motions will be filed. Of course, solving this problem requires our judges to make the effort to be right in deciding what is frivolous.

Once the judges realize that their workloads can be lessened by eliminating what should never have been filed in the first place, they should begin awarding substantial punitive awards of fees on facts such as those noted above. Perhaps eliminating the frivolous will leave the courts in a position to more timely decide the matters that truly belong in the courtroom. I hope so.

Meet the Executive Council

Editor's Note: From time to time, Section members ask "Just who the heck is *on* the Executive Council, anyway?" We will therefore run profiles of the Council members, a couple at a time.

CASEY CAMPBELL

Casey Campbell is a partner in the Law Offices of Logar • Campbell, a professional corporation, practicing exclusively in family law. She is a member of the State Bars of Nevada and California and is admitted to practice in the United States Courts of the Districts of Nevada and California.

Ms. Campbell is a member of the Nevada State Bar and its Family Law Section, is an editor of the upcoming Family Law Manual, is a member of the Executive Council of the Nevada State Bar Family Law Section and was a member of the Child Support Review Committee of the Nevada State Bar Family Law Section.

Ms. Campbell served as a law clerk for the Honorable Edward Dean Price in the United States District Court/ Eastern Division and as a deputy district attorney for the Washoe County District Attorney's Office. She has been a member of the firm of Logar-Campbell since 1987.

MARY ANNE DECARIA

Mary Anne Decaria is a partner in the firm of Silverman & Decaria, Chtd. Her practice is devoted primarily to family law.

Mary Anne grew up in Utah and attended college at the University of Utah, graduating *magna cum laude* with a Bachelor of Arts degree in English. She obtained her legal degree from Gonzaga University School of Law, *cum laude*, in 1981.

After law school, Mary Anne traveled to Europe and upon her return to Reno, began her legal career as Judge Barrett's law clerk in Department 2 of the Second Judicial District Court. She spent most of that year enmeshed in the Priscilla Ford murder trial. At that time, the judges' law clerks also served as court bailiffs. At trial's end, Mary Anne took charge of the Priscilla Ford jury while it deliberated and was sequestered with the jury during the guilt and penalty phases of the proceedings.

Mary Anne is on the Executive Council of the State Bar of Nevada Family Law Section. She currently serves as Chairman of the Family Law Section Legislative Task Force and as Chairman of the 1995 Family Law Spring Showcase Committee. Mary Anne is a member of the Editorial Board of the 1994 Nevada Family Practice Manual and served on the 1992 Nevada Child Support Review Committee. She writes a column regularly for the Washoe County Bar publication, *The Writ*, and serves on the Washoe County Domestic Violence Task Force Legal Advocacy Committee.

Whenever possible, Mary Anne and her husband go camping and fishing with their two daughters. Time spent in the wilderness helps her maintain perspective on what is truly important in life.

QDRO's con't

dren are not receiving the proper child support to which they are legally entitled.

The fundamental flaw in the child-support process appears to be that one parent gives an unsecured promise to make child-support payments over a period of years and then either disappears or stops making the payments. A QDRO can take a third party — a qualified retirement plan — and turn it into a stakeholder which makes the child support payments, in effect turning the unsecured promise to pay child support into a "secured promise" because the child-support payment is then made by a qualified plan.

Typically, the obligation to pay child support is based on the family laws of the various states, as evidenced in a judgement or separation agreement that is prepared by a family lawyer. The QDRO provisions of the Internal Revenue Code clearly provide that a QDRO can be used to transfer funds from a qualified retirement plan of the participant spouse for the purpose of paying child-support obligations that arise under state law.[8]

It is surprising therefore that so few family lawyers have used QDROs to meet child-support obligations. In fact, thus far the use of QDROs for child-support purposes is extremely rare: apparently substantially less than 1% of all QDROs are being used for child-support purposes.[9] The proposition advanced by this article is that, depending on certain state law issues (which are discussed later), in the future family lawyers always should seriously consider having child support paid by means of a QDRO (and, of course, the QDRO always should be prepared by an ERISA lawyer.)[10]

COORDINATING STATE FAMILY LAW WITH THE QDRO RULES

The principal reason QDROs have not been used (or only used extremely rarely) for child-support purposes appears to be family lawyers dislike QDROs because they are so burdensome and difficult to prepare; therefore most family lawyers avoid using a QDRO unless it is absolutely necessary.[11] A secondary reason appears to be that the vast majority of family lawyers simply are not aware that a QDRO can be used for child-support purposes (it can also be used for spousal support or alimony payments).[12]

The biggest stumbling block to the use of QDROs for child support is the coordination of state family law with the QDRO rules. In preparing a QDRO for child support, state family law rules must of course be followed to ensure that the child-support payments are consistent with state family law. However, the state family law requirements which are put into the QDRO must also meet the requirements of the Internal Revenue Code that a QDRO not change the form of benefit payable by a qualified plan. For example, a qualified plan cannot be ordered to make a child support payment of $200 per month if such a payment option is not available under the plan. Let us assume for example that a plan is a defined contribution plan (such as a profit-sharing plan or Section 401(k) plan) that has as the only payment option a lump sum distribution. To qualify as a QDRO distribution in this case the plan may make a lump sum distribution to the child for child support of, say, $30,000. However, such a payment option might not be consistent with the applicable state family law.

