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Notes and Comments

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Temporary Maintenance Awards: A Remedy in a State of Chaos

Since the adoption of the new section dealing with temporary maintenance, Domestic Relations Law § 236(B)(5-a) has caused our matrimonial courts to be in a state of confusion and perplexity. Applying the statute has become one of the most difficult and arduous tasks to confront the lower courts. If a deviation is required from the provisions of the statute, which applies a formula to assess temporary maintenance, the court must devote an enormous amount of time to the task that will further contribute to its backlogs and the time for a case to reach the trial calendar in the matrimonial parts.

For example, in Queens County, following the filing of a note of issue, the calendar delay is eight months. It is not unusual for the same court to take four months to decide a *pendente lite* application. We understand that most of the counties in the New York city metropolitan area have similar delays. The litigants and their attorneys cannot tolerate this state of affairs. It is in a word, unacceptable, so that the need to either amend the statute, or repeal it, appears to be a singular priority for the legislature to accomplish. In our view, the statute is beyond fixing and only its repeal will correct its deficiencies.

When we last analyzed Domestic Relations Law § 236(B)(5-a) in the Fall 2010 edition of the *Family Law Review*, we were most concerned that the courts would have a difficult, if not impossible, task to fit the facts of a given case into the statutory prerequisites. Speak to any practicing matrimonial attorney concerning the new law, and they will uniformly report that the statute is unworkable, should have been applied to permanent and not temporary awards, and that in order for the courts to do equity they have the difficult task of applying 17 statutory factors in order to deviate from the presumptive formula. Bear in mind that the statute has a $524,000 cap[1] on the payor's income. For example, if you are representing a spouse whose husband earns in excess of $524,000 (for this example assume gross income of $600,000), and say the wife earns $300,000, if the court declines to deviate from the formula and apply the formula to $76,000 of excess income, an injustice to the payee spouse will occur. Because the wife's income does not exceed the $524,000 cap, her income would not be adjusted, and the full $300,000 of gross income would be used in the formula to arrive at the correct presumptive amount of temporary maintenance. The two required computations would be as follows: 1) 30% of $524,000 equals $157,200, and 2) 20% of $300,000 equals $60,000. Subtracting one from the other results in the first computation of the presumptive amount of $97,200. The next calculation required by the statute would be to combine the incomes ($824,000) and multiply this result by 40%, yielding $329,000. The statute then provides that the wife's income should be subtracted from this sum to yield the second presumptive amount, in this case $29,600. Since the statute dictates that the lesser amount from the two calculations must be utilized, the wife in this example would receive $29,600 in temporary maintenance.

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This result is unfair and extremely prejudicial to the payee spouse, especially where the pre-separation standard of living is extremely privileged and opulent. Returning to our example, what would be fair would be for the court to first determine what discount it necessarily must take if it declined to deviate from the statute and consider income above $524,000. Since the court, in essence, has discounted the husband's gross income of $600,000 by a factor of 12.67% ($600,000 less $524,000 [the cap amount] is a reduction of $76,020), the wife's $300,000 income should be reduced by a similar 12.67% factor, or $38,010, resulting in $261,990 of payee income to be applied to the formula calculation. The new calculation would be 30% of $524,000 of payor income ($157,200) and 20% of $261,990 of payee income ($52,398), to arrive at the sum of $104,802 as the presumptive amount of support. The next calculation would take 40% of their combined incomes of $785,990, or $314,396 reduced by the wife's income of $261,990, which would result in $52,406 of presumed support. Since this calculation is the lower number, $52,406 should be awarded to the payee spouse, not $29,600 as resulted in our above example. Several questions are now raised by this illustration. Even though the statute does not provide a formula by which to treat the parties financially equally by reducing the wife's income by 12.67%, which it did by implication by its failure to deviate from the statute, would it still be possible for the court to do so? There is no present answer. The reality is that whatever the court decides to do the Appellate Division will soon review. Only then will an injustice to a payee spouse be rectified. What an appeal court will or will not allow in calculations made under the temporary maintenance statute remains to be seen, although the First Department in *Khaira v. Khaira*,[2] discussed *infra*, is the first appellate court to address the statute.

Another interesting facet of the new statute is where the court, based upon all the facts and circumstances of the case, decides to deviate from the formula, thereby raising still new problems. Apart from having to set forth all 17 numerated factors in the statute and the court's application of such pre-requisite, which we will treat elsewhere in this article, and applying the same incomes used above, will the court first calculate the first $524,000 of income against the wife's income of $300,000 without adjustment, as we suggested, or will it use the full combined incomes of $900,000. No answer here is postulated.

Faced with the exigencies of a congested calendar, and the knowledge that the Court is required to apply all 17 factors (which cannot be waived by either the parties or their counsel), the Court may be reluctant to do so. Any decision written would probably consume perhaps 20 or more pages. It would seem likely that there would be few decisions that would deviate for either equitable reasons or applying the formula in excess of the $524,000 cap.

Still another problem will certainly arise concerning a discussion of the 17 factors where deviation is selected. For example, many of the factors might require expert testimony. How could the court determine the future earning capacity of the parties as required by factor v without an employment expert to give testimony regarding such future event? The conclusion is readily apparent. The court, out of necessity, would have to order hearings which would include the testimony of the parties and expert witnesses to comply with the mandates of the statute. One cannot possibly believe that the legislature had this in mind when it enacted Domestic Relations Law § 236(B)5-a.

Another provision of the new statute gives the court discretion to issue a temporary award based upon the needs of the payee or the pre-commencement standard of living, whichever is greater, if the information submitted was insufficient to fashion an award. The statute, however, does not define what information would be insufficient to make such award so that the Court has no guidelines as to the legislative intent in enacting this provision.

When the dilemmas discussed above are considered in drafting opting-out language in a separation agreement, still new problems arise. Where there is income that exceeds the cap, what examples should be set forth in the agreement? Should counsel take it on their own to use the examples contained in this article, or slavishly follow the statute? The matrimonial bar has learned with respect to the Child Support Standards Act that any error in draftsmanship could result in the agreement being set aside as to child-support and the formula amount being imposed against the paying spouse. It is most likely that the same result will occur where an error drafting an illustration for maintenance is defective.

Recently, the Appellate Division, First Department decided the *Khaira v. Khaira*[3] case. It was the first appellate case to deal with the application of Domestic Relations Law § 236(B)(5-a), and in particular with regard to when and under what circumstances the court may deviate from the presumptive formula amounts, as well as the procedure to do so. The court first reflected on the prior standard for temporary maintenance, which was essentially to determine what amounts justice requires having regard for the parties standard of living and ability to pay. It also acknowledged that the new statute was not aimed merely to tide over the non-moneyed spouse but to provide consistency and predict stability in calculating temporary maintenance. The low court, dealing with the husband's gross income of $851,549, applied the prior $500,000 cap and made the calculation pursuant to the formula without adjusting the wife's income by the same percentage factor as suggested above. However, the lower court made an additional award considering the income above $500,000 without first addressing the 19 factors.[4] It in effect directed the husband to not only pay the calculated amounts on $500,000, but additionally to pay the

carrying charges of the marital residence. There was no discussion by the appellate court as to whether the wife's income should have been reduced by the same percentage factor that the court applied by using the $500,000 cap. It went on to hold that additional awards outside the formula could not be directed unless the court deviated by considering the 19 enumerated factors and setting forth its written reasons for reaching a conclusion as to the 19 factors. It then concluded that the award of the carrying charges on the marital residence as additional maintenance without applying the 19 factors was error. In a word, the award made pursuant to this statute must be all-inclusive. The court concluded "However, we believe that the new approach of calculating spousal support payments to the non-moneyed spouse by means of a formula is intended to arrive at the amount that will cover all the payee's presumptive reasonable expenses." Nonetheless, the court took pains to explain that direct payments for housing and the like beyond the guideline amount is quite possible and may be appropriate based upon the facts of the case with the caveat that the deviation factors must be applied. The court also noted that where an award by following the statute would result in an unjust or inappropriate award, deviation should be considered. It finally noted that "while the ultimate support award may well be appropriate, it must be appropriately supported and explained."

Finally, the Appellate Division then modified the lower court determination by vacating the support award and remanding the matter for re-consideration pursuant to the requirements of Domestic Relations Law § 236(B)(5-a). Undoubtedly, the other Appellate Divisions will necessarily consider other appeals involving awards made pursuant to this unworkable statute. While a formula approach might find support in permanent awards, temporary awards should still be made according to the circumstances of the case, the parties' preparation standard of living, and the respective financial conditions. Our legislature should be fast to act and repeal this statute which will only work injustice and inequity to husbands and wives who must necessarily apply to the matrimonial court for financial relief, and will cause untold and unnecessary expenses in prosecuting appeals to the Appellate Division...apart from any increase in calendar delays.

Endnotes

1. Formerly $500,000 and increased to $524,000, effective January 31, 2012, in accordance with the Consumer Price Index-Urban as set forth by Social Services Law § 111-i.
2. 2012 WL 371997 (N.Y.A.D. 1st Dept.).
3. *Id.*
4. An additional two factors are applied when considering income over the cap.

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The Missing Military Annuity—Case Continued

By Mark E. Sullivan

Overview

In the initial installment of this trilogy about the Survivor Benefit Plan, we learned of the disaster that befell Mae Lydick in Clinton County in 1986 with the court's failure to allocate to her former spouse coverage under her ex-husband's Survivor Benefit Plan.[1] Thus, she was left with nothing to fall back upon if her ex-husband died before her. His military pension share payments to her would end with his death, since no survivor annuity was in her settlement.

The first part of the series explained what the SBP is, the cost of SBP coverage and the amount paid to the surviving spouse or former spouse upon the death of the servicemember (SM). It ended with an explanation of benefits and disadvantages of SBP coverage and a chart showing the pros and cons for the Plan.

The remaining two installments will cover how SBP works, how to adjust the benefit amount, and deadlines for elections. They will also deal with how to use a court-ordered election when the SM or retiree will not cooperate, where to send the documents, and how to argue the case for a separated spouse to convince the court that she should have received SBP former-spouse coverage.

Election Options

Let's see how SBP works. For a SM on active duty who is married or has a dependent child, the election for SBP must be made before or at retirement.[2] An active duty SM who is entitled to retired pay is *automatically* enrolled in SBP at the maximum authorized level of coverage unless he or she declines (before retirement) to be covered or else chooses coverage at a lower level; if the SM is married, the spouse must consent to this choice.[3] Reservists can make the election upon completion of 20 years of creditable service and they have a second chance to elect SBP coverage upon reaching age 60 if they have deferred the decision.[4]

Divorce terminates SBP coverage for a spouse. There is no provision in the law which makes former spouse coverage an automatic benefit. The only means by which a person who is divorced from a servicemember may receive a survivor annuity is if *former spouse coverage* is elected.

Dealing with Deadlines

A servicemember on active duty may elect former spouse coverage at divorce. Military retirees may elect former spouse coverage for a spouse who was a beneficiary under the Plan when divorce occurs after retirement.[5] The election must be made by the member / retiree *within one year of the divorce decree*.[6] At the time of making this election, the retiree must provide a statement setting forth whether the election is being made pursuant to a court order or a written agreement previously entered into voluntarily by the retiree as part of, or incident to, a divorce proceeding (and, if so, whether such written agreement has been incorporated in, ratified, or approved by a court order).[7] An election filed by the retiree is effective upon receipt by the Defense Finance and Accounting Service (DFAS).[8]

If the SM is required to provide such coverage and then fails or refuses to make the required election, the former spouse may still obtain the required coverage by serving on DFAS (or the appropriate retired pay center) a copy of DD Form 2656-10 along with certified copies of the divorce decree and the court decree granting SBP coverage.[9] These must be received by DFAS within one year of the order providing for SBP coverage.[10] This is called a "deemed election."

Note that this is a second one-year deadline, distinct from the first. In some states a divorce decree need not contain the terms of a property division or marital settlement; it simply recites the facts of the marriage and enters an order dissolving it. Occasionally the dissolution is granted apart from the property division upon a motion to sever or bifurcate the proceedings. Sometimes the decree of divorce or dissolution provides for some of the property division but leaves other terms to be resolved by a follow-up order, such as a QDRO (in the case of a private pension plan). Counsel for the nonmilitary spouse should note carefully these deadlines on the office calendaring system to prevent a catastrophe for the now-former-spouse and a malpractice claim for the attorney.

While a court can order SBP coverage,[11] a court decree cannot in itself *create coverage*. The SM or former spouse must submit a signed election request to DFAS to establish coverage. This was discovered the hard way in a Virginia case, *Dugan v. Childers*.[12] In that case, the husband retired from the Army and named his wife as his SBP beneficiary. When they divorced, the court ordered him, with his consent, to name his now ex-wife as his SBP beneficiary. He failed to do so and, after his remarriage, he made his new wife the beneficiary instead. He was held in civil contempt by the judge and once again was ordered to name his former wife as his SBP beneficiary. He died without doing so.

At that point, the ex-wife sought to impose a constructive trust on the SBP benefits that had been paid to the widow. The trial judge refused to do this, granting summary judgment instead in the widow's favor. The Virginia Supreme Court affirmed, stating that the ex-wife did not notify DFAS within the specified time limits for her SBP election and, because she did not comply with this rule, she was barred from collecting SBP by reason of federal law and preemption. In short, a state court cannot "divide" SBP benefits in violation of federal statutes and rules. When Congress has decided that there is one

specific way for the SM or the ex-wife to ensure coverage, namely, the application process (and specific time limits) set out above, that procedure must be followed.[13]

Termination of SBP Coverage

Entitlement to SBP payments stops upon the former spouse's remarriage if this occurs before age fifty-five, but SBP coverage will be reinstated if the former spouse's marriage ends due to death, divorce or annulment.[14] SBP coverage will continue if the former spouse is 55 or older at the time of remarriage.

Receipt of a valid former spouse election terminates any existing "spouse coverage" by SBP. Unlike civilian retirement annuities, former spouse coverage cannot be combined with coverage for a current spouse in order to provide some measure of coverage to both; there can be only one SBP beneficiary.

