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Reduce Liability. Secure Benefits.

The QDRO Advisory Report™ is a BLOG and quarterly newsletter published for the benefit of the family law attorney.

Our goal is to keep you informed of case law trends and legislative developments that may affect your divorce case. Each edition will also feature a practice pointer.

Please let me know if I can be of any further assistance.

Sincerely,

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FOUNDATIONAL CASES & LEGISLATIVE UPDATE

ARIZONA

Van Loan v. Van Loan, 116 Ariz. 272 (Ariz.App.Ct. 1977)

Comment: Trial court adopted the use of the time-rule to determine the amount of an alternate payee's award. Time-rule is a formula expressed as a fraction where the numerator is the years in the marriage and plan divided by the total number of years in the plan. Coverture *maximizes* an alternate payee's award. The Arizona Supreme Court has yet to accept or reject the use of the time-rule. *See Koelsch, infra.*

Johnson v. Johnson, 131 Ariz. 38 (Ariz.S.Ct. 1981)

Comment: The Arizona Supreme Court expressed a preference for a present value analysis when dividing a defined benefit plan. The Court also held that tax consequences and inflationary issues should not be considered when valuing a pension plan since those considerations are speculative. The court pointed out that tax rates change and that the husband's tax bracket would probably change after his retirement. Likewise, the effects of future inflation were currently unknown (*citing In re Marriage of Fonstein*, 17 Cal.3d 738, (1976)).

Koelsch v. Koelsch, 148 Ariz. 176 (Ariz.S.Ct. 1986)

Comment: Supreme Court stated a preference for a lump-sum distribution method (present value analysis) when dividing a defined benefit plan. The court neither condoned nor rejected the use of the time-rule as utilized in *Van Loan*. Plan at issue was the Arizona Public Safety Personnel Retirement System, which is a contributory defined benefit plan.

Parada v. Parada, 196 Ariz. 428 (Ariz.S.Ct. 2000)

Comment: Arizona Revised Statute 38-846 prohibited a former spouse from receiving a survivor benefit under the Arizona Public Safety Personnel Retirement System. Decision affirmed *Koelsch*.

Cooper v. Cooper, 167 Ariz. 482 (Ariz.App.Ct. 1990)

Comment: The Arizona appellate court expressly accepted the use of the time rule as used in *Van Loan*. The Court also pointed to differences in defined contribution and defined benefit plans that may have affected the reasoning used by the Arizona Supreme Court in *Koelsch*. The Court implied that a mandatory contributory plan would strengthen a separate property argument, as was the case in *Koelsch*.

***Kelly v. Kelly*, 198 Ariz. 307 (Ariz.S.Ct. 2000)**

Comment: Present value should be placed on social security benefits a party could have received had that party participated in the system during the marriage. The present value of the social security benefit is then offset against the present value of the party's pension plan. The pension plan at issue was the Civil Service Retirement System ("CSRS"). CSRS at the time did not pay into social security.

NEVADA

***Gemma v. Gemma*, 105 Nev. 458 (1989)**

Comment: The Nevada Supreme Court created a presumption of "time-rule" when calculating the amount of an alternate payee's award. The participant may rebut the presumption by showing that his or her post-marital *labor* contributed to the increase of the accrued benefit.

***Sertic v. Sertic*, 111 Nev. 1192 (1995)**

Comment: The Nevada Supreme Court held that the "salary base" of a present value analysis should be based on the participant's *career* and not the time accrued under the plan during the marriage (*citing Gemma*, 105 Nev. at 461-63).

***Wolff v. Wolff*, 112 Nev 1355 (Nev. 1996)**

Comment: The Social security benefits should not be considered when valuing a defined benefit plan. Decision is contrary to the holding in *Kelly* (Arizona).

FLORIDA

Caution: Florida courts have recently created some harsh QDRO case law. Therefore, it is imperative for the alternate payee's counsel to address all applicable benefits *prior* to resolution of the divorce action. Failure to do so may result in the prohibition of benefits in a *post-decree* QDRO.

***Blaine v. Blaine*, 2004 Fla App. Lexis 5839 (4th DCA 2004)**

Comment: Appellate court quashed a post-decree QDRO containing COLAs and early retirement subsidies since the benefits were not assigned in the divorce decree.