Hence, the biggest problem for child-support QDROs appears to be coordinating the QDRO rules and the applicable state family law rules. For example, child support in certain states may be considered a child's right so that it would be inappropriate to make a $30,000 lump sum payment to the divorced spouse (to be used for child support). (The fear in such states apparently is that the divorced spouse might spend the money for purposes unrelated to child support.) On the other hand, under applicable state family law, it also may be possible to use such funds for private school or college tuition if such expenditures are considered "child support" in the applicable state. There appear to be a large number of creative possibilities here, which are limited only by the fact that the QDRO rules and state family law rules must both be met and properly coordinated. Accordingly, the effective use of QDROs for child-support purposes will vary widely from state to state depending on how well the state family law rules interact with the QDRO rules. This is, of course, a determination that must be made by the family lawyers in each state.

Finally, both child support and spousal support generally require immediate cash payments (either in a lump sum or periodic payment). However, the QDRO rules limit "when" or "how soon" plan payments to the nonparticipant spouse may begin. Under the QDRO rules it will generally be easier to receive payments for child support or spousal support from "defined contribution" plans (such as profit-sharing plans or section 401(k) plans) than from "defined benefit" plans (these are the typical pension plan where a promised benefit typically begins at age 65 or, in some cases, typically an early retirement benefit at age 55). This will of course depend on the actual facts of any given case. However, as a general matter, when contemplating the preparation of a child-support or spousal-support QDRO, family lawyers should focus on those cases where the participant spouse participates in a "defined contribution" plan.

GETTING THE PARTICIPANT SPOUSE'S CONSENT

Unfortunately many family lawyers do not completely understand the dynamics of the QDRO transaction. The most important "negotiating leverage point" in the process is the failure of the participant spouse to be cooperative (because he stands to benefit from the status quo or wants to negotiate his former spouse into a smaller benefit); as a result the nonparticipant spouse might not receive a benefit because no QDRO will be prepared if the participant spouse refuses to sign the court order. This is a very important factor to keep in mind when preparing a QDRO that will be used for child support.

In other words, the first question to ask is whether the former husband and wife are cooperating and friendly so that the former husband will sign the "stipulated QDRO." If not, the cost of preparing a QDRO can become much more expensive; (this is discussed below.) The second question to ask is does it make sense to prepare a child-support or spousal-support QDRO based on the interaction of state law and the QDRO rules as they

apply to the type of plans in which the participant spouse participates?

Many participant spouses will not be very happy with the idea of converting an unsecured promise to pay child support into, in effect, a "secured promise" by agreeing to transfer a portion of their qualified retirement benefit for child-support purposes. For example, a separation agreement or judgement could provide that "a QDRO will be prepared that will provide $X in child support." Subsequently, a QDRO is drafted but the participant spouse objects to its terms, or is just plain uncooperative, and he refuses to sign the proposed court order. Here, again, no child support is being paid.

To avoid this major problem (one of the biggest problems in all QDROs is the failure of the parties to cooperate), the nonparticipant spouse's family lawyer should do the following:

A fundamental misconception by most family lawyers is that a QDRO must always be "stipulated" to, (that is signed) by both parties. This not correct. There is nothing in the QDRO rules in the Internal Revenue Code which requires a QDRO to be signed by both parties. The only requirements for a QDRO are that it must be a "domestic relations order" (which is defined as a state court "judgement, decree, or order" which (i) relates "to the provision of child support, alimony payments, or marital property rights," (ii) "is made pursuant to a State domestic relations law (including community property law)" and (iii) which otherwise meets the rules of IRC Section 414(p).) In other words, the nonparticipant spouse's attorney should tell the participant spouse's attorney "the signature of the participant spouse is not required, all we need is a court order signed by the judge and then approved by the plan as a QDRO."

So if the participant spouse does not cooperate in signing the court order which provides for child support or spousal support, the attorney representing the nonparticipant spouse can try to get an order to show cause or ex parte hearing in which the judge will sign the order without the necessity of getting the participant spouse's signature. This procedure will of course vary somewhat from state to state, but it is a very effective technique for the nonparticipant spouse to finally get her benefits or to get child support.

