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Qualified Domestic Relations Orders

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QUALIFIED DOMESTIC RELATIONS ORDERS

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The awareness of retirement plans in domestic relations actions has increased over the past decade. As contributions to these plans increase and the interest of an individual in the plan grows, it becomes more likely to be an asset subject to division in divorce. Over this same period, the courts have increasingly defined retirement plan benefits as marital property.[1]

This article discusses the division, during divorce, of benefits distributable from qualified retirement plans of private employers. In particular, this article focuses on the Qualified Domestic Relations Order (QDRO), which is the method enacted by Congress in 1984[2] for dividing such benefits. A retirement plan is "qualified" if it meets the requirements of section 401(a) of the Internal Revenue Code. Income earned in a qualified plan is tax-exempt under section 501(a) of the Code until paid to the retiree, at which time the retiree is taxed.[3]

Under federal law, prior to the Retirement Equity Act of 1984,[4] any assignment or alienation of benefits under a qualified retirement plan was prohibited. Along with this prohibition, section 514 of the Employee Retirement Income Security Act of 1974 (ERISA) preempted state laws relating to pension plans.[5] Therefore, it was not clear whether benefits could be paid directly to nonparticipants to meet obligations for child support, separate maintenance, alimony, or property divisions. Nevertheless, several cases arose in which the courts were asked to determine whether the ERISA preemption and antiassignment provisions applied to those obligations. In spite of the antiassignment

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1. Young v. Young, 288 Ark. 33, 701 S.W.2d 369 (1986); Day v. Day, 281 Ark. 261, 663 S.W.2d 719 (1984); Bachman v. Bachman, 274 Ark. 23, 621 S.W.2d 701 (1981); In re Marriage of Brown, 15 Cal. 3d 838, 544 P.2d 561, 126 Cal. Rptr. 633 (1976).

2. Retirement Equity Act of 1984, Pub. L. No. 98-397, § 104, 98 Stat. 1426, 1433-36 (1984).

3. I.R.C. §§ 401(a), 501(a), 402 (1986).

4. I.R.C. § 401(a)(13) (1984).

5. Employment Retirement Income Security Act of 1974, Pub. L. No. 93-406, § 514, 88 Stat. 935, 1018-19 (1974) (codified as amended at 29 U.S.C. § 1144 (1986)) [hereinafter ERISA].

provision, some courts held that ERISA was *not* intended to preempt state domestic relations law that permitted the attachment of benefits to meet those obligations.[6] Furthermore, when a participant was already receiving benefits from the plan, the Internal Revenue Service ruled that the antiassignment provision was *not* violated when a plan trustee complied with a court order requiring the distribution of the participant's benefits to his or her spouse or children to meet the participant's alimony or child support obligations.[7] The law was even less clear as to whether benefits not currently being paid could be assigned for future payment. There was virtually no authority on this question and no guidance concerning the taxability of such payments.

The Retirement Equity Act of 1984 generally applies to employee pension benefit plans that are subject to ERISA. Therefore, the Act does *not* apply to government plans[8] or to Individual Retirement Accounts.[9] It would apply, however, to private employer plans.

The Act was adopted to answer many of the questions concerning the antiassignment problem. The Act amended section 401(a)(13) of the Internal Revenue Code by providing that payments to a spouse or child under a QDRO do *not* violate the antiassignment provision, and that payments under a domestic relations order that is not a QDRO *do* violate the antiassignment provision.[10] The Act has two primary results: (1) it provides a method for direct payment of benefits awarded from the plan to a nonemployee spouse; and (2) it clarifies the tax treatment of payments from the plan upon divorce. The Act does not answer the question of what is marital property. This is still a question of state law. The Act merely governs the form and timing of payment of benefits and addresses the question of whether the participant's spouse or dependents may be assigned benefits under the plan. The method for

6. Cody v. Riecker, 594 F.2d 314 (2d Cir. 1979); American Tel. and Tel. Co. v. Merry, 592 F.2d 118 (2d Cir. 1979); Kikkert v. Kikkert, 177 N.J. Super. 471, 427 A.2d 76 (App. Div. 1981).

