

## DOMESTIC RELATIONS ORDERS.

The objective of this Course is to enable practitioners to more effectively function in the area of employee benefits by acquisition of a comprehensive understanding of essential concepts of law and regulation as is relevant to the division of retirement entitlements incident to a Property Settlement Agreement and/or a Final Judgment of Dissolution of Marriage. Integral to this process is material intended to enhance practice skills necessary for the negotiation and assignment of retirement benefits to an alternate payee incident to a marital property settlement or divorce. Central to practitioners functioning in this complex area is a capacity to interact with Pension Plan Administrators. The anticipated outcome of participation in this Course is acquisition of a higher level of performance capability regarding the division of Qualified Defined Benefit Plans and Qualified Defined Contribution Plans incident to divorce.

ALERT.

To acquire the requisite skills, requires practitioners to become familiar with terms used by Plan Administrators and Pension Experts. When a term is initially used it will be set in bold and its definition provided.

Qualified Domestic Relations Orders (QDRO) did not exist prior to passage of the Retirement Equity Act (REA)[1].

QDRO's appeared approximately twenty-seven years ago, yet they continue to plague attorneys with their complexity. Prior to enactment of REA, 26 U.S.C.A. 401(a)(13) prevented any assignment or alienation of employee retirement benefits incident to divorce that were provided by a Qualified Retirement Plan.[2] A "Qualified Retirement Plan" is an employee plan that the Internal Revenue Service has found to be in compliance with section 26 U.S.C. 401(a).[3] An assignment of retirement benefits to an "alternate payee" former spouse incident to divorce was significantly modified by the Retirement Equity Act (REA).[4] The change in federal law that made the benefits provided by Qualified Retirement Plans subject to division and assignment incident to divorce, was a revision of Internal Revenue Code §401(a)(13) and the addition of 29 U.S.C.1056(d) and 26 U.S.C 414(p). The earlier section of Title 26, became §401(a)(13)(A) and a new section was added as §401(a)(13)(B), which reads as follows.

### (B) SPECIAL RULES FOR DOMESTIC RELATIONS ORDERS

Subparagraph (A) shall apply to the creation, assignment, or  
recognition of a right to any benefit payable with respect to a

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participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

In addition, the Retirement Equity Act created a new instrument that facilitated the previously prohibited assignment or alienation of the retirement benefits of the Participant Spouse to a spouse, former spouse or other dependent of the Participant Spouse. This instrument is the Qualified Domestic Relations Order or QDRO.[5] As a result of REA, qualified retirement benefits became assignable incident to a marital property settlement agreement or Final Judgment of Dissolution of Marriage to the following individuals:

a spouse, former spouse, child, or other dependent of a participant...

This group of individuals could have retirement benefits assigned to them as a result of:

any judgment, decree, or order (including approval of a property settlement agreement).  
(emphasis author's)

As a result of REA, divorcing spouses and the courts were provided with a federal mechanism, which if fully complied with would allow the division and assignment of previously immune qualified retirement plan benefits to a member of a specified group: "alternate payee", pursuant to a Qualified Domestic Relations Order.[6] The determination of what constitutes marital/community property and the division of assets incident to divorce remains a state function. REA does not intrude on such determinations.[7] The REA only provides the mechanism to give effect to a state divorce proceeding that divides and assigns the benefits from one or more Qualified Retirement Plans.

Amount of plan subject to division pursuant to a Domestic Relations Order.

Can a Domestic Relations Order assign to an alternate payee 100% of a participant's benefit? Be clear our affirmative reply to this question is limited to ERISA Plans. This affirmative view does not hold for other retirement systems, such as the Military Retirement System. Additionally the permitted percentage of allocation to an alternate payee though allowed by ERISA is subject to any state limits.

Caution Regarding the Above 100% Comment.

A Domestic Relations Order may not prospectively assign a participant's account balance. The

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amount subject to a Domestic Relations Order may not exceed 100% of the participant's vested account balance on the date the Domestic Relations Order is Qualified.