Changing SBP Coverage

An election of former spouse coverage is basically irrevocable, meaning that the SM may not terminate SBP participation once it is elected.[15] However, the law allows the SM to request a change in SBP coverage (if not barred by court order) if he or she remarries, or acquires a dependent child, and meets the requirements for making a valid option change. Such a request must be made within one year from the date of marriage or the child's birth.[16]

DFAS requires a copy of the final decree of divorce or dissolution before making any adjustment to the SM's SBP. When SBP is required in a court order, separately or in connection with the division of military retired pay, the proper addresses to use are:

(a) ARMY, NAVY, AIR FORCE and MARINE CORPS: Defense Finance and Accounting Service, U.S. Military Retirement Pay, P.O. Box 7130, London, KY 40742-7130;

(b) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591;

(c) PUBLIC HEALTH SERVICE: Office of Commissioned Corps Support Services, Compensation Branch, 5600 Fishers Lane, Room 4-50, Rockville, MD 20857;

(d) NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION: Same as U.S. Coast Guard.

For Reserve Component members who are not yet receiving retired pay (under age 60), mail the election (certified or registered mail with return receipt attached is strongly recommended) to:

(a) ARMY: U.S. Army Human Resources Command, 1600 Spearhead Division Avenue, ATTN: AHRC-PDR-C, Ft. Knox, KY 40122;

(b) NAVY: Navy Reserve Personnel Center (PERS 912), 5722 Integrity Drive, Millington, TN 38054;

(c) AIR FORCE: Headquarters, ARPC / DPSSE, 6760 E. Irvington Place, Denver, CO 80250-4020;

(d) MARINE CORPS: Headquarters, U.S. Marine Corps, Separation & Retirement Branch (MMSR-6), 3280 Russell Road, Quantico, VA 22134-5103;

(e) COAST GUARD: Commanding Officer (LGL), USCG Personnel Service Center, 444 S.E. Quincy Street, Topeka, KS 66683-3591.

State courts may order SMs to participate in SBP and to designate their spouses or former spouses as beneficiaries.[17] A current spouse will be notified of the election to provide coverage for a SM's former spouse, but she or he cannot veto that election.[18]

When a separation agreement provides for SBP election, a court can order specific performance to require the SM or retiree to execute the necessary documents for service upon DFAS.[19] This approach is definitely preferable to citing the SM for contempt of court, which might lead to arrest and jail but might not result in the SM's executing the necessary papers for a change in SBP coverage.[20]

When a SM has elected SBP spouse coverage at retirement and later divorces and then dies, the rules can be particularly harsh for the former spouse if the SM has not filled out the necessary form to elect "former spouse coverage" for his or her former spouse. An individual who is covered as a "spouse" will not be covered once the divorce is granted unless "former spouse coverage" is elected. Without an effective *former spouse election* filed at DFAS, SBP benefits will remain payable to the *spouse* and will go to the widow or widower, if any, rather than the former spouse.

Counsel for the spouse or former spouse must be vigilant to avoid the loss of survivor benefits due to inaccurate or sloppy wording. As a general rule, one must operate on the assumption that agreeing to a division of the pension (or of "retired pay" or "military retirement benefits") would not extend the protection of a survivor annuity to the client, in the absence of a state statute or case providing such protection. Counsel for the spouse or former spouse must always presume that the survivor annuity needs to be requested specifically or reserved. "Life and Death" is the easiest way to remember the point; a pension division settlement should provide for lifetime payments and a death benefit when counsel represents the non-employee spouse. The needed protection can often be ensured simply by including a short clause in the settlement, stipulation or decree that states:

> Mary Doe, the plaintiff, shall also be awarded former spouse coverage under the Survivor Benefit Plan, with defendant's retired pay as the base amount.

Even omission of the last clause, "with defendant's retired pay as the base amount," is not critical for Mrs. Doe, since DFAS will use that as the "default solution" when no retired pay base amount is stated in the order.

Servicemembers sometimes decide to forgo participation in SBP when retirement time arrives. When an active-

duty SM declines SBP at retirement, he or she must do so in writing and—if married—with spousal consent. Once made, this decision is usually irrevocable. This happens with Reserve Component members as well. Sometimes a Guard/Reserve member decides to decline SBP coverage or choose SBP coverage at a reduced base instead of full retired pay. This will require spousal concurrence and, once again, he or she should consider this to be final and not open to modification later on.

What happens when someone wants a higher level of coverage later on? Usually this arises from the desire of the spouse or former spouse for increased coverage, from a misunderstanding by the member about his or her options at age 60, or a subsequent ruling by a judge that "Mrs. Doe's military survivor annuity will be based on the full retired pay of Mr. Doe from the East Virginia National Guard."

Whatever the impetus, it is important to recognize that the SBP coverage level in such a case cannot be modified. Once a member has chosen a reduced base amount for spousal SBP coverage, DFAS lacks the statutory authority to increase the coverage level upon a later divorce and former spouse SBP election, regardless of whether this election originates with the member or from the former spouse as a deemed election.

A court order cannot require DFAS to increase the level of coverage. In fact, a state court divorce decree cannot require any SBP election which could not be done voluntarily by the SM. If a prior election is irrevocable, it remains irrevocable regardless of what the judge decides. All SBP elections are irrevocable unless a change is specifically authorized by law. In general, if the proposed change involves a change in cost, it probably is not authorized. Beneficiary changes which are the result of remarriage, children, divorce, or marriage, are allowed. Changes may not, however, affect the level of coverage.[21]

For Guard and Reserve personnel, there is no new opportunity to change coverage when the SM attains age 60. When a former spouse election is made, it must be based on the same level of coverage originally elected regardless of any subsequent court order. Thus, if the Guard/Reserve member deferred the decision at the 20-year mark, he or she may elect—for the first time—SBP coverage at age 60. But if an election was made at the 20-year mark, whether for immediate coverage or coverage starting at age 60, it cannot be changed at age 60. The only situations in which the level of SBP coverage can be increased are the remarriage of the SM,[22] or an SBP "open enrollment period" when this is authorized by Congress (explained below).

Remedies for the Wronged Former Spouse

Filing a notice of former spouse election with DFAS, generally speaking, is the sole and exclusive manner of changing spouse coverage to former spouse coverage. If someone misses the deadline for former spouse coverage, it cannot be corrected by simply submitting another court order to the pay center, so as to "restart the clock." DFAS has already anticipated that in its regulation for SBP elections:

> If an election of former spouse coverage was agreed to or ordered by an earlier court order, then a subsequent order or modification that merely restates the previous provision and imposes no new obligation on the member does not begin a new 1 year period. A subsequent court order holding a member in contempt of court for failing to fulfill the prior agreement is not the type of court order that can be used to begin a new 1 year period to deem an election.[23]

This approach is affirmed in the cases which deal with missed deadlines (summaries shown below):

- *Matter of: Nawanna Driggers—Survivor Benefit—Former Spouse Coverage*, 71 Comp. Gen. 475, 1992 U.S. Comp. Gen. LEXIS 989. Court order reiterating an earlier order awarding former spouse coverage under SBP does not establish a new one-year filing period for deemed election. Merely restating the previous agreement and making *no change* in the prior agreement does not constitute a "modification" as used in 10 U.S.C. 1447(13); thus, a new one-year period does not begin.
- *Matter of: Constance L. Posner*, 71 Comp. Gen. 478; 1992 U.S. Comp. Gen. LEXIS 992. Modification of prior court order must for the first time order SBP coverage for the former spouse. A new order that merely reaffirms the substance of a prior order cannot provide the basis for a new one-year period for filing.
- *Matter of: Master Sergeant George M. McClain, USAF (Retired)(Deceased)*, 1992 U.S. Comp. Gen. LEXIS 1022. Unless the subsequent order adds to or changes the obligation for SBP coverage, a new order cannot be used to begin a new one-year period to deem an election.
- *In Re: [Redacted] Claimant*, Department of Defense, Office of General Counsel, Office of Hearings and Appeals, Claims Case No. 99102801 (7/21/2000). http://www.dod.mil/dodgc/doha/claims/military/99102801.html. If the court later modifies the divorce decree to give the former spouse rights to SBP coverage which she did not have under the original decree, a new one-year period arises.

Occasionally the former spouse learns of the lack of timely filing (or a denial by DFAS) after the one-year deadlines have passed but before the SM's death. When this happens, the former spouse may attempt to obtain administrative relief. If the facts justify it (as in the case of an improper denial of an SBP claim by DFAS), relief may be available through the Department of Defense Office of Hearings and Appeals to review the initial determina-

tion.[24] This should be considered as a measure of exhaustion of remedies before seeking relief through an application to the Board for the Correction of Military Records. These Boards have been established for each of the appropriate uniformed services, and relief may be obtained, given the right facts, so long as the SM or retiree has not remarried (or, if remarried, the new spouse consents to the application).

Applications for correction of a military record are made on DD Form 149, the form to be used with the Board; the on-line version is in fillable PDF format.[25] The application must be served upon the Board within three years of discovery of the "error." However, the Board may excuse failure to file within the deadline if an extension would be in the interest of justice.[26]

In cases before the various boards for correction of military records, even though all other applications must be made by the servicemember, legal representative or next-of-kin, the procedures for requesting SBP coverage allow a former spouse to apply.[27] The instructions for completing DD Form 149, "Application for Correction of Military Record," include the following at #10:

> 10. ITEM 12. The person whose record correction is being requested must sign the application. If that person is deceased or incompetent to sign the application may be signed by a spouse, widow, widower, next of kin (son, daughter, mother, father, brother, or sister), or a legal representative that has been given power of attorney. Other persons may be authorized to sign for the applicant. Proof of death, incompetency, or power of attorney must accompany the application. **Former spouses may apply in cases of Survivor Benefit Plan (SBP) issues.** [emphasis added]

Counsel for the applicant should be familiar with the cases in the Court of Federal Claims dealing with deadlines, deemed elections, divorce decrees and the Court's authority to order remedies.[28]

A small number of cases have grappled with finding solutions for the wronged spouse in these cases. In *Wise v. Wise*,[29] the Florida appellate court was faced with the SM's inability to effectuate former spouse coverage in breach of the parties' agreement. The omitted former spouse SBP coverage did not result from a missed deadline under 10 U.S.C. § 1448(b)(3)(A) or 10 U.S.C. § 1450(f)(3)(B). Rather, the impossibility stemmed from the SM's initial election of "child coverage" during the marriage. After pointing out that the statute did not allow what the parties had intended, that is, a change from child coverage to former spouse coverage, the court remanded the case, stating that the remedy was based on the part that a survivor annuity plays in the entire structure of equitable distribution:

> Our reversal of the lower court's order, however, does not end the matter. Like other retirement plans, military retirement benefits, including a Survivor Benefit Plan, are considered marital assets—subject to equitable distribution…. As has been shown, federal law expressly empowers state courts to order a spouse to maintain a Survivor Benefit Plan for a former spouse, and that was done in this case in the 1993 dissolution judgment…. In the instant case, it is apparent that an annuity was awarded to the former wife as part of the overall scheme of equitable distribution in the final judgment. Accordingly, the lower court has authority to revisit the equitable distribution in this case or otherwise effect the terms of the dissolution judgment.[30]

In another Florida appellate decision, the SM died during the appellate process, making it impossible to designate the former spouse as his SBP beneficiary. There, the appellate court remanded with the following instructions:

> To compensate Nancy [the former spouse] for this loss, we remand to the trial court for a determination of the valuation of Nancy's portion of the military pension, and for a full and complete re-evaluation of the property distribution of the parties as of the date of the original judgment of dissolution. Nancy is to be compensated for the loss of her portion of the pension from property awarded to Harry [the retiree]. If the value of marital property is insufficient to compensate Nancy for her loss of the pension, the trial court may enter a judgment for the balance, enforceable against Harry's non-marital assets, now a part of Harry's estate.[31]

Finally, courts may employ their equitable powers to require the creation of trusts or funding of commercial annuities to replace an SBP benefit which has been lost. In *Johnson v. Pogue*,[32] the Mississippi Court of Appeals dealt with the impossibility of designating the former spouse as SBP beneficiary because of the SM missing the one-year statutory deadline. In that case, the appellate court required the retiree to purchase an equivalent annuity for the ex-wife. In *In re Marriage of Lipkin*, an Illinois case, the parties were divorced after false representations by the ex-husband as to the wife's SBP coverage being irrevocable. The ex-wife later discovered the member/retiree had lied to her about SBP coverage, and the Court of Appeals affirmed a trial court judgment which required the retired SM to:

- Reinstate the SBP coverage "somehow,"

- Purchase a private annuity with identical benefits for the ex-wife, or
- Create and fund an irrevocable trust providing her with identical benefits to the lacking SBP coverage.[33]

Applying this same logic, it might be expected that courts would allow a claim against the estate of the SM for an amount equal to the lost SBP payments. The only flaw in this remedy is the fact that many SMs die with little money and few assets in their estates. When the estate is insolvent, the above remedy is an empty promise.

A better choice, based on the rationale of *Johnson v. Pogue*, is to require the SM or retiree to obtain a life insurance policy with a death benefit that is equivalent to the missed SBP payments. The services of an expert might be necessary in order to value the SBP benefit forgone and to measure the statistical life expectancy of the retiree or SM. Use of life insurance as a substitute for SBP coverage will be explained further in the final installment of this series. The Alaska Supreme Court proposed the life insurance option in a non-military case dealing with omission of survivor annuity coverage in the settlement. In *McDougall v. Lumpkin*,[34] the Court stated that the spouse should either be awarded life insurance to protect her interest in the civilian retirement benefits of the pensioner or else should be provided survivor annuity coverage in the QDRO.

If a SM elects not to participate in the SBP upon retirement, which must be accompanied by the consent of the spouse, that decision is usually irrevocable. However, Congress sometimes enacts an "open enrollment period" to allow those who are not participating in SBP to enroll and those who are participating at a reduced base amount to increase that base amount. In addition, retirees who presently have child-only coverage may obtain spouse or former spouse coverage. Although this is an expensive option—all previous SBP premium payments back to the date of initial eligibility (usually the date of retirement) must be caught up—a good drafter will include a provision for this in an agreement or order prepared for the spouse of a SM who has already declined SBP coverage.

Note that DFAS takes the position that changes made during open enrollment are only "voluntary changes," not deemed elections. If counsel wants to obtain a change and the member will not agree, it will be necessary to bring the case to court and obtain a written election by the SM, so that a "voluntary" election form may be sent to DFAS (not an order compelling the choice of the servicemember).

With so many questions about SBP coverage, it's a good idea to have a visual template to explain the options. The flow chart on page 9 shows how to explain to a spouse or former spouse of a military member or retiree what is available.