7. Rev. Rul. 80-27, 1980-1 C.B. 85.

8. The Retirement Equity Act amends ERISA § 206(d), which pertains to assignments of benefits. Part 2 of ERISA, which includes § 206, does not apply to government plans. ERISA § 4(b) and § 201. Government plans generally have special provisions concerning divorce. *See, e.g.*, 5 U.S.C. § 8345 (1982 & Supp. III 1985) (civil service retirement benefits); 10 U.S.C. § 1408 (1982 & Supp. III 1985) (military retirement benefits); 45 U.S.C. § 231 (1982 & Supp. III 1985) (railroad retirement benefits); and 42 U.S.C. § 402 (1982 & Supp. III 1985) (social security benefits).

9. Section 201 of ERISA exempts Individual Retirement Accounts (IRA) from Part 2 of ERISA. However, § 408(d)(6) of the Code contains a method for transferring an individual's IRA upon divorce.

10. I.R.C. § 401(a)(13) (1986), as amended by The Retirement Equity Act of 1984, *supra* note 2.

division of benefits under the Retirement Equity Act is the QDRO. The new QDRO rules are set out in section 414(p) of the Code.[11]

A QDRO is a domestic relations order that (1) creates or recognizes the existence of an "alternate payee's" rights, or assigns to an "alternate payee" the right to receive all or a portion of the benefits payable to a participant under a qualified plan, and (2) meets certain other requirements as discussed below.[12] A domestic relations order is a judgment, decree or order (including a court-approved property settlement agreement) that relates to the payment of benefits to a child, spouse (present or former), or other dependent of a participant pursuant to state domestic relations law.[13] A property settlement agreement that has not been approved by a court is not a domestic relations order. The "alternate payee" is the spouse, former spouse, child, or other dependent who is recognized under the order as having a right to receive all or a portion of the participant's benefits.[14]

By amending section 401(a)(13) of the Code, the Retirement Equity Act makes clear that *any* assignment of a plan benefit violates the antiassignment rule and could disqualify the plan, unless the assignment is pursuant to a QDRO.[15] Under the Act, the QDRO is the sole means of attaching retirement plan benefits. Moreover, since it is clear that federal law allows payments from a plan under a QDRO, the plan may be required by a state court to recognize valid QDROs. This does not mean that a state court cannot divide retirement plan benefits under an order that is not a QDRO; it merely means that the spouse must look to the employee, not the plan, for payment.

In addition to being a domestic relations order, a QDRO must meet the following requirements:

1. The order must specifically state each retirement plan to which it applies, and it is advisable to refer to the proper name of the plan.[16] A statement that refers to "each pension or profit sharing plan of the employer in which the employee participates" is unsatisfactory.

2. The order must clearly specify:

a. The name and last known mailing address (if any) of the participant and the name and last known mailing address (if any) of

11. I.R.C. § 414(p) (1986).

12. I.R.C. § 414(p)(1)(A) (1986).

13. I.R.C. § 414(p)(1)(B) (1986).

14. I.R.C. § 414(p)(8) (1986).

15. I.R.C. § 401(a)(13) (1986), as amended by The Retirement Equity Act of 1984, *supra* note 2.

16. I.R.C. § 414(p)(2)(D) (1986).

each alternate payee.[17] The order meets this test if the plan administrator has reason to know the address of the participant or alternate payee independently of the order, such as where the alternate payee is a participant and the plan records include a plan address.[18]

b. The amount or percentage of the participant's benefits the plan will pay to each alternate payee, or the manner in which this is to be determined. The alternate payee's rights are still governed by state law. For example, the amount to which the alternate payee is entitled may be limited by state law to benefits accrued during marriage.[19] Section 414(p) requires only that the amount be clearly stated. In any event, one should try to avoid the possibility that the QDRO provides for a greater benefit than the participant will be entitled to.

c. The number of payments or period to which the order applies.[20] This could be payments for an undetermined period (such as the alternate payee's life), a fixed number of payments, or payment over the recipient's life expectancy.