Pension Plans Subject to ERISA and REA. [8]

Private Pension Plans: Plans provided by a corporate entity. These plans fall into two categories:

Qualified Pension Plan

Non-Qualified Pension Plan

Qualified plan: a corporate sponsored retirement plan that the Internal Revenue Service has determined to be in compliance with the requirements of 26 U.S.C. 401(a) as amended.

Employer contributions to such plans are not taxable to the participant in the year such contributions are made to the plan. However, employer contributions to the Plan are deductible in the year made. When distributions are made from the plan to the retiree such distributions become subject to federal income taxes. Qualified plans must be made available to full time employees on a non-discriminatory basis.

Types of Qualified Plans.

There are two separate and distinct types of Qualified Plans.

Qualified Defined Contribution Plan.

Defined at 26 U.S.C. 414(i):

a plan which provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

Common forms of Qualified Defined Contribution Plans:

401(k) Plan,

Thrift Plan

Savings Plan

Tax Deferred Annuity Plan (§457 Plan, §403(b) Plan)

Tip:

A Qualified Defined Contribution Plan is also termed "Individual Account Balance Plan". The benefit payable to a plan participant is expressed as a dollar value of the participant's "account".

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These plans provide "account balance statements" to employees not less frequently than annually. Many plans provide participants with detailed quarterly statements.

Qualified Defined Benefit Plan.

Defined at 26 U.S.C. 414(j):

any plan which is not a defined contribution plan.

These plans provide employees with an end of year statement, indicating a participant's monthly accrued benefit that is payable at the participant's Normal Retirement Age.

Normal Retirement Age is defined at 26 U.S.C. 411(a)(8).

the earlier of--

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of--

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

Non-Qualified Plans: Do not comply with the requirement found at 26 USC 401(a). Generally benefits provided by these plans are available to a select group or highly compensated employees. These plans may discriminate ("permitted discrimination") as to criteria for employee participation and benefits. Employer contributions are not afforded tax advantaged treatment. Generally, the "corpus" of such plans are treated as general assets of the sponsor corporation and are taxable to the employee at the earlier of being "made available" to the employee or actual distribution to the employee. Among the more common forms of Non-Qualified Plans are:

Supplemental Executive Retirement Plan (SERP)

Excess Benefit Plans

Alert:

The above two forms of Non-Qualified Deferred Compensation are designed to offset the limitations to benefits found at 26 U.S.C.415(b) & (c).[9]

Equity Type Non-Qualified Deferred Compensation Plans that are currently popular:[10]

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Stock Option Plans (with or without Stock Appreciation Rights [SAR])  
Restricted Stock Plans

Comment:

Stock Option Plans vary in design and generosity. Stock Options are often an incentive to offset initially lower direct compensation to a key employee in exchange for the opportunity to hold appreciating options on a tax advantaged basis. They are a key incentive for highly productive individuals.

There is a Significant Difference Between a Domestic Relations Order and a Qualified Domestic Relations Order.

Domestic Relations Order Defined:[11]

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).

Qualified Domestic Relations Order Defined:[12]

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...

Commentary:

It is to be understood that a Domestic Relations Order is an instrument of communication, it is not an opportunity to renegotiate a settlement. Practitioners must be vigilant to opportunistic individuals who in preparing a Domestic Relations Order disregard or reinterpret the provisions of the Property Settlement Agreement. Be prepared for this circumstance. It is suggested that counsel study and compare any proposed Order with the content of the underlying Property Settlement Agreement to confirm full document concurrence.

Comment:

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Departures from concurrence often arise as a result of imprecise language. To avoid such contests it is best to make a substantial effort to insert clear and unambiguous language into the Property Settlement Agreement. Clearly, in the heat of trial or the rigors of negotiation it is possible to falter. To avoid an unpleasantry, consider having your expert provide model language for possible settlement scenarios that might emerge. It is also important that your technical support person is available at this time (to the extent possible). It is unreasonable to conclude that every family attorney is a specialist not only on ERISA plans generally but on each unique ERISA plan. To the extent possible have a technical support person who is in possession of a relevant data base available.