Endnotes

1. *Lydick v. Lydick*, 130 A.D. 2d 915, 516 N.Y.S. 2d 326 (1987).
2. 10 U.S.C. 1448 (a)(2)(A).
3. 10 U.S.C. § 1448 (a)(3).
4. 10 U.S.C. § 1448(a)(2)(B).
5. 10 U.S.C. § 1448(b)(3)(A)(i).
6. 10 U.S.C. § 1448(b)(3)(A)(iii).
7. 10 U.S.C. § 1448(b)(5).
8. 10 U.S.C. § 1448(b)(3)(E).
9. 10 U.S.C. § 1450(f)(3)(A).
10. 10 U.S.C. § 1450(f)(3)(C).
11. 10 U.S.C. § 1450(f)(4).
12. *Dugan v. Childers*, 261 Va. 3, 539 S.E.2d 723 (2001).
13. *See also Silva v. Silva*, 333 S.C. 387, 509 S.E.2d 483 (1998); *King v. King*, 225 Ga. App. 298, 483 S.E.2d 379 (1997).
14. 10 U.S.C. § 1450(b)(2)–(3).
15. The one exception is by mutual consent between the second and third years of coverage. 10 U.S.C. § 1448a.
16. 10 U.S.C. § 1448(a)(5)(B).
17. 10 U.S.C. § 1450(f)(4). The trial court's order requiring SBP coverage was upheld in *Stokes v. Stokes*, 234 Or. App. 566, 228 P.3d 701 (2010).
18. 10 U.S.C. § 1448(b)(3)(D).
19. *See Rockwell v. Rockwell*, 77 N.C. App. 381, 335 S.E.2d 200 (1985). In *Hipps v. Hipps*, 278 Ga. 49, 597 S.E.2d 359 (2004), the Georgia trial court ordered SBP coverage as part of alimony since it could not award it as marital property division; the husband's military service entirely pre-dated the marriage. In *Forney v. Forney*, 239 Or. App.406, 244 P.3d 849 (2010), the Oregon Court of Appeals dealt with the valuation and distribution of the Survivor Benefit Plan. Even though the marriage occurred after the member's retirement, the SBP was treated as marital property and required to be valued.
20. *See Dugan v. Childers*, *supra* note 12.
21. Department of Defense Financial Management Regulation (DODFMR), DoD 7000.14R, Chapters 43 (SBP) and 55 (RCSBP) of the DoD Financial Management Regulations set out all the permissible changes.
22. 10 U.S.C. § 1448(g).
23. DoDFMR, Vol. 7B, Chp. 43, Sec. 430503.C.2.
24. See 31 U.S.C. § 3702 regarding a claim against the government. Administrative implementation is found at 32 C.F.R. Parts 281-282, and in DoD Instruction 1340.21.
25. This can be found at http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf.
26. 10 U.S.C. § 1552(b).
27. See, for example, the applicant's guide for the Army Board at http://arba.army.pentagon.mil/faqs.cfm. Click on "Applicant's Guide." Other useful websites are found at the "Links" section of the Army Review Boards Agency website, http://arba.army.pentagon.mil/links.cfm. These include each of the other service Boards for Correction of Military Records, the National Personnel Records Center, the "DoD Reading Room" (with redacted decisions from the various boards), and connections to veterans' service organizations which may be able to provide advice, representation or resources for applications to the boards.
28. *See, e.g.*, *Holt v. United States*, 64 Fed. Cl. 215 (2005), *Pence v. United States*, 52 Fed. Cl. 643 (2002) and *Woll v. United States*, 41 Fed. Cl. 371 (1998). The *Holt* case, in particular, draws attention to the failure of the former spouse's attorney to protect her SBP rights, the byzantine complexity of DFAS procedures, the failure of DFAS to promulgate implementing regulations, its failure to send the correct form to the former spouse, the absence of DFAS records to verify receipt of an application, and the numerous difficulties that Mrs. Holt had in navigating the bureaucratic maze.

29. *Wise v. Wise*, 765 So. 2d 898 (Fla. Dist. Ct. App. 2000).
30. *Id.* at 901 (citations omitted).
31. *Heldmyer v. Heldmyer*, 555 So. 2d 1324, at 1326 (Fla. Dist. Ct. App. 1990).
32. *Johnson v. Pogue*, 716 So. 2d 1123 (Miss. Ct. App. 1998).
33. *In re Marriage of Lipkin*, 208 Ill. App. 3d 214, 566 N.E.2d 972 (Ill. App. 1991).
34. *McDougall v. Lumpkin*, 11 P.3d 990 (Alaska 2000).

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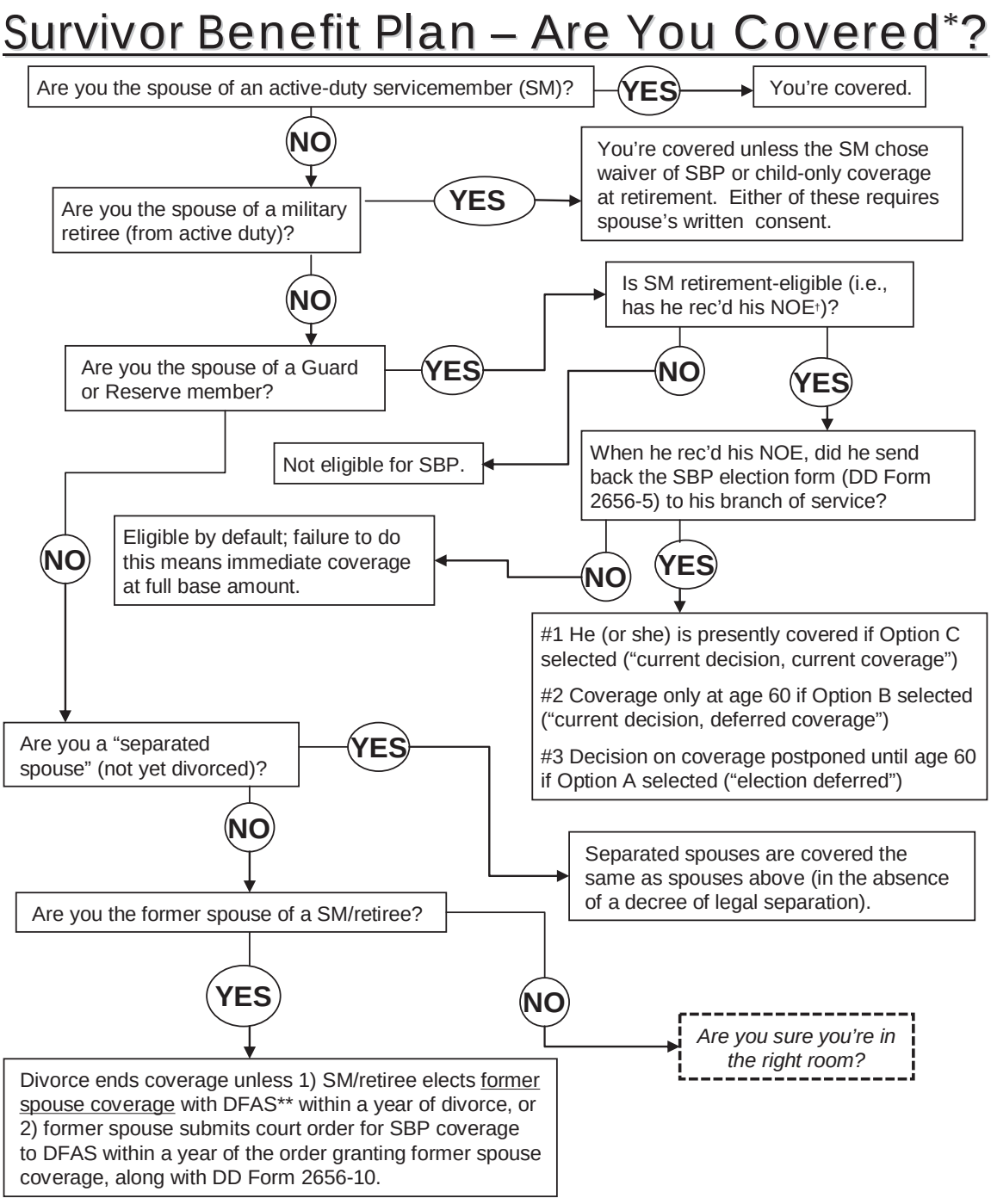

SBP coverage means eligible beneficiary receives 55% of selected base amount if SM/retiree dies first. Info above assumes no prior award of SBP by court order to another beneficiary (and confirmed through ret'ired pay center, usually DFAS).

†*Notice of Eligibility (NOE) is sent to Guard/Reserve SMs upon completion of 20 years of creditable service ("20-year letter").*

***Defense Finance and Accounting Service (or other uniformed services retired pay center).*

Shared Interest QDROs: Do These QDROs Provide Fair Treatment to Alternate Payees?

By Elverine F. Jenkins

I. Introduction

Numerous Americans have faced the unfortunate travesty of having gone through a painful divorce. Amidst a huge array of emotion-filled events stand realities that, in most cases, can only be settled in court. During the divorce process, there is property to be settled, support payments to be agreed upon, stock, cash in bank accounts and other monetary accounts to be liquidated, and custody issues to resolve. Once a divorce is finalized, and all property has been settled, the next most logical step is to begin the physical division of the awarded property.

Awarded property covers a wide spectrum of items, tangible and intangible alike, that must be handed over, preferably in the most painless manner possible. At this point, both parties finally can agree on one thing: they just want to get it over with and move on with their lives. Can you imagine learning that you have been awarded a proportionate share of some community property (let's say money) pursuant to divorce proceedings, but later being told that to receive that property depends on whether your ex-spouse is alive? Can you further imagine learning that your ex-spouse stipulates how and when you can even take your award? What if you then learned that this could have been avoided if your, or your ex-spouse's, attorney had drafted that court order in a more favorable manner? Imagine later learning that the only reason the attorney drafted the order in the manner submitted is because he or she used a sample "boilerplate" order, and simply did not fully understand the language used in the sample order. This is what using a shared payment Qualified Domestic Relations Order, or QDRO, is like. Under the Retirement Equity Act (REA),[1] an amendment to the Employee Retirement Income Security Act,[2] a QDRO can be drafted in this manner, fully providing benefits to an ex-spouse but using language that states the ex-spouse can continue receiving the award so long as the employee ex-spouse is alive. What is more appalling is that there is no recourse for the affected spouse once he or she has commenced receiving benefits.

This article will begin briefly with an introduction to the Employee Retirement Income Security Act of 1974, as amended (ERISA),[3] focusing primarily on the Act's anti-alienation provision[4] since the anti-alienation provision is the reason why ERISA was amended some ten years after enactment with REA.[5] The paper will then discuss the provisions of REA and will discuss how QDROs were introduced as the only exception to ERISA's anti-alienation clause.[6] To be discussed next is the requirements of a QDRO, including the definition as stated in REA.[7] Later to be explained are the two types of QDROs, namely the Shared Interest (or payment) Approach and the Separate Interest QDRO.[8] This is followed by an analysis and conclusion to support the thesis that shared payment QDROs should not be applied unless a divorce occurs after a participant has retired from employment.

Shared payment qualified domestic relations orders (QDROs) should only be applied in the event a divorce occurs post-retirement.[9] The death of a participant should not be the trigger-point that destroys an alternate payee's property right in his or her community share of a pension benefit awarded to his or her pursuant to a QDRO. In other words, once a person has been awarded a benefit, he or she should be allowed to keep it.

In 1974, the Employee Retirement Income Security Act (ERISA) was enacted to govern pension plans provided by private companies.[10] It was necessary for such a regulatory act to be passed because companies, which had retained and attracted good employees, were constantly reneging on promises made to their employees.[11] Not only that, but employers were shutting down plant sites and even firing employees just before becoming vested in order to avoid paying retirement benefits.[12] Employees were promised pension benefits in exchange for working for a number of years for their employer. Once the employee retired, the employer promised employees that they would receive a portion of their salaries every month for a specified amount of years. It is safe to deduce that employers developed many loopholes, including the ones mentioned above, to get around paying the promised benefits and employees' only remedy was to commence suit against the former employer.

Congress saw the need to regulate these companies and ERISA was enacted to protect employees' rights in the event they were promised retirement benefits at the appropriate time. A small but very essential part of the Act was that it contained a strict anti-alienation clause that prohibited anyone from receiving any portion of an employee's pension, not even wives, ex-wives, or children.[13]

Some years later, it was decided by Congress that the anti-alienation clause must be amended to allow some exceptions.[14] One of the biggest reasons this amendment became necessary is that many retired employees began to divorce but were not assuming financial responsibility for ex-spouses and / or children.[15] So the amendment to ERISA, called the Retirement Equity Act[16] (REA), created an exception to the anti-alienation clause that created a

property right in pension awards to ex-spouses (called alternate payees). One exception is that if an alternate payee provided to the court a QDRO, the alternate payee could be awarded a percentage of the marital portion of a retiring (or retirement eligible) employee (called a participant) so long as the QDRO was provided to the paying company (plan administrator) for approval by that company.[17]

Alternate payees have a property right in an ex-spouse's retirement pension benefit after a divorce pursuant to a QDRO. The rationale behind such an award is that a pension benefit accrued during the marriage, although payable at some point in the future, is considered community property. Such principle follows the idea that tangible items, such as homes (albeit, the equity earned), cars, cash, stock, and even furniture acquired during the marriage are split during a divorce, because such items are considered community property. Once these items are awarded to either spouse in a divorce decree, the items belong to the recipient and can be gifted, bequeathed, or retained by the party awarded. There is usually no event imaginable that can occur, not even death of either ex-spouse, that will cause the parties to lose that award.

In the arena of ERISA, there is such an event that *could* cause an alternate payee to lose his or her awarded benefit. That is what a shared payment QDRO can do. An alternate payee can be awarded her or his community share of the participant's pension, but if the language in the QDRO states that the award is payable as "shared payment," the alternate payee can lose his or her share of the benefit should the participant predecease the alternate payee. One cannot imagine how an ex-spouse would be affected if every state's family law code were amended to provide that an ex-spouse can only take his or her community share so long as the other spouse lives.