3. The order may not require the plan to provide any type or form of benefit, or any option, not otherwise allowed under the plan.[21] To meet this requirement, the attorney for the nonemployee spouse must obtain a copy of the most recent version of the plan that has been amended to comply with the Retirement Equity Act.

The order can select a specific form of benefit or allow the alternate payee to select the form.[22] The alternate payee should be given discretion because his or her circumstances may change prior to commencement of payment.[23] Even though the court could retain jurisdic-

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17. I.R.C. § 414(p)(2)(A) (1986).

18. S. REP. No. 575, 98th Cong., 2d Sess. 20, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 2547 [hereinafter SENATE REPORT].

19. *See* Marshall v. Marshall, 271 Ark. 116, 607 S.W.2d 90 (Ark. Ct. App. 1980); Harris, *The Arkansas Marital Property Statutes and the Arkansas Appellate Courts: Tiptoeing Together Through the Tulips*, 7 UALR L.J. 1, 15-22 (1984).

20. I.R.C. § 414(p)(2)(B) and (C) (1986).

21. I.R.C. § 414(p)(3)(A) (1986); Cummings v. Briggs & Stratton Retirement Plan, 797 F.2d 383 (7th Cir. 1986).

22. Although many plans contain a provision for the plan administrator, not the participant or beneficiary, to select the form of benefit, this will soon change. The Treasury has issued Proposed Regulations that state that the participant must be allowed to select the form of benefit. Prop. Treas. Reg. § 1.401(a)-4 (Q & A-3), 51 Fed. Reg. 3800 (1986).

23. The S. REP. No. 313, 99th Cong., 2d Sess. 1105 to the Tax Reform Act of 1986, Pub. L. No. 99-514, 100 Stat. 2085, which was adopted into the H.R. CONF. REP. No. 841, 99th Cong., 2d Sess. 857, states in the technical corrections to the Retirement Equity Act that an order will not fail to be a QDRO even if the form of benefit in the order is subsequently eliminated from the plan. If the QDRO's benefit is eliminated by plan amendment, the alternate payee could either receive the form specified in the QDRO or elect another allowed form (as long as the participant's benefits are not affected).

tion to amend the order, it is better to eliminate this possibility.

There has been some question as to whether a QDRO may require that benefits be paid to the spouse in the form of an annuity for the *spouse's*, rather than the *participant's* life, or even a joint and survivor annuity for the lives of the alternate payee and his or her subsequent spouse. Section 414(p)(4), as corrected by the Tax Reform Act of 1986, now makes it clear that a QDRO may provide for any form of benefit, including an annuity, except for a joint and survivor annuity for the alternate payee and a subsequent spouse.[24]

4. The order may not require that a plan provide increased benefits (determined on the basis of actuarial value).[25] The legislative history of the Retirement Equity Act indicates that an order does not violate this requirement as long as the benefits payable under the order are equal to or less than the actuarial value of the benefits to which the participant would have been entitled in the absence of the order.[26] Actuarial value is to be determined under the plan.

5. A QDRO must be consistent with all other QDROs received by the plan with respect to the participant.[27] The QDRO will take priority over a subsequent spouse's survivor benefits on a "first-come-first-serve" basis. The priority should be determined by the dates the orders were determined to be QDROs, not the dates of the orders themselves.

The most difficult question concerning a QDRO is whether the benefits payable to the alternate payee must terminate upon the death of the participant or upon the death of the alternate payee. Once the alternate payee begins receiving benefits, he or she should be able to select a form of benefit that does not terminate upon either the participant's or alternate payee's death. For example, an alternate payee could elect to receive an annuity with a number of years certain, an installment payment, or a lump sum payment. The options that are available will depend on the provisions in the plan.

When benefits are not yet distributable, the Retirement Equity Act is not clear. If the *participant* dies before payments begin, the death benefits would be payable to the alternate payee to the extent that the alternate payee is designated as the participant's beneficiary. Even then, the participant could change the beneficiary designation. Although the alternate payee would have a cause of action against the participant if the beneficiary designation is changed, the plan could not

24. I.R.C. § 414(p)(4)(A)(iii) (1986).
25. I.R.C. § 414(p)(3)(B) (1986).
26. SENATE REPORT, *supra* note 18.
27. I.R.C. § 414(p)(3)(C) (1986).

be forced to pay benefits to the alternate payee.

