



Winter 2009

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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QDRO CASE LAW REVIEW

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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)**

Focus: Trend in QDRO Case Law

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)**

Focus: Trend in QDRO Case Law

Comment: Appellate court denied a former spouse survivor benefits (Military SBP) in a post-decree assignment order since the divorce decree failed to assign the benefit to the former spouse.

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

Focus: Coverture

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."

***Rumler v. Rumler*, 932 So. 2d 1165 (2nd DCA 2006)**

Focus: Disability and Support

Comment: Case involved a non-ERISA municipal police pension plan (not subject to a QDRO). The court reversed an award for alimony since the trial court failed to make an allocation between the *retirement* and *disability* portions of the pension. Only the retirement portion is subject to equitable distribution. Court also reversed the trial court for failing to make sufficient findings for an alimony award pursuant to FSS §61.08(2).

***Nix v. Nix*, 930 So. 2d 711 (1st DCA 2006)**

Focus: DROP Benefits

Comment: Court held that the former spouse is entitled to DROP benefits when awarded an *interest* in the participant's pension plan. Court certified the question to the Florida Supreme Court. *See also Russell v. Russell*, 922 So. 2d 1097 (4th DCA 2006)(affirming former wife's interest in DROP).

***Dechellis v. Dechellis*, 925 So. 2d 379 (4th DCA 2006)**

Focus: Procedural Due Process

Comment: Court vacated the entry of a QDRO since the former husband failed to receive a "notice of hearing" pursuant to *Florida Rule of Civil Procedure 1.090*; general notice of the hearing is insufficient. *See also Butts v. Hegmann*, 705 So. 2d 1007 (Fla. 4th DCA 1998) (holding that adequate notice is imperative when a QDRO is entered since it produces a final result).

***Smith v. Smith*, 934 So. 2d 636 (Fla. 2nd DCA 2006)**

Focus: Present Value Analysis

Comment: Court held that a present value analysis of a defined benefit pension plan must be based on competent and substantial evidence, usually requiring expert testimony. Appellate court reversed the trial court for accepting a present value calculated by the former husband.

VIRGINIA

Caution: Virginia courts have precluded the assignment of benefits in a post-decree QDRO that were not assigned in the divorce decree.

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

Focus: Trend in QDRO Case Law

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 concluded that when entering a qualified domestic relations order (QDRO), the court may not modify a final divorce decree simply to adjust its terms in light of the parties' changed circumstances.

***Baker v. Baker*, 564 S.E.2d 164 (Va.Ct.App. 2002)**

Focus: Trend in QDRO Case Law

Comment: Appellate Court excluded gains and losses from a post-decree QDRO since it conflicted with the divorce decree.

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

Focus: Trend in QDRO Case Law

Comment: Appellate Court held that a QDRO must be consistent with the substantive provisions of the divorce decree.

Navas v. Navas, 599 S.E.2d 479 (Va.App.Ct. 2004)

Focus: Disability Retirement

Comment: Appellate Court held that a disability retirement allowance is analogous to a pension benefit under the Virginia Retirement System and may be divided by QDRO.

ARIZONA

Boncoskey v. Boncoskey, 167 P.3d 705 (Ariz.App.Ct. 2007)

Focus: Survivor Benefits/Time-Rule

Comment: Appellate court vacated a Domestic Relations Order that awarded the former spouse a survivor benefit that included benefits that were the separate property of the husband. The Arizona State Retirement System (“ASRS”) only permits a participant to designate one contingent annuitant. Thus, the award to the former spouse of the entire survivor benefit would preclude the husband from providing an annuity for a subsequent wife. The Court also held that Johnson, not Koelsch controls in situations involving pension benefits that have *not matured*. See *Johnson v. Johnson*, 638 P.2d 705 (Ariz.S.Ct. 1981); *Koelsch v. Koelsch*, 713 P.2d 1234 (Ariz.S.Ct. 1986).

Dressler v. Morrison, 130 P.3d 978 (Ariz.S.Ct. 2006)

Focus: Tenant in Common Remedy

Comment: The Court held that a separate civil action is required to establish co-tenant rights under 25-318 (B). A separate action prevents the action from being barred by res judicata principles and does not “impair the finality of the dissolution decree.” Moreover, the Dressler holding supports the compelling policy interest favoring the finality of property settlement agreements.

Lamparella v. Lamparella, 210 Ariz. 246 (App. 2005)

Focus: Tenants in Common Remedy

Comment: Court held that A.R.S. § 25-318 (B) is inapplicable when a dissolution decree effectuates an explicit property settlement that disposes of all of the parties’ community assets by use of a “catch-all” clause. A.R.S. § 25-318 (B) provides that property not disposed of in a dissolution decree is thereafter owned by the former spouses as tenants in common.