The shared payment approach further provides that an alternate payee, who has been awarded a portion of a participant's benefit, will receive her or his benefit only when the participant commences payment and in the form the participant alone chooses.[18] Moreover, if the participant dies prior to either party's commencement or while the alternate is receiving payments, the alternate payee's benefits stop.[19] This means that an alternate payee's benefit is payable over the participant's life expectancy, called the "measuring life,"[20] rather than over the life of the alternate payee. Additionally, the alternate payee's awarded share is not actuarially adjusted to be paid over her lifetime. In other words, whatever decision a participant makes concerning a pension benefit is a decision made for the alternate payee as well and once the participant dies, the alternate payee no longer has an award. It makes more sense that the shared payment approach would be applied to an award based on a divorce that occurs after the participant has already retired and commenced payments. The rationale is that since the participant is already receiving payments there is not a choice to give to the alternate payee.[21]

Without stating the obvious unfairness of shared payment QDROs, the death of a participant should not be the trigger point that destroys an alternate payee's property right in her community share of a pension benefit awarded to her pursuant to a QDRO. Either the alternate payee has a property right or does not; shared payment QDROs should only be applied in the event a divorce occurs post-retirement (of a participant).

II. Historical Background

A. Legislative History

In 1974, Congress enacted the Employee Retirement Income Security Act (ERISA)[22] to govern pension plans promised by private companies. The passing of this Act was necessary to protect the rights of employees (and their beneficiaries) under employee benefit plans by imposing a list of requirements on employers pertaining to standards of conduct, responsibilities, and obligations under the plan.[23] The Act contained a strict anti-alienation clause[24] that prohibited the assignment of a participant's retirement benefits to ensure that employees have benefits at retirement.[25] The Act set minimum standards for pension plans in that it requires benefits that are payable under certain types of retirement plans not be assigned to or alienated from anyone other than the participant.[26] This anti-alienation clause became effective on January 1, 1976 and prevails unless an exception is available.[27] If an exception is available, then the company's plan document must include a statement to that effect.[28] "Governmental plans and church plans that have not elected to be covered by ERISA's vesting rules and certain types of plans maintained by certain tax-exempt organizations are not subject to the anti-assignment and QDRO rules" in ERISA (and in the Internal Revenue Code, or IRC, 4, whose rules are almost identical to that of ERISA's).[29] The strict anti-alienation provision of ERISA prevented spouses, former spouses, children, and other dependents from accessing retirement benefits to satisfy family support obligations.

Despite ERISA's prohibition, a number of court decisions and revenue rulings began to create exceptions to the anti-alienation rule.[30] Congress' response was an amendment to ERISA roughly ten years after ERISA was implemented.[31] This amendment allowed retirement benefits to be assigned to a former spouse in the event of a divorce with the enactment of The Retirement Equity Act (REA) of 1984.[32] REA created the Qualified Domestic Relations Order (QDRO) exception to ERISA's anti-alienation provision, allowing an alternate payee (an ex-spouse, child, or other dependent) a right to receive all or a portion of the plan participant's benefits under the retirement plan if a QDRO is signed by a judge, and submitted to the plan administrator detailing how the plan benefits will be allocated to the alternate payee.[33] The QDRO, however, must comply with ERISA and the plan

rules. These rules are set forth in REA[34] and are found in most QDROs almost verbatim.

B. What Is a QDRO?

It is worth noting that there are two sets of almost identical QDRO rules:[35] one is found in ERISA and the other in the Internal Revenue Code (the Code).[36] The Code, however, differs in the "types of plans to which [the Code) appl[ies] and the legal consequences of failure to comply."[37] A QDRO, then, is a DRO (domestic relations order) that assigns to an alternate payee the right to receive all or a portion of the benefits payable to a participant under a *qualified retirement plan* and that meets certain other requirements.[38] (Note that if a DRO fails to meet the requirements for a QDRO, the anti-assignment rule prohibits a benefit from being assigned to the alternate payee unless another exception to the anti-assignment rule is available and also subject to a company's pension plan rules.[39]) A QDRO may be issued as a separate judgment, decree, order, or property settlement agreement.[40] QDRO provisions may also be included in the divorce decree and must be qualified by the Plan Administrator. However issued, the document must satisfy QDRO requirements.[41]

Before a QDRO is *qualified*, it is a domestic relations order (DRO), which is a judgment, decree, or order relating to or outlining the provisions of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant and is made pursuant to a State domestic relations law (in Texas, the community property law).[42] No DRO exists until the court has signed the judgment or Order, or has approved the property settlement.[43] Hence, a DRO does not have to be a separate order to be valid.[44] A decree can encompass a DRO, so long as the QDRO rules are followed.[45] Administratively, a DRO is first submitted to the plan administrator who determines if the DRO meets QDRO standards and "qualifies" the DRO.[46] Once qualified, the parties take the order to the judge to sign, and then resubmit the signed copy to the plan administrator to be implemented.

C. Elements of a QDRO

Under the Code and ERISA, an order must satisfy certain requirements in order to meet qualification status and thus qualify as a QDRO.[47] An order has to first be determined a DRO and then satisfy any additional requirements to be considered a QDRO.[48] The following requirements must be contained in the order:

a. The last known mailing address of the participant and alternate payee must be stated;

b. The name of each plan to which the order applies must be stated;

c. The dollar amount or percentage of the benefit to be paid has to be well defined;

d. The number of payments/time period to which the order applies must be defined;

e. The order CANNOT require the plan to provide the alternate payee with any form of benefit not payable under the plan;

f. The order CANNOT require a plan to provide for increased benefits;

g. The order CANNOT require a plan to pay benefits to an alternate payee that are legally required to be payable to another alternate payee; and

h. The order CANNOT require a plan to pay benefits to an alternate payee in the form of a qualified joint and survivor annuity payable to the AP's subsequent spouse.

D. Shared Payment QDROs, Differentiated from Separate Interest QDROs

So far, it may appear that drafting a QDRO, while highly technical in nature, should be very straight forward. An alternate payee should be able to hire an attorney to draft a QDRO who would simply follow the QDRO guidelines and submit the QDRO to a plan administrator. Once properly submitted, the alternate payee should begin receiving payments. This process seems simple enough, except that when dealing with a law as technical as ERISA, drafting a QDRO, and, moreover getting it approved, is anything but simple.

QDROs generally fall under two basic categories (for defined benefit pension plans only): shared payment (or stream of payment) and separate interest.[49] While there is no statutory definition provided in ERISA or the Code, there are, however, characteristics of either category that differentiate one from the other.[50]

Under a separate interest QDRO (for a defined benefit or contribution plan), an alternate payee has a "separate interest" in the participant's plan, as the name suggests.[51] This means that the death of the participant has no effect on the interest of the alternate payee.[52] Under this approach, the measuring life is that of the alternate payee, who chooses when to commence and in what form.[53] This is accomplished by *actuarially adjusting* the alternate payee's share of the benefit to his or own life expectancy.[54] The ability to commence payments does not depend on the participant's life or when the participant commences.[55] Under a separate interest approach, the participant's benefit is "assigned outright to the alternate payee so that the alternate payee owns a separate interest in the plan"[56] and when the participant dies, the payments awarded to the alternate payee do not stop (unless the QDRO provides that the participant's life is the measuring life).[57] Additionally the QDRO will specify what happens to the benefit if the participant or alternate payee dies.[58] Some possibilities are the alternate payee's benefit can revert to the participant after the alternate payee dies;

the alternate payee can be named a surviving spouse after the participant dies, thereby protecting the alternate payee's benefit; or, depending on the form of payment chosen,[59] the remaining payments can be paid to the alternate payee's estate should the alternate die before all guaranteed payments have been received.

A shared payment QDRO provides an opposite outcome. This option is most often utilized when a participant has already commenced receiving benefits under the plan (for a defined benefit plan).[60] It is, however, an option that a drafter of a QDRO may choose and must clearly specify in a QDRO. Under a shared payment QDRO, the participant decides when payments will commence and in what form. A portion of the participant's benefit is awarded to an alternate payee, but the measuring life is always that of the participant.[61] This means that "[i]f a participant dies before benefits commence, the alternate payee under a stream of payment or shared payment QDRO generally is not entitled to receive any [further] benefits unless" the QDRO provides that the alternate payee receives a qualified pre-retirement survivor annuity[62] (or QPSA, which must be clearly spelled out in the QDRO).

Moreover, under a shared payment QDRO, if the alternate payee predeceases the participant, before or after awarded benefits commence, the benefit assigned to the alternate payee (payable for the participant's lifetime) will usually revert to the participant.[63] Also, depending on the type of benefit chosen by the participant, the alternate payee's benefit ceases whenever the participant's benefit ceases (unless the QDRO specifies that the alternate receives a QPSA). In other words, once awarded a benefit, an alternate payee may lose the award if either party dies. This stipulation seems fair and accurate if the alternate payee is the measuring life. But, if the participant is the measuring life, depending on the form of benefit chosen, the alternate payee takes a gamble that the participant will outlive the alternate payee.

III. Analysis

Keeping in mind that pension plans are "inherently designed and funded to provide the participant, and not the alternate payee, a lifetime stream of income,"[64] it is understandable why a shared payment QDRO is available as an option for splitting pension benefits pursuant to a divorce decree. However, one must carefully consider all such components of both types of QDROs for defined benefits plans to insure that the intentions of both parties are carried out. It is important to understand the distinction of the two types of QDROs and the provisions therein mostly because "[f]or the alternate payee, it means the difference between [receiving] a lifetime annuity or nothing at all."[65]

It is significant to point out that applying either approach is the way used to define the "duration of the benefits for the alternate payee."[66] The choices in duration determine whether the benefits are to be paid over the alternate payee's or participant's lifetime, but do not actually govern what portion of the benefit the alternate payee is to receive.[67] Using a separate interest QDRO, the alternate payee's share is actuarially adjusted to make the payments over her lifetime[68] and provides the recipient with his or her own *separate interest* or separate proportionate share in a lifetime monthly annuity. This approach would seem to be the preferred choice, and for good reason.

One good reason is that no one is forced to take a gamble as to which party will outlive the other in order to determine how much a person will ultimately receive from the pension plan. There is no guesswork. Ex-spouse A knows the exact amount to expect to receive for a lifetime and is not forced maintain unwanted contact with ex-spouse B for the purpose of knowing whether the other is still alive to continue receiving an *already awarded* benefit.

Another reason a separate interest QDRO is preferable is because it allows flexibility to an alternate payee as to when he or she can actually commence benefits.[69] Most plan documents provide that an alternate payee can commence her payments on or after the participant's earliest retirement age, but no later than the participant's normal retirement age (usually age 65).[70] Should an alternate payee choose to commence at the earliest date possible, the benefit will be actuarially adjusted to provide for longer period of time for which benefits are to be paid out. Allowing an alternate payee to choose the time to commence is ideal, especially for those alternate payees needing the funds sooner than age 65.

The alternate payee is not alone in benefiting from a separate interest QDRO. "Because benefits are guaranteed for the alternate payee's lifetime once they commence, the participant is not forced into electing a reduced qualified (postretirement) joint and survivor annuity for the benefit of the alternate payee."[71] The participant, too, is free to choose any form permitted under the plan. It is still, however, necessary to include QPSA provisions for the alternate payee, which is necessary to ensure the alternate payee's rights if the participant should predecease the alternate payee,[72] especially if the alternate payee has not yet commenced. In short, the rationale for a separate interest approach (with QPSA provisions) is mostly two-fold: protecting the alternate payee's benefit despite which spouse outlives the other, and providing a less restrictive benefit choice to the alternate payee as well.

Under the shared payment approach, just as the name suggests, the alternate payee shares in the participant's pension at the time of commencement. To put it another way, the alternate payee's benefit is not actuarially adjusted to her life expectancy.[73] But rather, the alternate payee receives her benefit when the participant commences and, depending on how the QDRO is drafted, ends when the participant dies.

It would seem that the pitfalls of a shared payment QDRO could be avoided by simply providing that the alternate is awarded a QPSA and/or a QJSA if the participant strongly objects to a separate interest QDRO.[74] A QPSA protects an alternate payee from losing her benefit should the participant die prior to either party commencing.[75] A QJSA protects the alternate payee's benefits from expiring should he or she outlive the participant once benefits are being paid out to the parties. Many divorces, one would agree, are a bit nasty. It is probably safe to conclude that a participant is not willing to give up any portion of a pension benefit especially if the accrued benefit amount is substantial.

Unfortunately, there are no guidelines provided by the Department of Labor, ERISA, or the Code[76] on selecting the types of QDROs. Plan administrators, in an effort to make the approval process easier, have discretion to *provide guidelines* by providing a copy of the company's summary plan description upon request by either party.[77] In addition to supplying summary plan descriptions to help guide the parties (more likely, their attorneys), most companies provide sample QDROs[78] or sample QDRO language. The boilerplate fill-in-the-blank QDROs are meant only as a guide as well and can be dangerous to use if one is not careful to review the QDRO and edit the information according to what is provided in the summary plan description. Sample QDROs frequently use language that tends to persuade the parties into applying the shared payment approach even though it is not required by REA. This is where, it seems, that the problems arise.

Without guidance from plan administrators, it is doubtful that divorcing parties would consciously agree to a shared payment approach to a QDRO when dividing benefits. An alternate payee, if given the opportunity to have all of his or her rights disclosed in an understandable manner, would probably not be willing to forgo a property right that was awarded to him or her simply because he or she outlives the participant. It seems most fair that if a plan administrator provides a sample QDRO or sample QDRO language, the sample should be neutral and give the parties an option to choose an approach as opposed to guiding them in a way that is less favorable to an alternate payee.

One may ask: Is it the duty of a plan administrator to act in the best interest of a non-participating alternate payee? After all, a pension plan is set up as an incentive to attract, retain, and reward good **employees**.[79] It would follow that a plan administrator's loyalty would be to its participant who has actually rendered employment services to the company for several years and with whom a relationship was developed. According to the Department of Labor, "[i]f the domestic relations order is determined to be a QDRO before the first date on which benefits are payable to the alternate payee, the plan administrator has a continuing duty to account for and to protect the alternate payee's interest in the plan to the same extent that the plan administrator is obliged to account for and to protect the interests of the plan's participants."[80]

A shared payment approach may not be the intent of the parties under a defined benefit plan. Oftentimes defined contribution plan QDROs are drafted simultaneously with defined benefit QDROs and may cause confusion regarding the time when payments can commence. Defined contribution plan QDROs do not have the consideration of duration because benefits are payable immediately and in the form of a lump sum.[81] The split is a simple percentage at a certain point, usually as of the date of divorce, including all earnings and losses.[82]

It is the opinion of the author that the language provided in a defined contribution QDRO should not provide that the alternate payee can commence his or her payment when the participant is eligible to commence and in the same form. If an attorney or ex-spouse does not understand the difference between the types of plans, it would follow that a defined benefit QDRO may lead to an accepted QDRO that does not carry out the intentions of the parties.[83] Under a QDRO for the defined contribution plan, there is no measuring life and, upon receipt of the benefit, is considered a complete distribution of payments.[84]

A shared interest QDRO is most often, and should only be in the author's opinion, drafted for a participant who has already retired, as this is the only acceptable approach.[85] "Once a participant retires, it is too late to use a separate interest QDRO."[86] A benefit that has already commenced cannot be actuarially adjusted over an alternate payee's life expectancy.[87] Under most company's plan documents, once a benefit election has been made, a participant is prohibited from changing the election.[88] So, if a QDRO is submitted to a plan administrator post-retirement, an alternate payee can only receive a share in the payments already being made to the participant.[89] No other option is available.[90] Hence, this is the only reason a shared payment QDRO should be used—in the event no other option is available to the alternate payee.