Moreover, some defined benefit plans provide only for the minimum death benefit required by law, that is, an annuity for the life of the surviving *spouse*[28] of the participant. In such a plan, an unmarried participant has *no* death benefit. If the participant dies before retiring, the alternate payee/former spouse would not be entitled to any benefit.

The answer to these problems is to designate *in the QDRO* that the former spouse will be treated as the surviving spouse, which section 414(p)(5) of the Code allows. This accomplishes two purposes. First, when there would otherwise be no death benefit for the participant and therefore no survivor benefit for the alternate payee, the alternate payee would receive an annuity for his or her life. It is possible that after the participant's death, the plan may allow the spouse to waive the annuity and elect to receive an amount equal to the value of the annuity in a lump sum, in installments, or in any other form permissible under the plan.[29] Second, if the former spouse is treated as the surviving spouse, the participant cannot change his beneficiary designation without his former spouse's consent.

A provision in the QDRO designating the former spouse as spouse may be inadequate from the standpoint of the alternate payee. First, the designation protects only spouses, not children or other alternate payees. Second, the designation is permissive. If the order does not provide that the former spouse be treated as the surviving spouse, and the participant dies before the former spouse begins receiving benefits under the order, the former spouse will *not* receive benefits under section 414(p)(5).

From the standpoint of the participant, this designation has other undesirable consequences. For example, a participant may not borrow money from a pension plan and pledge his interest therein without his spouse's consent.[30] Moreover, the former spouse may defeat any rights of the participant's second spouse. The solution may be to designate the former spouse as surviving spouse under section 414(p)(5) *only* as to the portion of the benefit that is to be paid to the former spouse as alternate payee. However, whether this would qualify in a QDRO may vary among plan administrators.

If the alternate payee dies before the participant and before payments begin, there is some question as to whether the alternate payee

28. I.R.C. § 417(c) (1986).

29. I.R.C. § 417(e)(2) (1986).

30. I.R.C. § 417(a)(4) (1986), as added by the Tax Reform Act of 1986, *supra* note 23, at § 1898(b)(4).

may designate a beneficiary of his or her portion of the benefits. Some plan administrators maintain that the alternative payee has no right to designate a beneficiary since the alternate payee is considered a "beneficiary" under the Act.[31] Since few plans give authority for a beneficiary to designate a beneficiary, such a designation would be in violation of the plan's terms. The safest approach is to provide in the order that the participant shall designate the alternate payee's primary beneficiary as the participant's *contingent beneficiary* (with respect to the alternate payee's portion of the benefits). At least this should prevent the participant from receiving a windfall. Whether a plan administrator will accept this provision will vary from plan to plan.

An alternate payee should be prepared, however, for the plan administrator to take the position that the alternate payee (or his or her beneficiary) is *never* entitled to benefits in the event of the death of the participant or the alternate payee, unless section 414(p)(5) applies or the alternate payee actually begins receiving benefits prior to the participant's or alternate payee's death. Since the plan could be disqualified if it pays benefits under an order that is not a QDRO, plan administrators will probably be conservative pending a determination of this question.

Another issue that must be addressed in the QDRO is the timing of payment of benefits to the alternate payee. Ordinarily, the QDRO may *not* require payment of benefits prior to the date on which the participant begins receiving benefits, or at least reaches normal retirement age under the plan. However, a QDRO may require that payments to the alternate payee begin on or after the date on which the participant attains the "earliest retirement age" under the plan, whether or not the participant actually retires on that date.[32]

The earliest retirement date is the earlier of (1) the date on which the participant is entitled to a distribution, or (2) the later of (i) the date the participant reaches age fifty or (ii) the earliest date the participant could begin receiving benefits if he or she separated from service.[33] For example, if the plan provides for withdrawals by the participant while employed, the former spouse should be entitled to an immediate distribution. However, if only nondeductible employee con-

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31. ERISA § 206(d)(3)(J) (1974) (codified as amended at 29 U.S.C. § 1056 (1982 and Supp. III 1985)), as added by the Retirement Equity Act of 1984, *supra* note 2.