IN OTHER WORDS, THE NONPARTICIPANT SPOUSE'S ATTORNEY SHOULD TELL THE PARTICIPANT SPOUSE'S ATTORNEY "THE SIGNATURE OF THE PARTICIPANT SPOUSE IS NOT REQUIRED, ALL WE NEED IS A COURT ORDER SIGNED BY THE JUDGE AND THEN APPROVED BY THE PLAN AS A QDRO."

USING QDROS FOR SPOUSAL SUPPORT

IRC Section 414(p)(1)(B)(i) provides that a QDRO may be prepared for "child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant ...." Hence, as discussed above, a QDRO can be used to make one, two, or three of the following types of payments: (1) child support, (2) alimony or spousal support, and (3) marital property rights distribution to a spouse (the pension). Hence, there could be a QDRO that is used only for child-support purposes and another QDRO that is used only for spousal-support purposes. Also, there could be a QDRO that is used only to divide a pension benefit, or a QDRO could be drafted that provides for any combination of these three. For example, a QDRO could be drafted that provides for child support and the division of a pension, or for spousal support and the division of a pension, or for child support and spousal support, or, finally, for child support, spousal support, and the division of a pension.

The problems discussed above concerning child-support QDROs generally also apply to QDROs for spousal support. The most important factor is the interaction of the QDRO rules and the state family law rules regarding spousal support.

QUALIFIED MEDICAL CHILD SUPPORT ORDERS ("QMCSOS")

Many employers limit medical coverage for children under their group medical plans to the biological children of employees and to individuals who qualify as dependents under federal or state law. Over the years, there have been numerous attempts by states to enact laws requiring employers to loosen their group medical plan eligibility requirements to include children born out of wedlock or children placed for adoption. These attempts have been unsuccessful largely because of the ERISA preemption over state laws that pertain to qualified welfare plans.

In the 1990's the divorce rate in the United States continues to increase. Following a divorce, many of the employees who are not granted custody of their children drop those children from their medical plan. Thereafter, the burden of providing medical coverage typically falls on the custodial parent or in some cases — if the custodian parent has limited financial resources — the state through its Medicaid program.

Congress, in an effort to reduce the number of medically uninsured children in the United States, included in the recent tax law, the Omnibus Budget Reconciliation Act of 1993 ("OBRA'93") a provision that requires employers to cover children who are otherwise ineligible to participate in the employer's medical plans; this is done through the use of a "Qualified Medical Child Support Order" ("QMCSO"). OBRA '93 also authorizes civil enforcement provisions (ERISA section 502) that give states the right to take action against medical plans that fail to comply, gives the Department of Labor the authority to assess a civil penalty of $1,000 for each violation, and amends ERISA's preemption provisions to conform to these new requirements.

What is a "QMCSO"? The QMCSO provisions are found in section 609(a) of

ERISA and are modelled in large part on the QDRO provisions. Therefore the QMCSO provisions contain many requirements which are similar to the QDRO requirements.

A QMCSO is a state court order, issued pursuant to a state domestic relations law, that creates or recognizes the child's right to receive benefits for which the plan participant is eligible under the group medical plan. For the QMCSO to qualify as an enforceable court order the following information must be included:

(i) The name and last known mailing address of the plan participant and the name and the address of each child covered by the order.

(ii) A reasonable description of the type of coverage to be provided by the plan, or the manner in which such type of coverage is to be determined.

(iii) The period of time to which the order applies.

(iv) The name of each plan to which the order applies.

The court cannot require a plan to provide any type of benefit not provided under the plan, except to the extent necessary to meet the requirements of the medical child support provisions of the Social Security Act that were added by OBRA'93.

The QMCSO will be served on either the employer or the agent for service of process which is indicated in the plan's summary plan description. On receipt of the order, the plan administrator must promptly notify the plan participant and each child covered by the order of the receipt of the order and the plan's procedures for determining whether the order is a QMCSO. It is up to the employer or the plan administrator to establish reasonable procedures for making this determination and to administer the provision of benefits under such orders. According to the law, the procedures must: (1) be in writing, (2) provide for the prompt notification of each person specified in the medical child support order on receipt by the plan of that order, and (3) permit the child to designate a representative for the receipt of copies of notices that are sent with respect to the medical child support order.

The creation of a QMCSO is another way that family lawyers can ensure that medical benefits will be provided to children who are born out of wedlock, are placed for adoption, or do not reside with the employee as a result of a divorce. The Department of Labor will continue to be responsible for enforcement in this area and in the future will provide additional guidance to all interested parties.