***Padot v. Padot*, 2004 Fla App. Lexis 19101 (2nd DCA 2004)**

Comment: Appellate court denied a former spouse survivor benefits (Military SBP) in a post-decree order since the benefits were not assigned in the divorce decree.

***Boyett v. Boyett*, 703 So. 2nd 451 (Fla. 1997)**

Comment: Supreme Court prohibited the use of a “coverture” fraction when calculating a former spouse’s award. The court reasoned that “coverture” improperly assigns benefits that accrue *after* a divorce. Florida is among a minority of states that decline to recognize “coverture.”

VIRGINIA

***Primm v. Primm*, 407 S.E. 2d 45 (App.Ct. 1991)**

Comment: Appellate Court authorized the use of “coverture” when calculating the amount of an alternate payee’s award. The Court reasoned that the former spouse should be able to share in the increased value of the pension over time.

***Hastie v. Hastie*, 514 S.E.2d 800 (App. Ct. 1999)**

Comment: Appellate Court held that a QDRO may not modify a final divorce decree simply to adjust its terms in light of the parties’ changed circumstances but must be consistent with the substantive provisions of the decree.

***Bradley v. Bradley*, 570 S.E.2d 881 (App.Ct. 2002)**

Comment: Appellate Court declined to award a former spouse pre-retirement survivor benefits since the benefit was not assigned in the divorce decree. The Court also noted that Code § 20-107.3(G)(1) allows for payment to an alternate payee only as such benefit become payable to the participant.

OHIO

New Legislation:

House Bill 98 impacts all five (5) of Ohio’s public retirement systems and is effective **October 27, 2006**. The bill provides additional protection for an alternate payee pursuant to a Division of Property Order (“DOPO”). The legislation permits an alternate payee to receive a joint and survivor annuity and COLAs.

No changes are being made to the state prescribed DOPO format pursuant to R.C 3105.90. Therefore, the joint and survivor annuity and COLAs should be *assigned* in the divorce decree and not the DOPO.

***Hoyt v. Hoyt*, 559 N.E.2d 1292 (1990)**

Comment: The Ohio Supreme Court expressed a preference for using “coverture” when calculating the amount of a former spouse’s award via QDRO. The Court reasoned that the former spouse is entitled to a proportional share in the growth of the pension.

CALIFORNIA

***In re Marriage of Lehman*, 18 Cal.4th 169 (Cal.S.Ct. 1998)**

Comment: The California Supreme Court affirmed the use of the time-rule and reasoned that various events and conditions after dissolution may affect the amount of retirement benefits that an employee spouse receives, but not their character. According to the Court, once a participant begins to accrue retirement benefits during the marriage, the benefits themselves become a community asset from then on.

***Gillmore v. Gillmore*, 629 P.2d 1 (Cal.S.Ct. 1981)**

Comment: The California Supreme Court held that a nonemployee spouse can *immediately* receive her community interest in a community pension plan.

***Oddino v. Oddino*, 939 P.2d 1266 (Cal.S.Ct. 1997)**

Comment: The California Supreme Court interpreted ERISA from excluding *early retirement subsidies* from a QDRO, assuming the participant is still employed.

NEW MEXICO

***Ruggles v. Ruggles*, 860 P.2d 182 (1993)**

Comment: The New Mexico Supreme Court issued a scholarly opinion addressing numerous issues arising from the assignment of benefits in a divorce. The Court expressed a preference for the lump-sum distribution method but gave the trial court discretion to apply alternate methods based on the equities of the case.

PRACTICE POINTER ¹

Chapter 2 Trend in QDRO Case Law

§ 2.01 Overview

Family law attorneys now have an additional incentive to enter the QDRO concurrently with the divorce decree. Some jurisdictions have enacted harsh QDRO case law that *prohibit* the assignment of benefits, post-decree, that were not assigned in the final judgment. The impact of this trend on family law attorneys is increased malpractice liability. Therefore, it is prudent to recognize the trend and adjust your case management accordingly. That means, for the most part, filing the QDRO *concurrently* with the divorce decree.

§ 2.02 Identifying the Trend

Family law attorneys can no longer rely on a third party to secure a client's retirement benefits following a divorce. Until recently, it has been common practice to secure benefits via QDRO, post-decree. Some jurisdictions even refer the parties to a third-party "pension counsel," post-decree, without addressing any of the retirement issues during the divorce case. That is a dangerous practice.