32. I.R.C. § 414(p)(4) (1986). According to the Conference Report in the Tax Reform Act of 1986, a plan may provide for payment to the alternate payee earlier than the earliest retirement date. The QDRO cannot provide for such payment in absence of a plan provision.

33. I.R.C. § 414(p)(4)(B) (1986), as amended by the Tax Reform Act of 1986, *supra* note 23, at § 1898(c)(7)(vii) (1986).

tributions may be withdrawn without separation from service, the alternate payee would only be allowed to receive the nondeductible employee contributions under this rule. If no withdrawals are allowed, but the plan provides that immediate distributions will be made to terminated participants, and the participant is age forty, the earliest retirement date would be age fifty. The alternate payee should review the document for features that determine the earliest retirement age and when the plan allows withdrawals.

If benefits are to be paid to the alternate payee on or after the earliest retirement age but before the participant reaches normal retirement age, the order can consider only benefits actually accrued as of that date as if the participant had terminated on that date.[34] In a defined contribution plan, this would be the account balance as of the benefit commencement date.

When the participant has not yet separated from service or reached the earliest retirement age, a QDRO may not require payment of benefits to the alternate payee in absence of a plan provision authorizing such a distribution. This may prevent a lump-sum settlement between parties at the time of the divorce. However, an earlier distribution from a profit sharing plan may be possible if the plan allows in-service withdrawals by the participant.[35] Again, it would be important to review the plan for such a provision.

Procedures

The plan document is not required to contain provisions concerning QDROs.[36] However, the plan administrator is required to establish

34. I.R.C. § 414(p)(4)(A)(iii) (1986). The maximum amount that can be paid to the alternate payee beginning on this date is calculated by using the participant's normal retirement benefit, accrued as of the date payout begins, and by actuarially reducing such benefit based on the interest rate specified in the plan. A plan that provides for early distribution under this rule will not be considered to be in violation of other provisions concerning in-service distributions from a pension plan or a 401(k) plan. I.R.C. § 414(p)(5) (1986). In determining the amount of benefit, any "early retirement subsidy" cannot be considered. In other words, if the participant would receive more benefits if he qualified for early retirement and retired on a particular date than if he merely terminated employment on a particular date, the difference cannot be taken into account. If an alternate payee begins receiving benefits under the order, and the participant subsequently retires with the increased retirement benefits, the order may specify that the amount payable to the alternate payee is to be recalculated. In this manner, the alternate payee also receives a share of this increased benefit to which the participant is entitled. This recalculation is not considered to violate the prohibition against a QDRO providing for increased benefits. SENATE REPORT, *supra* note 18, at 21.

35. I.R.C. § 414(p)(4)(B) (1986), as amended by the Tax Reform Act of 1986, *supra* note 23, at § 1898(c)(7)(vii) (1986) and text accompanying note 33.

36. Temp. Treas. Reg. § 1.401(a)-13T(b) (1986).

procedures it can use to determine whether an order is a QDRO.[37]

Upon receipt of an order, the plan administrator must promptly notify the participant and each alternate payee by mailing notice of such receipt and copies of the plan administrator's procedures to them.[38] The plan administrator must determine whether the order is a QDRO within a reasonable time after receipt, as defined in regulations to be prescribed by the Secretary of Labor. The plan administrator must then notify the participant and each alternate payee of its determination.[39] If the determination is negative, the parties should correct the order so that it can qualify as a QDRO. Generally, the notice will contain the reasons for the denial.