#### Information That MUST Appear in a Domestic Relations Order.

the name and the last known mailing address of the participant and the name and mailing address of each alternate payee covered by the order,  
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,  
the number of payments or period to which such order applies,  
each plan to which such order applies.

#### Insertions into a Domestic Relations Order That Cause It To Be REJECTED.

requires a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

requires the plan to provide increased benefits (determined on the basis of actuarial value),  
requires 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.

As will be discussed in this Course, full compliance with the above guidance should be sufficient to cause your Domestic Relations Order to become a Qualified Domestic Relations Order. Unfortunately, there are intrusive Plan Administrators who attempt to exceed their REA authorized authority and cause unanticipated difficulties for the practitioner. In a separate section below this Course discusses "Dealing With Plan Administrators". Be Prepared for a Plan Administrator to attempt to exceed his or her authority.

#### Caution Regarding DISCOVERY.

The intent of the parties is to equitably ascertain and distribute the marital portion of the employee's retirement benefits (as property). Before this asset(s) can be assigned to a spouse it is fundamental that all retirement benefits of the parties are known and quantified. Hence, Discovery should be the initial step in this process. Absent comprehensive discovery there is no certainty that all of the benefits are known. As a practical matter, it is strongly suggested that

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practitioners be able to document their discovery efforts. There are moments when a participant may "forget" to reveal a significant retirement asset. Benefits not revealed may become a source of client discontent post-divorce when "bragging" discloses previously unknown assets.

Alert:

It is unwise to presume that each employer provides but one retirement plan to employees. Consider the following example as indicative of what could happen when the practitioner presumes but one pension for an employee. Illustrative of such failure are the Potential Retirement Benefits of an employee of the International Brotherhood of Electrical Workers (I.B.E.W.)

International Brotherhood of Electrical Workers Local Unions Savings and Security Plan  
Pension Benefit Fund (Washington D.C.)  
IBEW Local 3 White Plains Savings & Investment Plan.  
Joint Industry Board of the Electrical Industry Employees' Retirement Income Plan  
Joint Industry Board Employees' 401(k) Plan  
Pension Trust Fund of the Pension, Hospitalization and Benefit Plan of the Electrical Industry (Defined Benefit Plan)  
Annuity Plan of the Electrical Industry  
Deferred Salary Plan of the Electrical Industry  
Additional Security Benefits Plan of the Electrical Industry  
National Electrical Benefit Fund  
Health Reimbursement Account Plan of the Electrical Industry (Defined Contribution Plan)  
Not all members are in each of the above plans. The purpose of this enumeration of plans provided by the electrical industry is to alert the practitioner to make a well documented effort to perform comprehensive discovery in order to confirm the scope and worth of the employee's retirement entitlements. In this exercise it is suggested that the practitioner make an effort to use when possible an "employer or union specific" Interrogatory. If necessary seek this form from an experienced Pension Evaluation firm.

Recapitulation:

The first step in the QDRO process should be Discovery. It is imprudent to begin to develop a matter until there is reasonable certainty that you are in possession of the employee's total retirement benefits program. Discovery

should include any employers or unions in which the employee is a member (or had been a member). Part of the attorney's discovery effort should be a request for the Summary Plan Description (SPD) for each plan in which the employee participates. Not only will this SPD

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facilitate an Immediate Offset Pension Evaluation, additionally it will provide useful information if a decision is made to prepare a Domestic Relations Order. Regarding discovery, it is the attorney representing the alternate payee who is the burdened attorney as this attorney has greater exposure if discovery fails to reveal elements of the employee's retirement package that could have been uncovered by comprehensive discovery.

Commentary:

The experienced practitioner does not begin this exercise with any presumption as to what the "optimal" Settlement Mode is in the instant matter. It is suggested that any consideration of settlement mode be made subsequent to analysis of an Immediate Offset Pension Evaluation.