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

Focus: Time Rule

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

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

Focus: Time Rule

Comment: Trial and Appellate court utilized a “coverture” fraction to determine the amount of an alternate payee’s award. Coverture is a formula stated as a fraction where the numerator is the years in the marriage while in the plan divided by the total number of years in the plan. Coverture maximizes an alternate payee’s award.

***Koelsch v. Koelsch*, 148 Ariz. 176 (1986)**

Focus: Survivor benefits/ Equitable Distribution

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

***Prada v. Prada*, 196 Ariz. 428 (2000)**

Focus: Survivor Benefits

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*.

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

Focus: Social Security Offset

Comment: Present value should be placed on social security benefits a party should 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”), which does not pay into social security.

NEVADA

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

Focus: Time Rule

Comment: Supreme Court created a presumption of “coverture” when calculating a former spouse’s award of a defined benefit plan. Nevada and other western states refer to “coverture” as the “time rule.” The participant may rebut the presumption by showing that his post-marital labor contributed to the increase in his accrued benefit.

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

Focus: Social Security Offset

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

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

Focus: Present Value

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

OHIO

Romans v. Romans, 2006 Ohio 6554 (App. 2006)

Focus: Constructive Trust

Comment: Appellate Court permitted the imposition of a constructive trust on the benefits received by the “new” wife of the Participant permitting the former spouse to receive a portion of the survivor benefits despite the statutory prohibition of R.C. 3105.86.

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. The legislation permits an alternate payee to receive a joint and survivor annuity and COLAs, if awarded in the divorce decree. See newsletter for more information.

CALIFORNIA

Caverly v. Gray, 66 Cal. Rptr. 3d 87 (Cal.App.Ct. 2007)

Focus: Time Rule

Comment: A trial court is not bound a by a particular method of division, including use of the time rule. Rather, a trial court must choose a method of assignment that will achieve substantial justice (*citing In re Marriage Gowan*, Cal.App. 4th 80 (1997)).

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

Focus: Time Rule

Comment: The California Supreme Court affirmed the use of the time rule and reasoned that various events and conditions after divorce affect the amount of retirement benefits a participant may receive 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.

Oddino v. Oddino, 939 P.2d 1266 (1997)

Focus: Early Retirement Subsidies

Comment: The California Supreme Court interpreted ERISA from excluding *early retirement subsidies* from a QDRO if the participant is an active employee.

Gillmore v. Gillmore, 629 P.2d 1 (1981)

Focus: Immediate Assignment

Comment: The California Supreme Court held that a nonemployee spouse can immediately receive her community interest in a community pension plan, once the participant reaches his eligible retirement date.

NEW MEXICO

Palmer v. Palmer, 142 P.3d 971 (Ct.App.2006)

Focus: Survivor Benefits and Due Diligence of Counsel

Comment: Court affirmed the district court by awarding survivor benefits in a post-decree assignment order even though the benefit was not addressed in the divorce decree. The court stated that survivor benefits are a valuable community asset (*citing Irwin v. Irwin*, 910 P.2d 342 (App. 1996)). The Court's ruling has *little effect* since the Office of Personnel Management rejected the wife's claim for survivor benefits due to her failure to follow procedures pursuant to the Code of Federal Regulations. This case highlights the importance of retaining competent counsel familiar with federal retirement benefits.

Hadrych v. Hadrych, 2007 NMCA 1; 2006 N.M. App. Lexis 156 (Ct.App.2006)

Focus: Waiver of Military Pay

Comment: Court required Member Former Husband to pay to 50% of his military pay directly to the Former Spouse pursuant to the parties divorce decree, even though there was no *indemnification* provision in the settlement agreement (distinguishing *Scheidel*, 4 P.3d 670 (Ct.App.2000) where the settlement agreement contained an indemnification clause for any actions or reductions caused by the member). The court relied on the principles of fairness and equity at arriving at its decision.

ERISA

Kennedy v. Plan Adm'r for DuPont Sav. & Inv. Plan, 129 S. Ct. 865 (2009)

Focus: Federal Common Law Waiver

Comment: The United States Supreme Court held that ERISA imposes a statutory fiduciary duty upon the plan administrator. The duty imposed by ERISA is the duty to act in accordance with plan procedures in determining who is entitled to beneficiary status under the plan. Moreover, a plan administrator is required under the rule to disregard a waiver of benefits if that waiver conflicts with plan procedures. The Court also concluded that a waiver is not rendered invalid by ERISA's anti-alienation provision.