Upon receipt of an order, the plan administrator must separately account for the amounts that would have been payable to the alternate payee had the order been immediately determined to be a QDRO.[40] If, within eighteen months after the deferral of benefits, the order is determined to be a QDRO, the plan administrator must pay the segregated amounts (plus any interest thereon) to the individuals entitled thereto.[41] If within eighteen months the order is determined *not* to be a QDRO, or, if for some reason there is no determination, the plan administrator must pay the segregated amounts to the person who would otherwise be entitled to them. If that person has not yet begun receiving benefits, the amounts must be paid back into the plan.[42] After this eighteen-month period, if a subsequent determination is made that the order is a QDRO, it will apply prospectively only.[43]

If the plan administrator has erroneously determined that the order is not a QDRO, the alternate payee, as a beneficiary, could bring an action in federal court against the plan administrator under ERISA section 502.[44] Even if the order is determined not to be a QDRO, the

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37. I.R.C. § 414(p)(6)(B) (1986). The Internal Revenue Service will not rule on whether an order is a QDRO. Priv. Ltr. Rul. 85-38-063 (June 25, 1985).

38. I.R.C. § 414(p)(6)(A)(i) (1986).

39. I.R.C. § 414(p)(6)(A)(ii) (1986).

40. I.R.C. § 414(p)(7)(A) (1986).

41. I.R.C.§ 414(p)(7) (1986). Under the technical corrections provisions, the 18-month period is clarified to begin on the date the first payment would be required under the order. Tax Reform Act of 1986, *supra* note 23, at § 1898(c)(2).

42. I.R.C. § 414(p)(7) (1986).

43. I.R.C.§ 414(p)(7)(D) (1986).

44. ERISA § 206(d)(3)(J) (1974) (codified as amended at 29 U.S.C. § 1056 (1982 and Supp. III 1985)) as added by the Retirement Equity Act of 1984, states that the alternate payee will be considered a beneficiary for purposes of ERISA. Of course, if the plan administrator determines that the order is not a QDRO, the spouse is not an alternate payee, and theoretically could not bring this action. However, this interpretation is contrary to the intention of the Retirement Equity Act.

spouse may have a cause of action against the participant. For example, if an order is determined to be qualified after the eighteen-month period, the alternate payee may have a cause of action against the participant for amounts paid to the participant that should have been paid to the alternate payee.

Once an order is determined to be a QDRO, the alternate payee is entitled to any notices, such as summary annual reports, summary plan descriptions, and benefit statements, as are any beneficiaries under ERISA.[45]

The Tax Reform Act of 1986 provides that payment of benefits under a QDRO is not a garnishment for purposes of federal or state restrictions on garnishment.[46]

The Retirement Equity Act also establishes the tax treatment of distributions under a QDRO. If the alternate payee is the former spouse, the alternate payee will be taxed on any distributions made to him or her.[47] In addition, payments to the alternate payee before the participant is fifty-nine and one-half years of age are not subject to the ten percent additional income tax that might otherwise apply under certain circumstances.[48] The exemption from the pre fifty-nine and one-half age penalty does not apply once the alternate payee rolls the distribution into an individual retirement account. If the alternate payee is not the former spouse, but is a child or other dependent, the participant will be taxed on the distributions even though they are made to the alternate payee.[49]

If the participant has a basis in his benefit as a result of making nondeductible contributions, this basis, called the "investment in the contract," will be allocated between the participant and the alternate payee on the basis of present value.[50] The rules concerning taxation of

45. ERISA §§ 104 and 105 (1974).

46. ERISA § 206(d)(3)(M) (1974), added by the Tax Reform Act of 1986, *supra* note 23, at § 1898(c)(5).

47. I.R.C. § 402(a)(9) (1986). Also, any attorney representing the participant should consider including an indemnification provision that sets forth the intended taxability to the spouse and indemnification to the participant should the participant be required to pay taxes on any distribution to the alternate payee. The participant will be taxable on any benefits under an order that is not a QDRO.

48. SENATE REPORT, *supra*, note 18 at 23. I.R.C. § 72(t)(2)(D) (1986), as added by the Tax Reform Act of 1986, *supra* note 23, at 1123(a).

49. I.R.C. § 402(a)(9) (1986), added by the Tax Reform Act of 1986, *supra* note 23, at § 1898(c)(1). For payments prior to enactment of the Tax Reform Act of 1986, the alternate payee was taxable even though not the former spouse.