In far too many third-party referral cases, the litigants are often learning of the "retirement issues" for the very first time. Thus, resolution of their case is delayed.

Unfortunately for the client, many divorce attorneys rather "dump" the litigants on a third party rather than protecting their client's interest. It is bad public policy to allow this practice to continue since it discourages a timely resolution of the divorce case.

Referring the litigants to a third-party, post-decree, also ignores the impact divorce has on retirement benefits. *See* Chapter 1, *Operation of Law*. Remember, at divorce a former spouse *loses* her retirement benefits, in connection with the marriage, by operation of law. It is a QDRO that re-secures a former spouse's benefits.

Two recent Florida appellate cases, however, have signaled an end to such practice, to wit: *Padot* and *Blaine*. Under *Blaine* and *Padot*, benefits assigned pursuant to a QDRO, post-decree, may be prohibited if not assigned by the divorce decree. Thus, Florida courts now place the onus on divorce counsel to secure their client's benefits at the time of final judgment, not months or years later. Virginia has created similar case law. I anticipate for the trend to continue.

¹ Excerpt from *Qualified Domestic Relations Orders: Strategy and Liability for the Family Law Attorney*, by Raymond S. Dietrich, Esquire © Matthew Bender LexisNexis 2008

Strategic Point: Trend in QDRO Case Law—A QDRO must be consistent with the benefits assigned by the divorce decree. *Padot v. Padot*, 2004 Fla. App. LEXIS 19101 (2nd Dist. Ct. App. 2004); *see also* *Blaine v. Blaine*, 2004 Fla. App. LEXIS 5839 (4th Dist. Ct. App. 2004). A QDRO must be consistent with the “substantive provisions” of the divorce decree. *See* *Bradley v. Bradley*, 570 S.E.2d 881 (Va.App. 2002). A QDRO may not modify a divorce decree simply to adjust its terms in light of the parties’ changed circumstances. *See* *Nava v. Nava*, 599 S.E.2d 479 (Va.App. 2004)(*citing* *Hastie v. Hastie*, 514 S.E. 2d 800, 803 (Va.App.1999); *see also* *Gemma v. Gemma*, 778 P.2d 429, 432 (Nev.1989) (holding that use of the “time rule” should be stated in the divorce decree); *see also* *Baker v. Baker*, 564 S.E.2d 164,166 (Va.App. 2002) (excluding gains and losses from a post-decree QDRO since it conflicted with the divorce decree).

In *Padot*, the Former Spouse sought to have survivor benefits assigned to her, post-decree, from a military pension. The divorce decree, however, failed to assign her survivor benefits. In fact, there was no mention of survivor benefits during the entire divorce proceeding. Accordingly, the Court declined to award survivor benefits to the former spouse since it **conflicted** with the benefits assigned by the divorce decree.

In *Blaine* the former husband challenged the entry of a QDRO, post-decree, that conflicted with the parties’ divorce decree. Specifically, the decree awarded the former spouse thirty-five percent of the participant’s pension plan. The QDRO, however, assigned the former spouse *additional* benefits including future plan improvements, cost-of-living adjustments (“COLAs”), and early retirement subsidies.

The *Blaine* Court held for the former husband and quashed the proposed QDRO. The Court based its holding on two grounds. First, the Court noted that the QDRO conflicted with the Final Judgment. Like *Padot*, the former spouse failed to address the *additional* benefits in her divorce case. Second, and far more reaching, the Court concluded that future enhancements such as COLAs and early retirement subsidies are *non-marital* assets. Florida is among a minority of states that decline to recognize *coverture* when formulating the amount of the award. *See* *Boyett vs. Boyett*, 703 So. 2d 451 (Fla. 1997). In other words, under *Boyett*, the marital portion should be frozen as of the date of dissolution, without any consideration of future growth. *See* Chapter 8, *Time-Rule/Coverture Strategy* for further discussion.

In *Bradley*, the Court denied the former spouse the protection of a Qualified Preretirement Survivor Annuity (“QPSA”) contained in a post-decree QDRO. The Court noted that the divorce decree made no mention of any preretirement survivor annuity. Therefore, allowing the QDRO to assign the benefit would conflict with the divorce decree.

The trend in QDRO case law illustrates the increasing malpractice liability of failing to file a QDRO concurrently with the divorce decree. Following the Court’s decisions in *Blaine*, *Padot*, and *Bradley* one thing should be clear: counsel for a former spouse should address *all* retirement benefits before resolution of the divorce case.