SUMMARY

The proper use of QDROs can, depending on state family law requirements, constitute a solution to many of the child support problems in the United States in the case of participant spouses who participate in "defined contribution" plans (as well as to a much lesser extent participant spouses who participate in "defined benefit" plans.) Depending on state family law requirements, QDROs can also be effectively used to pay spousal support obligations. Hence, family lawyers all over the United States are encouraged to carefully consider the use of QDROs for both child-support and spousal-support purposes.

In addition, family lawyers should bring the new QMCSO provision to the attention of their clients when they discuss the issue of how medical coverage will be provided for any children of the marriage after the date of the divorce.

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Mark Dundee of Towers, Perrin, Los Angeles. Towers Perrin is the second largest employee benefits consulting firm in the United States and reviews approximately 5,000 QDROs each year for plan administrators. Mr. Dundee is the QDRO expert for Towers Perrin. Mr. Dundee is a tax and ERISA attorney who received his B.B.A Adv. Cert., Loyola Marymount University; B.S. University of San Francisco; M.A. University of San Diego; M.I.B., Schiller "Heidelberg" Universitaet (Germany); he participated in comparative law studies at Oxford University (England), University of Beijing (China) and Western University; LL.M (Taxation), University of San Diego Law School and he is completing his Ph.D. at Pepperdine University.

Notes

[1] IRC Section 401(a)(13) and ERISA Section 206(d)(1) set forth the "anti-assignment rule" which provides that no benefit under a qualified plan can be "assigned or alienated." As indicated in IRS regulation 1.401(a)-13, an assignment of benefits includes any direct or indirect arrangement (whether revocable or irrevocable) whereby a party acquires from a participant or beneficiary a right or interest enforceable against the plan. Thus, benefits under a plan subject to the anti-assignment rule may not be anticipated, assigned (either at law or in equity) alienated or subject to attachment, garnishment, levy, execution or other legal or equitable process. The anti-assignment provision is enforced by the Department of Labor and the IRS.

There are, however, a number of exceptions to this rule the most common of which are the exceptions for federal tax levies, a tax judgement or a "qualified domestic relations order." The anti-assignment rule applies during the entire time that amounts representing a participant's benefits are held in the trust or the insurance contract established to hold plan assets.

[2] Besides IRC Section 414(p), a provision almost identical to IRC Section 414(p) is found in Section 206(d) of Title I of ERISA. The Title I provisions set forth the rights and duties of plans, participants, beneficiaries, and alternate payees and are designed to protect the pension rights of such employees. Hence, a lawsuit that enforces a pension right is brought under Title I of ERISA. Title II contains the amendments to the Internal Revenue Code that contain the "rules" that qualified pension, profit-sharing, and Section 401(k) plans must follow, or they may lose their tax qualification. The QDRO rules of IRC Section 414(p) are among the many complex tax qualification rules that may cause the plan to be "disqualified" or lose its tax qualification if the plan administrator does not comply with them. Hence, plan administrators are under much pressure to carefully comply with these tax qualification rules. This is why plan administrators are so careful in reviewing QDROs.

[3] There are not many articles on this subject, although many seminars and speeches are given. A good article, which highlights a number of interesting technical issues from the perspective

of the family lawyer who is drafting a QDRO, is Cazzulino, *Effective QDROs, Los Angeles Lawyer* 26 (May 1992).

[4] One leading source for analyzing QDROs from the perspective of the plan administrator is *Hamburger, Guide To Assigning and Loaning Benefit Plan Money* (1992), which contains approximately 300 pages of extensive analysis and discussion.

[5] See, for example, Meyen, *Mistakes Family Lawyers Make In Preparing QDROs* [cite] 1994.

[6] It is very unusual to see any discussion on the topic of using QDROs for child-support or spousal-support purposes. In fact, not that much has been written about QDROs in general.

[7] Of course, this is a solution only for participants who participate in retirement plans.

[8] IRC Section 414(p)(1)(B)(i) provides that a QDRO may be prepared for "child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant ...."

[9] This is a very rough estimate, based on conversations with other ERISA and family lawyers.

[10] This need not be expensive. ERISA lawyers will prepare QDROs that can be used for child-support purposes for as little as $500.

[11] This fear is not justified in view of the fact that ERISA lawyers will prepare such QDROs for a very low price.

[12] It is crystal clear that this can be done. IRC Section 414(p)(1)(B)(i). However, there may be state family law problems which are discussed in this article.

Comments Sought on Clark County COPE Program

Since March, 1994, all parties to Domestic Relations cases in Clark County have had to complete a 3-5 hour program entitled "Children Cope With Divorce" offered by one of two private companies in cooperation with the court. Now that we have had six months' experience, it seems appropriate to invite commentary, criticism, or a complete review article on the subject. If anyone has any opinion on the COPE program, please send it to the Editor.

Nevada Family Law Report
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