50. I.R.C. § 72(m)(10) (1986); Priv. Ltr. Rul. 85-11-099 (Dec. 21, 1984). Under the technical corrections, only the spouse or former spouse is allocated any basis.

annuities under section 72 otherwise apply.[51]

Finally, the Code provides that ten-year averaging (or five-year averaging under the Tax Reform Act of 1986) treatment for a lump-sum distribution is *not* available to an alternate payee.[52] However, any part of a lump-sum distribution to the alternate payee may be rolled over, tax free, to an individual retirement account.[53] Moreover, just because amounts are payable to an alternate payee does not disqualify the participant from receiving a lump-sum distribution.[54]

Effective Dates

The provision concerning QDROs was effective January 1, 1985. To the extent that payments to an alternate payee were already being made prior to that date, the plan administrator is required to treat the order as a QDRO. In addition, a plan administrator may treat any other order entered before January 1, 1985, as a QDRO.[55] The legislative history states that "the committee encourages plan administrators to treat an existing order as qualified to the extent it is consistent with the provisions of the bill."[56] Thus, orders entered prior to January, 1985, may still be considered as QDROs if distributions have not yet commenced.

Conclusion

Although the Retirement Equity Act has been in effect since January 1, 1985, QDROs are still not widely used. There are two reasons for this. First, in many divorces the costs of preparing QDRO provisions are unacceptable to the parties. This is particularly true when, as is usually the case, the spouse will not receive any benefits until years later, and even then payment may still be speculative. Second, trial judges have, justifiably, stated that the marriage relationship should be completely and permanently severed. A QDRO (or any other division

51. A portion of each payment is taxable to the alternate payee under I.R.C. § 72 (1986).

52. I.R.C. § 402(e)(4)(M) (1986). Where the parties are agreeable and a lump-sum distribution can be made, the participant could receive a distribution, elect special averaging, pay the lower tax, and pay the alternate payee the balance.

53. I.R.C. § 402(a)(6)(F) (1986) provides for rollover upon receipt of the alternate payee's entire balance. Apparently, an alternate payee may not roll over the funds if less than the entire balance to his or her credit is distributed. A participant, on the other hand, may roll over a partial distribution under § 401(a)(5)(D).

54. I.R.C. § 402(e)(4)(M) (1986).

55. Retirement Equity Act of 1984, Pub. L. No. 98-347 § 303(d), 98 Stat. 1426, 1453 (1984); In re Marriage of Williams, 163 Cal. App. 3d 753, 209 Cal. Rptr. 827 (1985).

56. SENATE REPORT, *supra* note 18, at 23.

of retirement benefits) may unnecessarily tie the parties together.

Nevertheless, there are many situations in which a QDRO is necessary and desirable. It is not unusual for professionals or executives to accumulate several hundred thousand dollars in qualified plans. However, these accumulations are not limited to highly-paid individuals. The following is an example of an individual other than someone highly-paid, who may be a candidate for a QDRO:

> Harold, 48, and Mary, 47, have been married for 20 years. Harold has worked at XYZ Company, a local manufacturer, for the last 20 years, and makes $35,000 per year. Harold is covered by his company's retirement plan and for the last eight years Harold has participated in a savings plan in which his employer matches his own contributions. Harold has $25,000 in the savings plan. Because of Harold's age, his current vested "accrued benefit" in the company retirement plan might easily be valued in excess of $50,000. In many situations, the parties will not have enough other assets which can or should be offset against these assets, which total at least $75,000.

It is impossible to predict the "right" situation in which to use a QDRO. However, an attorney should always inquire concerning retirement benefits. Even if a QDRO is *not* used, the value of the employee-spouse's retirement benefits may give the nonemployee spouse a larger current settlement.

The QDRO provision is extremely technical, burdensome to plan administrators, and needs clarification, particularly concerning death benefits. Nevertheless, section 414(p) adds some certainty in the ability of a spouse or child to receive retirement benefits directly from the plan rather than the participant. With all of the problems in collecting alimony and child support, this is a relief to those representing alternate payees. Although the practice of severing the marriage relationships will be continued, the QDRO (particularly when improved by regulations) should be an effective means of dividing retirement benefits when necessary. It is a provision with which family law practitioners must become familiar if they are to adequately represent their clients.