Conclusion

Most plan documents provide various optional forms of benefits payable to a recipient, except that an alternate payee may not designate a beneficiary upon his or her death since the premise of an award is to provide *lifetime* payments. It should follow that an alternate payee should be given the same choice in optional forms as the participant is given. Additionally, an alternate payee should not have to wait until the participant commences before being allowed to take her benefit. If the alternate payee is awarded a benefit, the alternate payee enjoys the interest in a benefit that no longer belongs to the participant.

Shared interest QDROs require the alternate to wait until the participant retires before he or she can commence payments.[91] An "alternate payee is simply sharing in the monthly…payments" payable to the participant at a point in time when the participant chooses.[92] Shared interest QDROs do not seem to take into account that a right has been created in a person who is not a participating employee in a plan.[93] It seems to create one right to one person. In other words, both parties are sharing in a benefit that should be separated once an accepted QDRO has been received.

Using a shared interest QDRO is like providing an award to a person, and then taking it back. An alternate payee is forced to take a gamble hoping to outlive the participant by a substantial number of years,[94] especially if this is the only source of income one may have. No separate rights are created. In fact, most alternate payees, under a shared interest QDRO, are usually unaware that a participant has begun receiving payments. Plan administrators do not always treat the alternate payees with the same diligence as their participants. It is up to the alternate payee to keep in constant contact with the plan to know when her benefits are to commence.

On the contrary, when a participant is approaching retirement and has not communicated his desire to retire, most companies will contact the participant ensuring that it is his or her intent to continue working. But for an alternate payee, no such communication is given. In addition to losing a benefit, an alternate payee may in fact start receiving payments at an even later time than permitted to do so due to administrative processes.

It is understandable that not many family law attorneys are very knowledgeable about the technical nature of QDROs. ERISA is a highly technical federal law, and attorneys who have clients with pension benefits are expected to read and interpret a plan document, or summary plan description, and draft an acceptable QDRO that complies with ERISA. Due to the lack of knowledge of some attorneys of this subject matter, many QDROs are rejected, causing several revisions before an acceptable QDRO is provided. In an effort to reduce the number of failed QDROs received by plan administrators, some companies choose to provide sample (or model) QDROs.[95]

What should the sample QDROs provide? Is it the duty of the plan administrator to include all possibilities in a sample and allow the drafting attorney to make a choice based on the guidance of the sample provided? Are they meant to be mistake proof? It is the opinion of the writer that they are not. It is more probable than not that a sample QDRO drafted would be a bit one-sided towards the participant. The samples tend to lean towards providing the participant with the more favorable benefits, which may sometimes lead to excluding information that would have a positive effective on an alternate payee's award.

For example, a defined benefit QDRO can allow an alternate payee to take a benefit at the participant's earliest retirement date.[96] According to IRC §414, the participant earliest retirement age is "the earlier of (i) the date on which the participant is entitled to a distribution under the plan, or (ii) the later of (I) the date the participant attains age 50, or (II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service."[97] If a plan document provides that a participant's earliest retirement is age 50, under a separate interest QDRO the alternate would be given the choice to take a reduced amount (reduced to be paid over a longer period) at that time.[98] Under a shared interest QDRO, the choice is not there.[99] A sample QDRO that does not provide all available options would tend to be one-sided in favor of the participant.[100]

No other award pursuant to a divorce has the possibility of being taken away once awarded should the awarded party outlive the ex-spouse. If a judge awards one party a car, the other party's death has no affect on the receipt of the car. The same should be applied with respect to any pension award. It is a property right created by law to an alternate payee. An alternate payee should be treated the same as a plan participant and afforded the same rights. A lifetime benefit should not depend on the life of another. Either an alternate payee has been awarded a benefit or has not. The death of a participant should not be the determining factor in destroying an alternate payee's awarded benefit.

Endnotes

1. I.R.C. § 401(a)(13).
2. Pub. L. No 93-406, 88 Stat. 829 (1974), codified as amended in various sections of 26 and 29 United States Code (U.S.C.).
3. *Id.*
4. I.R.C. § 401(A)(13).
5. Prior to REA, ERISA provided certain exceptions to the anti-alienation provisions namely, voluntary and revocable assignments of 10% or less of any benefit by participant in pay status, secured loans to participants, and federal tax levies of collection of federal tax judgments. Treas. Reg § 1.401(a)-(13)(d)(2); I.R.C. § 4975; Treas. Reg. § 1.401(a)-(13)(b)(2). *See also* Kennedy and Shultz, *Employee Benefits Law: Qualification and ERISA Requirements*, 2nd edition (2009), Ch. 12, page 281.
6. Kennedy and Shultz, *Employee Benefits Law: Qualification and ERISA Requirements*, 2nd edition (2009), Ch. 12, pages 281-282.
7. I.R.C. § 414(p)(1)(B); ERISA § 206(d)(3)(B)(II); ERISA §§ 206(d)(3)(C)(i)-(iv).
8. QDROs, The Division of Pensions Through Qualified Domestic Relations Order, U.S. Department of Labor Publication (2001), Q 3-3.
9. "The shared interest approach has to be utilized if the participant is already retired and is receiving benefits." Kennedy and Shultz, *Employee Benefits Law: Qualification and ERISA Requirements*, 2nd edition (2009), Ch. 12, page 282.
10. See 29 U.S.C.A. § 1001 for Congressional findings and declaration of policy.

11. James A. Wooten, *The Most Glorious Story of Failure in Business: The Studebaker-Packard Corporation and the Origins of ERISA*, 49 Buff. L. Rev. 703 (2001).
12. *Id.*
13. Kennedy and Shultz, *Employee Benefits Law: Qualification and ERISA Requirements*, 2nd edition (2009), Ch. 12 page 281.
14. *Id.* at 282.
15. Hilary Greer Fike, *Qualified Pension Trends and Divorce Considerations*, American Journal of Family Law, Vol. 14, 234-241 (2000).
16. ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(3)(A).
17. Mark W. Dundee, Esq, Qualified Domestic Relations Order Answer Book 1-4 (Wolters Kluwer 4th Ed. 2007).
18. Mark W. Dundee, Esq, Qualified Domestic Relations Order Answer Book 1-26 (Wolters Kluwer 4th Ed. 2007).
19. *Id.*
20. *Id.* at 1-29.
21. Mark W. Dundee, Esq, Qualified Domestic Relations Order Answer Book 1-26 (Wolters Kluwer 4th Ed. 2007).
22. ERISA § 206(d)(1).
23. S. Rep. No. 93-127, at 35 (1973).
24. ERISA §§ 206(d)(1), 206(d)(2).
25. Mark W. Dundee, Esq, Qualified Domestic Relations Order Answer Book 1-26 (Wolters Kluwer 4th Ed. 2007), citing ERISA §§ 206(d)(1), 206(d)(2) and I.R.C. 401(a)(13).
26. *Id.*
27. I.R.C. § 404(p)(4).
28. 29 U.S.C. § 1056(d)(1), I.R.C. § 401 (a)(13); Treas. Reg. § 1.401 (a)-13(b).
29. Mark W. Dundee, Esq, Qualified Domestic Relations Order Answer Book 1-4 (Wolters Kluwer 4th Ed. 2007).
30. *Id.*
31. Gary A. Shulman, Qualified Domestic Relations Order Handbook 1-13 (Wolters Kluwer 3rd Ed. 2006) citing, Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1426.
32. ERISA § 206(d)(1); 29 U.S.C. § 1056(d)(3)(A).
33. *Id.*
34. ERISA § 206(d)(1); 29 U.S.C. §§ 1056(d)(3)(C), 1056(d)(3)(D).
35. Mark W. Dundee, Esq., Qualified Domestic Relations Order Answer Book 1-3 (Wolters Kluwer, 4th Ed. 2007). Note: "For the most part, there is no practical effect of having two different sets of QDRO rules. [I]f a QDRO complies with ERISA's QDRO rules, it also will comply with the code's QDRO rules, and the assignment of a benefit from the participant to the alternate payee will not be prohibited."
36. ERISA § 206(d)(3); I.R.C. § 414(p).
37. Mark W. Dundee, Esq., Qualified Domestic Relations Order Answer Book 1-3 (Wolters Kluwer, 4th Ed. 2007).
38. I.R.C. § 414(p)(1); ERISA § 206 (d)(3)(B).
39. I.R.C. § 401(a)(13); ERISA § 206 (d)(1).
40. I.R.C. § 401(a)(13)(C)(ii).
41. I.R.C. § 414(p); Ross v. Ross, 308 N.J. Super. 132 (App. Div. 1998).
42. I.R.C. § 414(p)(1)(B); ERISA § 206(d)(3)(B)(ii); Notice 97-11, 1997-2 C.B. 379.
43. Mark W. Dundee, Esq., Qualified Domestic Relations Order Answer Book 1-7 (Wolters Kluwer, 4th ed. 2007).
44. *Id.* at 1-25.
45. *Id.*
46. *Id.* at 5-17 & 5-18.
47. *Id.* at 1-15.
48. I.R.C. § 414(p)(1)(B); ERISA § 206(d)(3)(B)(II); ERISA §§ 206(d)(3)(C)(i)-(iv).

    (1) In general.

    (A) Qualified domestic relations order. The term "qualified domestic relations order" means a domestic relations order—

    (i) which creates or recognizes the existence of an alternate payee's right to, or assigns to an alternate payee the right to, receive all or a portion of the benefits payable with respect to a participant under a plan, and

    (ii) with respect to which the requirements of paragraphs (2) and (3) are met.

    (B) Domestic relations order. The term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which—

    (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and

    (ii) is made pursuant to a State domestic relations law (including a community property law).

    (2) Order must clearly specify certain facts. A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

    (A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

    (B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

    (C) the number of payments or period to which such order applies, and

    (D) each plan to which such order applies.

    (3) Order may not alter amount, form, etc., of benefits. A domestic relations order meets the requirements of this paragraph only if such order—

    (A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

    (B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

    (C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

49. Mark W. Dundee, Esq., Qualified Domestic Relations Order Answer Book 1-26 (Wolters Kluwer, 4th ed. 2007).
50. *Id.*
51. *Id.* at 1-27.
52. *Id.* at 1-29.

53. *Id.* at 2-10.

54. GARY A SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK 6-3 (WOLTERS KLUWER, 3RD ED. 2006).

55. Except that an alternate payee cannot commence payments later than a participant's normal retirement age as set out by the plan document (or in the case of participants working past normal retirement age, not later than the participant commences benefits) or earlier than the participant's earliest retirement age as specified in the plan document.

56. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK 2-10 (WOLTERS KLUWER, 4TH ED. 2007).

57. *Id.* at 1-29.

58. *Id.* at 1-27.

59. Plan documents offer different forms of payment at different times. For example, some plans may provide for a lump sum payout after the participant reaches a certain age and, if chosen, is considered a complete distribution of the awarded benefit. Other optional forms include a period certain that guarantees payments to be paid out for a certain number of months (such as 5 year certain and life form of payment where payments are guaranteed for 60 months whether or not the awarded party is still alive).

60. JON MALLIN, SURVIVORSHIP RIGHTS: SHARED PAYMENT AND SEPARATE INTEREST QDROS (2010), available at http://qdroprofs.com/Documents/PDF/Articles/Article-5--Survivorship-SharedPayAndSeparateInterest.pdf.

61. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 2-4 (WOLTERS KLUWER, 4TH ED. 2007).

62. *Id.* at 1-27.

63. JON MALLIN, SURVIVORSHIP RIGHTS: SHARED PAYMENT AND SEPARATE INTEREST QDROS (2010), available at http://qdroprofs.com/Documents/PDF/Articles/Article-5--Survivorship-SharedPayAndSeparateInterest.pdf.

64. GARY A SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK, 6-4 (WOLTERS KLUWER, 3RD ED. 2006).

65. GARY A SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK, 6-3 (WOLTERS KLUWER, 3RD ED. 2006).

66. *Id.*

67. *Id.*

68. *Id.*

69. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 1-29 (WOLTERS KLUWER, 4TH ED. 2007).

70. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 1-33 (WOLTERS KLUWER, 4TH ED. 2007).

71. GARY A. SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK, 6-7 (WOLTERS KLUWER, 3RD ED. 2006).

72. *Id.*

73. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 2-7 (WOLTERS KLUWER, 4TH ED. 2007).

74. *Id.* at 1-31.

75. QDRO's, The Division of Pensions Through Qualified Domestic Relations Order, U.S. Department of Labor Publication (2001), Q 3-5.

76. Except that Notice 97-11; 1997-1 C.B. 379

> provides information intended to assist domestic relations attorneys, plan participants, spouses and former spouses of participants, and plan administrators in drafting and reviewing a qualified domestic relations order ("QDRO"). The Notice provides sample language that may be included in a QDRO relating to a plan that is qualified under § 401 (a) or § 403 (a) of the Internal Revenue Code of 1986 ("qualified plan" or "plan") and that is subject to § 401 (a) (13). The Notice also discusses a number of issues that should be considered in drafting a QDRO. A QDRO is a domestic relations order that provides for payment of benefits from a qualified plan to a spouse, former spouse, child or other dependent of a plan participant and that meets certain requirements.

77. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 5-18 (WOLTERS KLUWER, 4TH ED. 2007).

78. Joshua A. Dean, Comment, *Wilson V. Wilson: The Effect of QDROs on Appealing Divorce Decrees*, 42 Akron L. Rev. 639, n. 16 (2009).

79. BARRY KOZAK, EMPLOYEE BENEFIT PLANS, 4 (CAROLINA ACADEMIC PRESS, 2010).

80. See The Department of Labor's Website: "FAQ'S About Determining Qualified Status And Paying Benefits," available at http://www.dol.gov/ebsa/faqs/faq_qdro2.html.

81. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 3-4 (WOLTERS KLUWER, 4TH ED. 2007).