§ 2.03 Legislative Counterpart

Similar to the trend in QDRO case law, state and federal legislatures have enacted law that prohibit the assignment of benefits, post-decree, that were not assigned by the divorce decree. Specifically, we will examine Ohio's new public retirement law legislation and the United States Code governing the federal retirement system.

§ 2.03[1] State Law. Ohio House Bill 98 is a good example of a state law counterpart to the trend in QDRO case law. House Bill 98 became effective October 27, 2006. The new Ohio law now permits a former spouse to receive survivor benefits and COLAs as part of a property division in divorce. The catch, however, is that survivor benefits and COLAs must be assigned in the *divorce decree*. Failure to do so, will preclude the assignment of those benefits via post-decree assignment order, referred to in Ohio as a Division of Property Order ("DOPO").

The new Ohio law does not amend the division of property order statutes R.C. 3105.80 to 3105.90. Instead, the legislation requires the assignment of the survivor benefits and COLAs to be included in the divorce decree.

Like the trend in QDRO case law, the new Ohio law encourages the timely resolution of divorce. Therefore, Ohio's new law is sound *public policy*, as is the trend in QDRO case law.

Practice Tip: Use LexisNexis Bill Tracker to receive notification of proposed changes to your state's public retirement law. You can then track the changes through the legislature and adjust your case management accordingly.

§ 2.03[2] Federal Law. The federal retirement system is a good example of a federal law counterpart to the trend in QDRO case law. Specifically, federal regulations prohibit the assignment of a former spouse survivor benefit if the assignment is made *after* the employee's retirement or death. *See* 5 U.S.C. § 8341(h)(4). Importantly, the federal regulations will *preempt* state law. *See* Chapter 19, *Federal Retirement Plan Strategy* for further discussion.

In cases where the assignment of benefits is vague, the Office of Personnel Management ("OPM") will review the divorce decree to determine if survivor benefits were awarded to the former spouse. If survivor benefits were not awarded in the decree, a subsequent assignment will be denied if made *after* the employee's retirement or death.

You can cite to federal administrative decisions, *infra* below, to argue for or against the assignment of survivor benefits in state court, assuming the facts of your case fall within the confines of 5 U.S.C. § 8341(h)(4).

Federal Administrative Law Decisions: Survivor Benefits: Below are four key federal administrative law cases that construe the assignment of survivor benefits by divorce decree:

- *Dodd v. Office of Personnel Management*, 2007 MSPB LEXIS 1417 (2007) (holding that the assignment of survivor benefits must be clear and explicit);
- *Jackson v. Office of Personnel Management*, 2007 MSPB LEXIS 2397 (2007) (holding that survivor benefits must be “expressly provided for” in the decree or court order);
- *Rafidi v. Office of Personnel Management*, 60 M.S.P.R. 337; 1994 MSPB LEXIS 42 (1994) (holding that “retirement benefits” can *not* be reasonably interpreted to include death or survivor benefits);
- *Thomas v. Office of Personnel Management*, 46 M.S.P.R. 651; 1991 MSPB LEXIS 118 (1991) (holding a state court must make its intent clear to award survivor benefits).

§ 2.04 Plan Administrator Counterpart

A public plan administrator may also prohibit the assignment of benefits, post-decree, that were not assigned by the divorce decree. The prohibition only applies to Non-ERISA plans. The Florida Retirement System (“FRS”) is a good example of a plan administrator counterpart to the trend in QDRO case law.

The Florida public retirement law permits the assignment of benefits via QDRO by state statute. *See Fla. Stat. § 222.21*. A Non-ERISA plan administrator, such as FRS, has wide latitude to deny benefits pursuant to the plan’s internal guidelines and procedures. Under current FRS QDRO guidelines, the plan administrator may reject a QDRO that is inconsistent with the divorce decree. As part of its review process, FRS will request a copy of the divorce decree. The plan administrator will then compare the QDRO against the terms of the divorce decree. If the QDRO is inconsistent with the divorce decree, the plan administrator will reject the QDRO.

Like the trend in QDRO case law, FRS guidelines and procedures encourage the timely resolution of divorce. Therefore, the plan administrator counterpart is sound *public policy*, as is the trend in QDRO case law.