Carmona v. Carmona, 544 F.3d 988 (9th Cir. 2008)

Focus: Vesting of Survivor Benefits

Comment: The vesting of survivor benefits in divorce is an issue of first impression for the 9th Circuit. The 9th Circuit held that survivor benefits irrevocably vest in the participant's spouse at the annuity starting date and may not be reassigned to a subsequent spouse via QDRO. The Court also held that a state law constructive trust cannot be used to contravene the dictates of ERISA.

PRACTICE POINTER [1]

Chapter 3 Avoiding Malpractice Strategy

§ 3.01 Overview

Your avoidance of QDRO malpractice begins with your recognition and compliance with the two foundational rules presented in Chapters 1 and 2 of this practice guide: Operation of Law Strategic Point and the Trend in QDRO Case Law Strategic Point. Both “rules” are restated below:

Strategic Point: Operation of Law—Following a divorce a former spouse loses her qualified ERISA-based retirement benefits, in connection with the marriage, by operation of law.

Strategic Point: Trend in QDRO Case Law—A QDRO must be consistent with the benefits assigned by the divorce decree.

§ 3.02 Negligence

QDRO malpractice is no different from any other tort claim of negligence. To make a *prima facie* case a plaintiff must prove four elements: duty, breach, causation, both actual and proximate, and damages.

With QDRO malpractice, the “breach” issue will likely be the turning point of your liability. After all, you surely owe a duty to your client as divorce counsel. Causation is likely to be self satisfying. Damages are easily calculated since a participant’s benefits are maintained by a fiduciary: the plan administrator. Thus, primary issue is “breach.”

The standard of care by which you will be judged by your peers, is that of “another professional in good standing in a similar community.” As a professional, you will be held to a higher standard of care than the “reasonable person” standard. Moreover, if you specialize in family law, the standard of care will be higher.

To avoid a malpractice claim, your objective is clear: take all necessary steps that a competent and prudent attorney would take under like circumstances to secure your client’s retirement benefits.

§ 3.03 Negligent Referral and the Unauthorized Practice of Law

The majority of states have concluded that the drafting of a QDRO is the practice of law. Therefore, refer your clients to a qualified attorney when a QDRO is needed; a qualified attorney is one that specializes in QDROs and related retirement issues.

Referring your client to a qualified attorney allows you to *shift your liability* to that professional. Importantly, you are unable to shift your malpractice liability to a lay person if you choose a financial planner, paralegal, or accountant to draft your QDROs. The ultimate responsibility for securing your client’s benefits lies with you, the attorney.

Therefore, reduce your malpractice liability and avoid negligent referral claims against you by using a qualified attorney to assist you with your QDRO.

§ 3.04 Avoidance Procedures

Following is a short list of the steps you can take during your divorce case to reduce your malpractice liability:

1. Begin your QDRO **discovery** immediately upon client intake;
2. Include a pension intake questionnaire at intake;
3. File a **Notice of Adverse Interest** during the divorce proceeding once the specific retirement plans have been identified. The retirement plan administrator is served with this notice;
4. Include a QDRO provision in fee agreement that the client is responsible for additional fees that may be incurred for the retention of a QDRO attorney;
5. Place client on **notice** in fee agreement that you do not specialize in the preparation of QDROs, if you are not preparing;
6. Place the client on **notice** in the fee agreement that their retirement benefits are at **risk** if a QDRO is not filed concurrently with the divorce decree;
7. Use a qualified attorney for QDRO preparation to **shift your liability** to that professional. Do not use a financial planner, paralegal, or accountant for QDRO preparation. You can not shift your liability to a lay person since you are ultimately responsible for their work. Many paralegals and the like simply complete the “model” QDRO provided by the plan.
8. Avoid **negligent referral** claims and **Unlawful Practice of Law** issues by referring your client to a qualified attorney. Most states have concluded that the drafting of a QDRO is the rendering of legal advice;
9. Obtain the Summary Plan Description (“SPD”), account statements, and QDRO guidelines and procedures for each plan;
10. Consider the use of a **Third Party subpoena** to obtain information directly from the plan administrator;
11. Do not enter into a settlement agreement *unless* the terms of the QDRO are included;
12. File the QDRO **concurrently** with the final judgment;
13. Place the onus on the client that they are to contact you in the event the QDRO is not “qualified” within 60 days of the decree;
14. Identify in the divorce decree who is responsible for filing the QDRO with the court and plan, if you are not filing;
15. Communicate and confirm with the QDRO attorney that the plan administrator has properly complied with the terms of the QDRO.

[1] Excerpt from *Qualified Domestic Relations Order: Strategy and Liability for the Family Law Attorney*, by Raymond S. Dietrich, Esq., © 2009 LexisNexis