82. *Id.* at 3-5.

83. GARY A. SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK, 6-3 (WOLTERS KLUWER, 3RD ED. 2006).

84. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 3-5 (WOLTERS KLUWER, 4TH ED. 2007).

85. *Id.* at 2-5.

86. Shulman, at 6-18.

87. *Id.*

88. Dundee, at 2-5.

89. Kennedy and Shultz, *Employee Benefits Law: Qualification and ERISA Requirements*, 2nd edition (2009), Ch. 12, page 282.

90. Dundee, at 2-5.

91. GARY A. SHULMAN, QUALIFIED DOMESTIC RELATIONS ORDER HANDBOOK, 6-15 (WOLTERS KLUWER, 3RD ED. 2006).

92. *Id.*

93. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 1-26 (WOLTERS KLUWER, 4TH ED. 2007).

94. *Id.* at 1-27.

95. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 5-18 (WOLTERS KLUWER, 4TH ED. 2007).

96. *Id.* at 2-17.

97. I.R.C. § 414(p)(4)(B).

98. MARK W. DUNDEE, ESQ., QUALIFIED DOMESTIC RELATIONS ORDER ANSWER BOOK, 1-28 (WOLTERS KLUWER, 4TH ED. 2007).

99. *Id.* at 2-8.

100. *Id.* at 5-18.

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Selected Case

Editor's Note: It is our intention to publish cases of general interest to our readers which may not have been published in another source and will enhance the practitioner's ability to present proof to the courts in equitable distribution and other matters. The correct citations to refer to in a case that may appear in this column would be:

(Vol.) Fam. Law Rev. (page), (date, e.g., Spring 2012) New York State Bar Association

We invite our readers and members of the bench to submit to us any decision which may not have been published.

George S. v. Amanda S., Supreme Court, New York County (Matthew F. Cooper, J., February 29, 2012)

For the Plaintiff: Mayerson Abramowitz & Kahn, LLP
292 Madison Ave, 18th Floor
New York, NY 10017

For the Defendant: Cohen Clair Lans Greifer & Thorpe LLP
885 Third Avenue, 32 Floor
New York, NY 10022

In this matrimonial proceeding, defendant-wife seeks to have the court use its civil contempt powers to punish plaintiff-husband for a violation of orders that are automatically triggered by the commencement of an action for divorce. The automatic orders, which became part of New York State divorce procedure in 2009 with the enactment of Domestic Relations Law (DRL) section 236(B)(2)(b) and the promulgation of 22 New York Codes, Rules and Regulations (NYCRR) 202.16-a, prohibit the unauthorized transfer of marital assets during the pendency of the case.

Here, there is little question that plaintiff violated the automatic orders by using close to $4 million in marital funds to purchase a house in Connecticut after he started this proceeding. As will be explained, the court finds that although civil contempt is an available remedy when a party transfers assets in violation of the automatic orders, it is not an appropriate remedy on these facts.

Background

Plaintiff commenced this divorce action on November 3, 2010, by filing a summons with notice. On or about December 3, 2010, defendant was served with the summons. Included with the summons was the "Notice Re: Automatic Orders," which recites verbatim the language of the automatic orders as provided in DRL § 236(B)(2)(b) and 22 NYCRR 202.16-a and sets forth their applicability to both parties. The parties exchanged Net Worth Statements on March 10, 2011. Plaintiff's Net Worth Statement was sworn to on February 11, 2011, but reflected assets as they existed on November 1, 2010, two days before the commencement date of the action. From plaintiff's Net Worth Statement and from his affidavit in opposition to defendant's motion for contempt, it appears that the parties are fortunate enough to have a marital estate worth in excess of $16 million, with approximately $12 million in liquid assets.

Plaintiff admits that after the commencement of the action he wrote checks totaling $49,409.34 from the parties' joint account to his fiancée, his fiancée's divorce attorney, and another individual. He also admits to having purchased his fiancée a diamond engagement ring for over $70,000. Plaintiff contends, however, since the time the divorce action began he has earned more than $10 million as a hedge fund manager, and therefore whatever he has spent on his fiancée should be viewed as having come from his current income and not from marital funds. On the other hand, plaintiff fully acknowledges that the Connecticut house, which he purchased on April 18, 2011 for $3,795,000, was bought with marital funds.

Defendant contends that the automatic orders of DRL § 236(B)(2)(b) and 22 NYCRR 202.16-a constitute an unequivocal mandate of the court and that plaintiff is charged with knowledge of such orders as the party who commenced the action. In light of plaintiff's unilateral expenditure of marital assets since the commencement of this action, and in particular his use of marital funds to buy himself an expensive house, defendant asserts that her equitable distribution rights have been prejudiced. Defendant further contends that plaintiff willfully failed to disclose in his Net Worth Statement the transfer of assets to his fiancée and that the court relied on this misstatement in awarding interim counsel fees to defendant. As a remedy for these alleged breaches of the restraint on the transfer of assets and compulsory disclosure found in the automatic orders, defendant moves to have plaintiff held in contempt of court and to have him fined, imprisoned, and restrained from making any further transfers of marital assets. Defendant also seeks attorney's fees in excess of $20,000 for having to bring the motion. Finally, with the request being made for the first time in defendant's reply affidavit and then by her attorney at oral argument, defendant seeks an order directing plaintiff to deposit $8 million of the $12 million in liquid marital assets in escrow until resolution of this action.

Plaintiff opposes defendant's application, specifically a finding of contempt, on the grounds that defendant's rights have not been prejudiced—a prerequisite to a contempt finding—and that effective remedies alternative to contempt are available. Though admitting to having used

marital funds to purchase the Connecticut house, plaintiff argues that he has not dissipated the marital estate but merely converted a liquid asset into real property. Plaintiff further asserts that the funds spent on his fiancée were from his personal post-commencement earnings, that the Net Worth Statement was a true and accurate reflection of his financial information as of the date of its completion on November 1, 2010, and that defendant has not demonstrated that plaintiff attempted to dispose of marital assets so as to prejudice defendant's entitlement to equitable distribution.

Legal Analysis

I. Contempt Based on Plaintiff's Alleged Dissipation of Marital Funds

The court need not delve into a lengthy analysis as to whether civil contempt is an available remedy for a violation of the automatic orders. This past year, Justice Ellen Gesmer held in *P.S. v. R.O.*, 31 Misc 3d 373 (Sup Ct, New York County 2011), that the promulgation of DRL § 236(B)(2)(b) as a court rule in 22 NYCRR 202.16-a constitutes a "lawful mandate[] of the court" and that the legislative history of DRL § 236(B)(2)(b) clarifies "that the Legislature intended that a violation of the automatic orders would be redressed by the same remedies available for violations of any order signed by a judge." *Id.* at 376. This court agrees fully with Justice Gesmer's sound reasoning and it concludes as she did that a party who violates the automatic orders is subject to being punished for contempt of court.

In order to adjudge a party in civil contempt, a court must conclusively determine three things: 1) the existence of a lawful order expressing an unequivocal mandate of which the party had knowledge; 2) the disobedience of such order; and 3) that the rights and remedies of a party to the action were prejudiced by the violation of the order. *Matter of McCormick v. Axelrod*, 59 NY2d 574, 583 (1983); Judiciary Law § 753(A)(3). Here, it has been established that the automatic orders are a lawful mandate of the court. *See P.S. v. R.O.*, 31 Misc 3d at 376. It has been further established that plaintiff, by instituting the action and causing the summons to be served, had actual or constructive knowledge of the language of the automatic orders contained within the summons. Finally, it is undisputed, and in fact admitted, that plaintiff breached the terms of the automatic orders by using marital funds for the purchase of the Connecticut house. Thus, the only issue remaining to be determined before a finding of contempt can be made is whether plaintiff's breach of the automatic orders prejudiced defendant's rights in this ongoing action (*see* Judiciary Law § 753[A]; *McCormick*, 59 NY2d at 583 ["prejudice to the right of a party to the litigation must be demonstrated"]) and whether alternative remedies to a finding of contempt are unavailable or would be ineffectual. *See Farkas v. Farkas*, 201 AD2d 440 (1st Dept 1994).

Prior to determining whether plaintiff's conduct rises to the severity of a contempt, it is useful to examine the legislative history leading to the enactment of the law establishing the automatic orders. In the Assembly's Memorandum in Support of Legislation, it is stated that the automatic orders are needed "to prevent both parties from dissipating assets, incurring unreasonable debts, or removing a party or the children from health or life insurance policies." Mem in Support of 2009 NY Assembly Bill A2574, Bill Jacket, L 2009, ch 72; *see also* Introducer's Mem in Support, 2009 NY Senate Bill S2970. Despite the fact that the word "dissipating" is not used in the automatic orders, it is clear from the history that one of the Legislature's prime concerns in enacting the law was to provide a means to remedy an all-too- common problem: that one of the parties to a divorce would undermine the equitable distribution process by spending, transferring or concealing marital property. Thus, a court, in considering an alleged violation of the automatic orders, must look not only to the actual text of the orders themselves, but it should view the violation from the perspective of the Legislature's articulated concern for preventing the dissipation of assets.

Dissipation has a specialized meaning within the context of matrimonial law. It has often been characterized as having a nefarious or devious undertone carrying the implication that the party transferring the funds did so with the intent of impeding the economic rights of the other spouse and preventing the court from making a fair and equitable distribution of the marital estate. *See Blickstein v. Blickstein*, 99 AD2d 287, 293 (2d Dept 1984); *Hartog v. Hartog*, 1992 WL 695903 (Sup Ct, New York County 1992). In some cases, the dissipation consists of the transfer of marital funds to a secret bank account (*see e.g. Maharam v. Maharam*, 245 AD2d 94 [1st Dept 1997]), or a spouse's use of marital property to pay for personal expenses and debts (*see e.g. Dewell v. Dewell*, 288 AD2d 252 [2d Dept 2001]). In other cases, the dissipation takes the form of transfer of funds without fair consideration to third parties. *See e.g. Davis v. Davis*, 175 AD2d 45 (1st Dept 1991). In almost all cases, it involves conduct by which a party seeks to hide or improperly dispose of marital assets during the pendency of a divorce action.

In this case, there can be no dispute that plaintiff's purchase of the Connecticut house with marital funds—alternatively characterized by plaintiff as a conversion of marital funds from cash into real property—violated the plain language of the automatic orders.[1] The funds used to purchase the property are acknowledged to be part of the marital estate, and although plaintiff states that he informed defendant of his plans to buy the house there is no suggestion that defendant ever consented to the transaction, in writing or otherwise, or that it was done pursuant to court order. On the other hand, plaintiff's purchase of the house in which he now resides—albeit with title not being in his name but instead being held in trust with plaintiff as the sole equitable owner—bears little of the in-

dicia of a transaction undertaken so as to undermine equitable distribution. The $3,795,000 in marital funds used to purchase the residence, though no longer in the form of a liquid asset, remain part of the marital estate subject to equitable distribution in the form of the Connecticut house. While plaintiff's actions may have violated the letter of the automatic orders, it cannot be said that those actions resulted in the kind of dissipation of marital assets that the Legislature was seeking to combat when it enacted the law.

Turning from the legislative intent behind the automatic orders to the elements necessary for contempt, the court's attention is again focused on the results of plaintiff's actions rather than on the actions themselves. This is because the key issue is whether defendant's rights and remedies were prejudiced by the violation of the automatic orders. With regard to the Connecticut house, it remains every bit as much marital property as it did when it was $3,795,000 in cash. Defendant can readily be made whole as a result of plaintiff's actions in that she will be entitled to a credit for the purchase price of the house or its value at the commencement of trial, whichever is greater, as well as a credit for any fees or costs that were incurred in the purchase of the house and were paid by plaintiff with marital funds. With regard to the payments made to or on behalf of plaintiff's fiancée, including the purchase of the engagement ring, if it can be shown at trial that those expenditures were indeed made from marital funds and not from plaintiff's separate income stream, then defendant will be entitled to a credit for those sums as well. In light of the parties' significant liquidity—there being $12 million available to offset plaintiff's expenditures that total at most $4 million—it can safely be said that neither defendant's rights under equitable distribution nor the remedies available to her to satisfy those rights have been prejudiced in any measurable way. Accordingly, plaintiff cannot be held in contempt of court as a result of his purchase of the Connecticut house or the expenditures he made with regard to his fiancée.

At oral argument on the motion, defendant's counsel sought to make the point that it would be unfair for the court to refrain from holding plaintiff in contempt simply because he has enough money to cover expenditures made in violation of the automatic orders. This, according to counsel, would be treating plaintiff differently from other litigants because of his wealth. The point is well taken. But as F. Scott Fitzgerald is reputed to have said, "the rich are different from you and me." In matrimonial cases in general, the rich are different from other litigants in that they generate more motions, demand more trial time and all in all take up a disproportionate share of judicial resources. In a matrimonial case like this one, the rich are different from others in that they have more assets—particularly liquid ones—to offset improper expenditures made with marital funds. Fair or not in terms of society as a whole, the fact remains that it is precisely because of the plaintiff's great wealth that what might be a contempt under other circumstances is not one here. Whereas in a case involving people of more limited means the transfer of $20,000—let alone $4 million—in marital funds would severely prejudice a spouse's rights to equitable distribution, here there is more than enough money on hand to insure that defendant receives her fair share of the marital estate. And absent harm or the lack of a remedy, there is simply no basis in law for punishing a party—rich or poor—for civil contempt. *See Matter of Department of Hous. Preserv. & Dev. of City of NY v. Deka Realty Corp.*, 208 AD2d 37, 43 (2d Dept 1995).

II. Contempt Based on Plaintiff's Alleged Failure to Disclose Expenditures

Defendant argues that plaintiff should also be found in contempt of court because he violated the automatic orders by intentionally failing to disclose the expenditures of marital funds in his Net Worth Statement. As is clearly noted on the face of the statement, the values that are set forth there reflect plaintiff's assets and liabilities as they existed on November 1, 2010, two days prior to the commencement of the case. Plaintiff admits to having transferred assets after that date, but the transfer was never reflected in an updated Net Worth Statement. Defendant, of course, has a remedy available to her short of contempt: she can demand a new Net Worth Statement, something it appears that she has not yet done. In any event, a current statement will be required by the court from both parties prior to the pretrial conference. Once again, the availability of a remedy and the lack of actual harm precludes plaintiff, under the circumstances presented here, from being held in contempt of court.