Immediate Offset Settlement Mode:

This is a calculation of the present cash value of the employee's benefit(s) as of a date certain. This determination of the marital component of the employee's benefit is generally made as of the jurisdiction's statutory end of marriage date (Benefit Determination Date). After the monthly marital benefit has been determined, this monthly marital benefit is then reduced to a present cash value. This calculation of present cash value is not performed as of the Benefit Determination Date. The calculation of present cash value of the marital monthly benefit is performed as of a date as close to current date as is possible (unless there is an agreement to use an alternate valuation date). Thus, there are two relevant dates for an Immediate Offset Pension Evaluation:

Date of Determination of the Marital Monthly Accrued Benefit  
Date of Determination of the present cash value of marital monthly benefit  
Federal Income Tax Alert:

It is to be noted that an Immediate Offset Pension Evaluation presents the "pre-distribution" present cash value of the marital portion of the benefit. Not incorporated into a pension evaluation report is any recognition of the fact that under this settlement mode the distribution to the alternate payee is pursuant to 26 U.S.C. 1041(a).[13]

In the section below titled:

Taxation of Distributions from a Qualified Defined Benefit Plan

This issue is discussed and a method to compute the federal income tax liability attributable to an Immediate Offset Pension Evaluation is suggested.

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## Deferred Distribution Settlement Mode:

The marital component of the employee's retirement benefit is to be distributed pursuant to the terms of a Domestic Relations Order that is intended to become a Qualified Domestic Relations Order upon review by the Plan's Administrator.

## Commentary:

The practitioner will note that in virtually all matters the purely mathematical result of a Deferred Distribution settlement favors an alternate payee. There may be other reasons for opting for this settlement format, but, the attorney representing an employee spouse should be clear that from a purely mathematical view, it is the alternate payee who is advantaged. This outcome is not applicable to Florida (if the Boyett format is followed [703 So. 2d 451]) or Texas (if the Berry format is followed [647 S.W.2d 945]).

## Drafting Process: Deferred Distribution Settlement.

The process to follow depends on the type of plan being considered. Recall there are two basic plan types:

Qualified Defined Benefit Plan

Qualified Defined Contribution Plan

The drafting process is unique as to language and format for each type.

## Drafting Process: Qualified Defined Benefit Plans.

There are two separate and distinct components to a Domestic Relations Order that must be addressed in a manner consistent with ERISA, REA, applicable state law and the intent of the parties. Failure of a draft to recognize these two components as separate benefits will be to the detriment of the practitioner and his or her client. Again, it is the attorney representing the alternate payee who will be the burdened attorney because failure to properly draft to recognize these two distinct entitlements is to the detriment of the alternate payee.

Component One: Annuity Benefits, i.e. upon retirement, monthly benefits payable over the lifetime of the retiree. This may be considered the "living benefits" component of your Order.

Component Two: Survivor Benefits, a benefit payable as a result of the death of the participant (prior to retirement) or retiree (subsequent to retirement).

## Additional Vocabulary:

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Accrued Benefit:

Defined Benefit Plan:[14]

the employee's accrued benefit determined under the plan and, except as permitted for actuarial adjustment, expressed in the form of an annual benefit commencing at normal retirement age

Defined Contribution Plan:[15]

in the case of a plan which is not a defined benefit plan, the balance of the employee's account

Annuity Starting Date: [16]

(i) the first day of the first period for which an amount is payable as an annuity, or

(ii) in the case of a benefit not payable in the form of an annuity, the first day on which all events have occurred which entitle the participant to such benefit.

Commentary: A common expression often used in place of the participant's Annuity Starting Date is: "Benefit Commencement Date".

Defined Benefit Plans: Expressing the Benefit to be Divided.

The experienced practitioner initially considers the Immediate Offset Settlement format prior to conclusion that the Deferred Distribution format is preferred in the instant matter. It is essential that the practitioner recognize that the benefit expressed for use in an Immediate Offset Pension Evaluation is not the benefit to be used for purposes of a Deferred Distribution Settlement. This caveat is principally directed to attorneys representing alternate payees. Other than in Florida and Texas, use of the benefit indicated in an Immediate Offset Pension Evaluation will be to the financial detriment of the alternate payee. Be clear on this distinction prior to electing a Deferred Distribution Settlement. It is to be noted that in Florida the "Boyett" formula is used.[17] This formula is significantly more restrictive than the Coverture Fraction used in 48 other states (Texas, has a similar formula). However, it is significant to note that the Florida Retirement System accepts Domestic Relations Orders using a "non-Boyett" formula award to an alternate payee.