III. Defendant's Request for Additional Relief

The court has determined that in this instance it cannot find plaintiff in contempt of court as a result of his violating the automatic orders by transferring assets or failing to immediately report those transfers. This determination, however, should not be taken as an indication that plaintiff's conduct is acceptable and can in any way be countenanced. Plain and simple, plaintiff's conduct is unacceptable irrespective of the fact that to this point he has had the resources available to him with which to mitigate the adverse effect of that conduct on defendant's rights under equitable distribution. If plaintiff were permitted to continue converting liquid marital assets into real property, as he has done here, or into other non-liquid assets, this could very likely result in defendant's rights being significantly harmed. This is because of the possibility of there no longer being enough cash on hand in the estate to be awarded to defendant upon the resolution of the case as an offset against the transfers. Instead, the parties would have to engage in the onerous task of having valuations done of the non-liquid assets, followed by the court ordered sale of the property.

The determination that plaintiff has already violated the automatic orders, and by so doing has demonstrated that he has the potential to do so again, requires that defendant be granted the injunctive relief she seeks to prevent further misconduct that would "adversely affect the movant's ultimate rights in equitable distribution." *Guttman v. Guttman*, 129 AD2d 537, 539 (1st Dept 1987) ("the prevailing rule…is to require that *pendente lite* restraints on property transfers be supported by proof that the spouse to be restrained is attempting or threatening to dispose of marital assets so as to adversely affect the movant's ultimate rights in equitable distribution"). Accordingly, plaintiff will be enjoined and restrained from transferring or otherwise converting funds from the parties' accounts or other marital property, except for basic living necessities, attorney's fees, or other court-approved expenditures, until the conclusion of this action.

The court will not address defendant's oral application for an order directing plaintiff to deposit $8 million in escrow during the pendency of the case. This specific form of relief, which was not requested in the moving papers and consequently not addressed by plaintiff's opposition papers, is too dramatically different from the relief that was sought in the moving papers. *See Frankel v. Stavsky*, 40 AD3d 918, 919 (2d Dept 2007). Moreover, the granting of injunctive relief to defendant, along with the admonishment that plaintiff has received in this decision, should prove sufficient to prevent further misconduct without the need for escrow. Suffice it to say that if plaintiff were to engage in the further transfer of assets, the very least of the consequences he would face would be having to deposit money in escrow.

Finally, defendant is entitled to reasonable and necessary attorney's fees as a result of her having to bring this motion in response to plaintiff having failed to obey the requirements of the automatic orders. *See* DRL § 238. Based on the extent of the papers drafted and the number of court appearances required, as well as defendant's attorneys' billing statements included as exhibits to the motion, the court finds that an award of $15,000 is warranted.

Conclusion

In light of the foregoing, it is hereby

ORDERED that defendant's motion is granted to the extent that plaintiff is enjoined and restrained from transferring or otherwise disposing of assets as provided for in the body of this decision; and it is further

ORDERED that plaintiff is directed to pay defendant's counsel the sum of $15,000 as and for reasonable attorney's fees within 10 days of the date of this decision; and it is further

ORDERED that all other relief sought in defendant's motion is denied, without prejudice to defendant seeking such relief in the event plaintiff were to commit further acts in violation of the automatic orders.

This constitutes the decision and order of the court.

Endnote

1. *See* 22 NYCRR 202.16-a(1)(c) ("Neither party shall sell, transfer, encumber, conceal, assign, remove or in any way dispose of, without the consent of the other party in writing, or by order of the court, any property [including, but not limited to, real estate, personal property, cash accounts, stocks, mutual funds, bank accounts, cars and boats] individually or jointly held by the parties, except in the usual course of business, for customary and usual household expenses or for reasonable attorney's fees in connection with the action").

Editor's Note: This is the second reported case to hold that contempt is a proper remedy to enforce an automatic stay provision when an action is filed and served. Although not holding the husband in contempt based on traditional defenses, e.g. lack of prejudice and availability of other remedies, the court indicated that it would do so upon another breach.

Recent Legislation, Decisions and Trends

By Wendy B. Samuelson

Same-Sex Marriage Update

Jurisdictions that permit same-sex marriages

On February, 13, 2012, the state of Washington was the seventh state to pass same-sex marriage legislation, which will take effect on June 7, 2012. Opponents have vowed to seek its repeal at the polls in November. On February 16, 2012, the New Jersey Assembly approved a bill legalizing same-sex marriage, but Governor Chris Christie vetoed it, and defied the Legislature to put the issue before voters instead. The Democrats will have nearly two years to obtain the two-thirds majority needed to override the veto. Public opinion has shifted since two years ago, when the Senate rejected a similar bill.

The other states that permit same-sex marriage include New York (as of July 24, 2011 when it passed the Marriage Equality Act) (new DRL § 210-a, 210-b), Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire, plus the District of Columbia. A similar statute is being considered in Maryland, and a referendum to legalize gay marriage in Maine has qualified for the November ballot.

Two states officially pledge to honor out-of-state same-sex marriages: Maryland and Rhode Island. Ten foreign countries also grant full marriage rights: The Netherlands, Belgium, Canada, Spain, South Africa, Norway, Sweden, Portugal, Iceland, and Argentina, as well as Mexico City, Mexico.

Federal Action on Same-Sex Marriage

Respect for Marriage Act re-introduced

On March 16, 2011 the Respect for Marriage Act (an act to overturn DOMA) was re-introduced in the Senate by Senator Dianne Feinstein and in the House by Representative Jerrold Nadler, after President Obama announced that he would no longer defend DOMA. In November, 2011, the Senate Judiciary Committee debated the bill, and voted 10-8 to advance the vote to the Senate floor where it would require 60 votes to pass. Senator Feinstein noted that DOMA denies same-sex couples more than 1,100 federal rights and benefits that are provided to all other legally married couples, including rights to Social Security spousal benefits, protection from estate taxes when a spouse dies, and the ability to file taxes jointly and claim certain deductions.

Windsor v. United States, No. 10 Civ. 8435, 2011 WL 3422841 (S.D.N.Y. July 28, 2011) was filed by the law firm of Paul Weiss Rifkind in conjunction with the ACLU on behalf of a surviving same-sex spouse whose inheritance from her deceased spouse had been subject to more than $360,000 of federal tax as if they were unmarried, whereas a heterosexual married couple would pay no taxes. (Since New York recognized their marriage, there was no New York estate tax.) The lawsuit challenges section 3 of DOMA which defines "marriage" as a legal union between a man and a woman. The plaintiff brought a motion for summary judgment, claiming that DOMA is unconstitutional and the defendant brought a cross-motion to dismiss the case. No decision has been reached as of this writing. If successful, the holding will be limited in scope to the federal recognition of valid same-sex marriages in states that allow same-sex marriage and/or recognize valid out-of-state same-sex marriages.

Update on *Commonwealth of Massachusetts v. Health* and *Human Services* and *Gill v. Office of Personnel Management*

On July 8, 2010, Judge Joseph Tauro of the U.S. District Court in Boston ruled in two separate lawsuits that a critical part of the federal Defense of Marriage Act (DOMA), a law barring the federal government from recognizing same-sex marriage, is unconstitutional. In one lawsuit, *Commonwealth of Massachusetts v. Health and Human Services*, the court ruled that DOMA violated the Tenth Amendment to the U.S. Constitution by taking from the states powers that the Constitution gave to them, including the power to regulate marriage. In the other lawsuit, *Gill v. Office of Personnel Management*, he ruled that DOMA violates the equal protection clause of the Fifth Amendment. Both of the lawsuits targeted Section 3 of DOMA which states that, for federal government purposes, the word "marriage" means only a legal union between one man and one woman as husband and wife, and the word "spouse" refers only to a person of the opposite sex who is a husband or a wife. Neither lawsuit challenged the section of DOMA that enables any state to ignore valid marriage licenses issued to a same-sex couple in other states.

On October 11, 2010, the U.S. Department of Justice filed notices of appeal to the U.S. Court of Appeals in these two cases. On January 14, 2011, the Department of Justice filed a single brief in the First Circuit Court of Appeals that defended DOMA in both these cases, but later the Department of Justice notified the Court that it will cease to defend both cases. On May 20, 2011, the Bipartisan Legal Advisory Group (BLAG), an arm of the U.S. House of Representatives, filed a motion asking to be allowed to intervene to defend DOMA Section 3. The Department of Justice did not oppose the request, but Massachusetts did and plans to file a response. The appellate briefs have been submitted as of December 2011, and no decision has been rendered yet.

Update on California's Proposition 8: Court of Appeals, 9th Circuit overturns Proposition 8 in California as unconstitutional

In May 2008, the California Supreme Court in its decision *In Re Marriage Cases* granted same-sex couples the right to marry. However, in November 2008, Proposition 8, a constitutional amendment designed to supersede the court's decision, narrowly passed, and gay couples could no longer marry in California. The two powerhouse attorneys who were opposite each other in *Bush v. Gore*, Ted Olson and David Boies, joined forces to overturn Proposition 8 in *Perry v. Schwarzenegger*. On August 4, 2010, District Court Chief Judge Vaughn Walker, in a landmark decision, ruled that the amendment to the California Constitution barring marriage for same-sex couples violates the U.S. Constitution's guarantees of equal protection and due process.

The merits were heard by a different 3-judge panel from the Ninth Circuit on December 6, 2010. The high court upheld Judge Walker's decision by 2-1, and determined that Proposition 8 is unconstitutional. Judge Reinhardt wrote, "Proposition 8 serves no purpose, and has no effect, other than to lessen the status and human dignity of gays and lesbians in California, and to officially reclassify their relationships and families as inferior to those of opposite-sex couples." The decision was limited in scope in that it only determined that California residents had the right to same-sex marriage, and did not determine the constitutionality of same-sex marriage on a national level. The defendants are appealing to the larger panel of the Ninth Circuit, rather than going straight to the U.S. Supreme Court.

Recent Legislation

New child support and maintenance thresholds

As of January 31, 2012, the combined parental income to be used for purposes of the CSSA changed from $130,000 to $136,000 in accordance with Social Services Law 111-i(2)(b) in consideration of the Consumer Price Index. Agreements should reflect the new amounts. The CSSA chart for unrepresented parties will change to reflect that amount as well. In addition, the threshold amount for temporary maintenance is now $524,000 rather than $500,000.

Family Court Act 437-a and 454, Social Services Law 111-h, amended, effective January 12, 2012

A child support obligor who fails to pay support may be ordered to participate in work activities or participate in job training, employment counseling or other available programs designed to lead to employment, in addition to the other remedies available for support enforcement.

New Executive Law 108, effective June 23, 2012

This law establishes an address confidentiality program in the office of the Secretary of State for domestic violence victims who need to maintain confidentiality of their location and authorizes the Secretary of State to accept service of process and receipt of mail on behalf of a program participant.

Family Court Act 821 amended, effective August 31, 2011

Criminal obstruction of breathing or blood circulation and strangulation is added to the list of actionable allegations in family offense petitions.

Domestic Relations Law 240, Family Court Act 411, amended, effective November 15, 2011

This amendment makes the presumption in favor of a minimum order of $25 per month for indigent child support obligors rebuttable by a showing that such an order would be unjust or inappropriate, based upon the ten factors applicable to departures from the child support standards. It eliminates the provision that "in no instance shall the court order child support below $25 per month." Also, the measure clarifies that, in cases where the imposition of the basic child support obligation would reduce the non-custodial parent's income to an amount below the self-support reserve, but not the poverty level, the court would be authorized, although not required, to direct payments for child care, educational and health care expenses, as part of its child support order.

CPLR 3122, amended, effective August 3, 2011

This amendment clarifies that in the absence of a patient's authorization, a trial subpoena duces tecum seeking the production of medical records may be issued by the court.

CPLR 306-b, 2101, 3025 and 3217, amended, effective January 1, 2012

CPLR 306-b was amended to correct a time of service problem that can occur when a court order extending time for filing is granted pursuant to CPLR 304. The amendment provides that service be made within 120 days "after commencement of the action or proceeding," rather than the filing of the summons and complaint, summons with notice or petition.

CPLR 2101(f) was amended to increase the time to object to defects in form from 2 to 15 days.

CPLR 3025(b) was amended to require a party moving to amend its pleadings to attach a copy of the proposed amended pleading to its motion to amend that pleading, clearly showing the proposed changes to the pleading (i.e., by redline).

CPLR 3217(a)(1) was amended to extend the time period in which a voluntary discontinuance may be obtained without need for a court order or a stipulation of discontinuance before the responsive pleading is served or within 20 days after service of the pleading of

the claim, whichever is later (rather than whichever is earlier).

22 NYCRR 202.6[b] amended, effective January 10, 2012

This amendment to the NYCRR permits a request for judicial intervention without fee for several types of proceedings, *inter alia*, an application for change of name, an application for default judgment to the clerk pursuant to CPLR 3215(a), an application under CPLR 3102(e) for court assistance in obtaining disclosure in an action pending in another state, and within the City of New York, an uncontested action for a judgment for annulment, divorce or separation commenced pursuant to article 9, 10 or 11 of the Domestic Relations Law.

Cases of Interest

Court of Appeals Round-up

Exchange of expert reports

Imperato v. Mount Sinai Med. Ctr., __NE2d__, 2012 WL 85193, Slip op. 00107 (2012)

Counsel's illness and law office failure justified vacating the preclusion order and the late service of plaintiffs' expert exchange pursuant to CPLR 3101 (d) (1) (i). The plaintiffs demonstrated the existence of a meritorious claim for purposes of avoiding preclusion, and the expert witness disclosure submitted by plaintiffs detailed the expert medical opinion evidence supporting the medical malpractice claim.

Electronic discovery

Facebook

Patterson v. Turner Constr. Co., 88 AD3d 617, 931 NYS2d 311 (1st Dept 2011)

Postings on a Facebook account, if relevant, are discoverable regardless of any privacy settings, just as relevant entries in a person's diary are discoverable. The matter was remanded to determine which pages were material and relevant.

Website usage

Tener v. Cremer, 89 AD3d 75, 931 NYS2d 552 (1st Dept 2011)

Plaintiff-physician brought a defamation lawsuit stemming from statements posted on a website which originated from a computer registered to the NYU Langone Medical Center. Plaintiff served a subpoena duces tecum on NYU, as a nonparty, seeking the identity of everyone who accessed the Internet using that address on a designated date in order to determine the identity of the defendant. NYU refused to provide the information, and plaintiff commenced the contempt action.

In opposition, NYU submitted the affidavit of its Chief Information Officer who stated that the text files on the computer in question were not retrievable because they were automatically written over every 30 days. In reply, the plaintiff submitted the affidavit of a forensic computer expert who explained that the term "written over" is deceptive because "old" information is simply allocated to free space within the computer system and can be retrieved using special forensic programs.

The trial court denied the plaintiff's motion for contempt, and the appellate division reversed, with the matter remanded to the trial court for a hearing as to whether the subpoenaed information is "inaccessible." A party moving for civil contempt arising out of noncompliance with a subpoena duces tecum bears the burden of establishing, by clear and convincing evidence, that the subpoena has been violated and that "the party from whom the documents were sought had the ability to produce them."

Here, an issue of fact was raised as to whether the identity of the party who allegedly defamed the plaintiff is discoverable. In deciding how to go about determining the issue, the First Department, in this case of first impression for the Appellate Division, held that a cost/benefit analysis should be used to determine whether the needs of the case justify retrieval of the data, as performed under the local rules of the Nassau County Supreme Court. Therefore, upon remand, the trial court should determine at least the following:

> (1) whether the identifying information was written over, as NYU maintains, or whether it is somewhere else, such as in unallocated space as a text file; (2) whether the retrieval software plaintiff suggested can actually obtain the data; (3) whether the data will identify actual persons who used the internet on April 12, 2009 [the date in question] via the IP address plaintiff identified; (4) which of those persons accessed Vitals.com; and (5) a budget for the cost of the data retrieval, including line item(s) correlating the cost to NYU for the disruption...If the [Supreme Court] finds after the hearing that NYU has the ability to produce the data, the court should allocate the costs of this production to plaintiff and should consider whether to include in that allocation the cost of disruption to NYU's normal business operations.

Escrow funds in pending divorce subject to attachment

Hallsville Capital SA v. Dobrish, 87 AD3d 933, 930 NYS2d 1 (1st Dept 2011)

In this matter related to a divorce action, a judgment creditor of the husband sought to obtain partial satisfac-

tion of its $11 million judgment by moving to compel a bank to turn over funds that it was holding in escrow on behalf of the couple pending the outcome of their divorce action. The funds were generated from the sale of the couple's yacht. In opposition, the wife claimed that the judgment creditor was not entitled to the entire escrow because she had a vested right to one-half of the funds pursuant to a post-nuptial agreement. The trial court entered judgment directing the bank to turn over all of the funds in escrow to the judgment creditor, which was affirmed by the appellate court. The escrow funds were attachable marital property because a judgment of divorce and equitable distribution had not yet been entered. The statute does not "create any contingent or present vested interests, legal or equitable" at any point before judgment nor does a post-nuptial agreement convert the proceeds of a sale of marital property into separate property.

Equitable distribution

Marshall v. Marshall, 91 AD3d 609, 935 NYS2d 900 (2d Dept 2012)

The order declaring that the two Chase accounts held by the husband in trust for his mother were not marital property was reversed, with the accounts declared subject to 50/50 equitable distribution, where the wife proved that the accounts were opened during the marriage, and originally in trust for her until the husband changed the beneficiary to his mother. The husband failed to overcome the presumption that the funds were marital property because he did not prove that his mother was the source of the funds.

On the other hand, the JHO properly determined that the HSBC Bank account which the husband held in trust for his mother was not marital property, since it was an account funded solely by the husband's mother, and held by him for his mother's benefit. The husband sustained his burden of proof by submitting the testimony of his 92-year old mother that she earned the money, which was her life savings, and asked her son to deposit it into an account for her benefit.

Shapiro v. Shapiro, 91 AD3d 1094, 937 NYS2d 368 (3d Dept 2012)

The parties were married 26 years, but were separated for the past 10 years after an initial action for divorce was dismissed. Although the parties had a long separation, the trial court did not abuse its discretion in awarding the wife a 50% share of the husband's pension because she left the workforce to care for their children; she made substantial non-economic contributions to the parties' assets during the early years of the marriage; she continued as the children's primary caretaker during the separation; and she sacrificed her career development and earning capacity in doing so, and earns "substantially less" than the husband does (although the court failed to provide their respective income information).

In addition, the court did not abuse its discretion in awarding college expenses for the parties' 2 children until age 22, where the husband acknowledged during his testimony that he had agreed to pay part of the expenses and that the funds had been set aside for that purpose. Further, he did not testify that he intended to limit his payments until each child reached 21 years of age.

Grounds

The new no fault statute, DRL 270(7), has created divergent opinions on whether and to what extent "no fault" requires factual allegations and a trial.

Schiffer v. Schiffer, 33 Misc3d 795, 930 NYS2d 827 (Dutchess County Sup Ct 2011) (Wood, J.)

In an action for divorce, the husband moved for summary judgment pursuant to the recently enacted no-fault provision of DRL 170(7). The husband claimed that the statute requires one party to subjectively decide whether the marriage is over, and that it does not provide for any defenses. The court denied the motion, on due process grounds, to allow the wife to contest the required time element and whether the relationship has in fact been broken irretrievably. In addition, the statute specifically requires that no judgment shall be granted until there is a determination of the economic and custodial issues.

But see Justice Palmieri's decision in *Vahey v. Vahey*, 247(27) NYLLJ 1, b (Nassau County Sup Ct February 9, 2012), joining Justice Falanga's decision in *D.R.C v. A.C.*, 32 Misc 293 (Nassau Co. Sup Ct 2011), a case previously reported in my column, finding that "no-fault" means "no trial" because all that is needed is the plaintiff's subjective self-serving sworn statement.

Temporary maintenance

Truglia v. Truglia, 91 AD3d 852, 936 NYS2d 912 (2d Dept 2012)

In this action for divorce and ancillary relief, the husband moved for an award of *pendent lite* maintenance, which the trial court granted in the amount of $2,628.47 per week. On appeal, the wife argued that, as an old law case, the trial court improperly applied the new maintenance formula as provided in DRL 236(B)(6)(a). The order was affirmed. Although the court improperly applied the new standard, its determination was nevertheless proper under the former standard because it reflected "an accommodation between the reasonable needs of the moving spouse and the financial ability of the other spouse Y with due regard for the pre-separation standard of living."

Khaira v. Khaira, __ NYS2d __, 2012 WL 371997 Slip op. 00850 (1st Dept 2012)

This is the first appellate decision to address the new temporary maintenance formula and the issue of duplication of awards by using the formula and then add-

ing an obligation for shelter or carrying charges on the marital residence.

The plaintiff wife moved for *pendente lite* support and legal fees. The court awarded the wife $13,870 per month in unallocated spousal and child support and $42,000 in legal fees, and directed the husband to pay, in addition to these amounts, the mortgage on the marital residence, the family's health insurance premiums, and the family's unreimbursed medical expenses, including those of his stepson.

On appeal, the order was modified by vacating the temporary maintenance award, remitting the matter to the Supreme Court for specific findings as to why it deviated from the statutory guidelines, and deleting the directive ordering the defendant to pay the stepson's health care insurance and medical expenses. The First Department held that "the new approach of calculating spousal support payments to the non-monied spouse by means of a formula is intended to arrive at the amount that will cover all the payee's presumptive reasonable expenses…[including] all the spouse's basic living expenses [housing costs, food, clothing and other usual expenses]." Here, the Supreme Court calculated the presumptive amount under the new guidelines, but then, without explanation as required by the new law DRL 236(B)(5-a)(c)(2)(b), ordered the husband to pay the mortgage, medical premiums and unreimbursed medical expenses, apparently on the ground that an additional amount of maintenance was warranted from that portion of the defendant's income that exceeded the guideline cap of $500,000.

Pensions

Russo v. Willoughby, 33 Misc3d 1236(A), 2011 WL 6379965, No. 19140/2000, Slip op. 52258 (Kings County Sup Ct Dec 19, 2011) (Sunshine, J.)

The parties entered into a stipulation of settlement, which provided for the husband to receive a distribution of the wife's NYPD pension, but the stipulation was silent as to the wife's Police Officer's Variable Supplement Fund (VSF). The husband filed an order to show cause for the court to grant a QDRO which awarded him a portion of the wife's VSF. Five months after the parties entered into their stipulation, the Court of Appeals reversed the Second Department's decision in ***DeLuca***, and held that VSF benefits were marital assets subject to equitable distribution if earned during the marriage. ***DeLuca v. DeLuca***, 97 NY2d 139, 736 NYS2d 651 (2001). The court held that this reversal five months after their stipulation does not provide a legal basis to grant the husband's relief since the VSF was specifically excluded from NYDP pension under the controlling appellate case law at the time of the stipulation. If the parties had intended to distribute the wife's VSF, the parties would have had to specifically reference it in the stipulation.

Smulevitz v. Smulevitz, 91 AD3d 752, 936 NYS2d 573 (2d Dept 2011)

The plaintiff-wife brought an action to reform the parties' stipulation of settlement, which was incorporated but not merged into the judgment of divorce, which failed to direct a division of the husband's pension plan. The wife sought an order naming her as the beneficiary of any pre-retirement death benefits in his pension plan and to restrain him from taking any action affecting those rights. The order granting the defendant's motion for summary judgment was affirmed. The wife failed to raise an issue of fact as to whether there was a mutual mistake relating to the decision not to include the pension as part of their equitable distribution settlement.

Paternity

Felix O. v. Janette M., 89 AD3d 1089, 934 NYS2d 424 (2d Dept 2011)

Petitioner, putative father, brought a paternity proceeding regarding a then four-year-old child who was being raised by the respondent's mother and her husband. After a hearing, the Family Court granted the petitioner's cross-motion to direct genetic marker testing after determining that the respondent had not offered sufficient evidence to rebut the presumption of legitimacy. On appeal, the order was reversed and the petition was dismissed, reasoning that "The issue of equitable estoppel does not involve the equities between or among the Y adults; the case turns exclusively on the best interests of the child." Here, it was in the child's best interests to equitably estop the petitioner from asserting paternity where the child was the third child born during the parties' marriage, the respondent husband was present at the hospital when the child was born, has lived with her since her birth, has been actively involved in her care and schooling, and has developed a loving father-daughter relationship, and the child referred to the respondent husband as her father during the trial. The petitioner did not offer evidence that he assumed the role of the child's father, or that the child ever recognized him as her father. The court determined that psychological evidence is not necessary to determine that the child would be traumatized by dissolving the close father-daughter bond.

Child support stipulations

McKenna v. McKenna, 90 AD3d 1110, 933 NYS2d 453 (3d Dept 2011)

The parties placed a child support stipulation on the record in a Family Court hearing, but failed to include a provision stating that the parties were informed of the CSSA standards, that the basic child support as calculated in accordance with the CSSA is presumptively correct, and whether or not the support agreed to deviates from the CSSA. The father moved to vacate the order, which was denied. The decision was reversed on appeal,

since the stipulation was invalid as it failed to comply with the CSSA, and the matter was remitted for further proceedings.

Author's note: Always bring the CSSA language with you to court in case you settle child support and place this stipulation on the record.

Child support modification

Berrada v. Berrada, 90 AD3d 1192, 934 NYS2d 57 (3d Dept 2011)

In a child support proceeding, the father alleged that he could not find employment. The court found that he failed to conduct a thorough job search and imputed $125,000 of annual earning capacity, and directed the father to pay $2,834 / month in child support. Three years later, the father brought a modification petition, which was dismissed. A parent's child support obligation is determined by the parent's ability to provide support, not his current financial situation. The father failed to demonstrate a substantial change in circumstances since the entry of the child support order. Here, the father remained unemployed, devoting attention to sales enterprises paying commission without producing consistent income. While the father made efforts to find full-time employment within his narrow area of expertise (the decision does not sate what that is), he did not extend his search elsewhere and testified he would only take a full-time job offer if it paid a substantial salary. "Notwithstanding the father's argument that his new business venture constitutes a substantial change of circumstances in that it may produce income in the future, "the courts will not require the children to subsidize a parent's financial decision" to forgo present employment for potential future income (citations omitted)."

UCCJEA

Malek v. Kwiatkowski, 90 AD3d 1109, 933 NYS2d 451 (3d Dept 2011)

The petitioner (father) brought a proceeding for joint custody and visitation after the respondent (mother) relocated with the parties' two children to an undisclosed location in another state. The mother appeared *pro se* by telephone at two court conferences, and refused to disclose her location because she claimed she and the children were fearful of the father. At the third conference, her attorney claimed that the matter should be dismissed for failure to effectuate personal service. Although the Family Court first denied respondent counsel's motion to dismiss for lack of personal jurisdiction because the mother was never served with process, it later dismissed the petition at trial on that ground. The order was reversed by the appellate court, with the matter remitted for an order directing substituted service. Pursuant to DRL 76(3), UCCJEA, "Physical presence of, or personal jurisdiction over, a party or a child is not necessary or sufficient to make a child custody determination."

Relocation

Shaw v. Miller, 91 AD3d 879, __ NYS2d __, 2012 WL 234036 (2d Dept 2012)

The court below did not err in granting the father's petition for relocation to Virginia where he established that the relocation to Virginia was economically necessary, that the child's life will be enhanced emotionally and educationally by the move, that it was the child's preference, that the move will not have a negative impact on the quality of the child's future contact with the mother, and that it was feasible to preserve the relationship between the mother and child through extended school vacation and summer visitation.

Counsel fees

In the wake of *Prichep v. Prichep*, 52 AD3d 61 (2d Dept 2008) and the amended DRL §§ 237(a) and (b) and § 238 effective October 12, 2010, another recent case provided a large noteworthy counsel fees award: *Palmeri v. Palmeri*, 87 AD3d 572, 929 NYS2d 153 (2d 2011). The wife's award of $140,000 in interim counsel fees and $7,500 / month in interim support was upheld on appeal, where the husband's medical practice earned more than $3 million / year and the wife was unemployed.

Siskind v. Siskind, 89 AD3d 832, 933 NYS2d 60 (2d Dept 2011)

The wife was awarded $340,000 in counsel fees after trial. In this 30-year marriage, where the wife, age 52, was a housewife and stay-at-home mother of three children, and the husband, age 51, earned $274,000 / year, the wife was awarded $65,000 / year maintenance until her 65th birthday. The appellate division did not supply any facts regarding the length of the marriage, parties' respective ages, nor respective incomes. I obtained this information by reading the underlying trial decision.

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Authors interested in submitting an article should send it in electronic document format, preferably WordPerfect or Microsoft Word (pdfs are NOT acceptable), along with a hard copy, to Elliot D. Samuelson, Editor, at the address indicated. Copy should be double-spaced with 1½" margins on each side of the page.

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