Language to be Used to Express a Deferred Distribution Settlement's Benefit for Purposes of Drafting a Domestic Relations Order Regarding a Qualified Defined Benefit Plan.

In the great majority of Deferred Distribution Settlements the alternate payee will be entitled to

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receive his or her benefit at a future date. It thus becomes necessary to express this future benefit in a form that is acceptable to the parties, does not diminish the award to the alternate payee and is understood and can be implemented by Plan Administrators. This process is best achieved by use of a fraction which has two popular designations (identical meaning).

Coverture Fraction

Time Rule

Commentary:

This Course uses the term "Coverture Fraction".

It is essential to recognize that the benefit that will be assigned to the alternate payee is not currently determinable, as the participant has not yet retired. Since the practitioner is going to assign to the alternate payee a portion of a not currently determinable monthly benefit, it is necessary to craft a formula provision to instruct the Plan's Administrator as to the specifics of the benefit determination calculation. This calculation of the assignment of a benefit to an alternate payee is better understood by following this Step by Step process.

Step I.

The Plan's Administrator determines the actual benefit payable to the participant at the alternate payee's Annuity Starting Date.

Step II.

The Plan Administrator shall multiply the monthly benefit ascertained at Step I, by a fraction.

The numerator of the Coverture Fraction:

The total period of participant service beginning with the later of the parties date of marriage or the date the participant first earned credited service in this plan (you will insert this date) up to (insert either the jurisdiction's end of marriage date or an agreed upon date).

Note: Generally all of the factors for the numerator of the Coverture Fraction are known at the time of divorce, hence, it is suggested that a specific number be inserted, e.g. 13.9 years, 22.7 years.

The denominator of the Coverture Fraction:

The participant's period of participant service up to the alternate payee's Annuity Starting Date

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(generally but not always simultaneous with the participant's Annuity Starting Date).

The product (multiplication) of the Step II Coverture Fraction and the Step I, benefit is the marital part of the benefit.

Step III.

The product of the Step II calculation shall be multiplied by (generally 50% as this is often the portion of the marital benefit that is assigned to an alternate payee [this is suggested but subject to variation based on the circumstances of each matter]).

The product of this calculation is the monthly benefit to be paid to the alternate payee.

ALERT:

Federal, Military and many state Plans provide post-retirement COLA. If the subject plan has a post retirement COLA, then insert the following provision as Step IV.

Step IV.

The benefit awarded to this alternate payee shall be proportionately adjusted for all post-retirement COLA increases or adjustments.

CAUTION:

Defined Benefit Plan – Result of an Alternate Payee Moving His or Her Assigned Monthly Benefit to Pay Status, Prior to the Actual Retirement of the Participant.

A significant concern of the attorney representing the alternate payee is the danger inherent in seeking insertion of language into the Domestic Relations Order giving the alternate payee authority (discretion) to move her or his benefit to pay status at the sole discretion of this alternate payee (recall "no good deed goes unpunished"). To appreciate the magnitude of this danger and its adverse impact on an alternate payee when such discretionary authority is provided for in a Domestic Relations Order the practitioner should become familiar with the concept of Actuarial Equivalence and Early Retirement Reduction Factors.

Discussion:

Relevance of Actuarial Equivalence to Domestic Relations Orders.

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Actuarial Equivalence: Of equal value.

Early Retirement Reduction Factors: the reductions to a participant's benefit as a result of retirement prior to a participant's Normal Retirement Age as such age is defined in the Plan. Virtually all Qualified Defined Benefit Plans provide for "subsidized" early retirement. This means that the reduction to a member's early retirement benefit is less than a full actuarial reduction (based on the plan's actuarial factors). For example.

Fred and Alma Hadley divorce in 2010. At that time Fred was age 53 and Alma was age 51. Fred's plan permits early retirement at age 55. Alma's attorney, knowing Alma's financial needs, inserts into the Property Settlement Agreement and Domestic Relations Order that Alma's interest shall be treated as her "separate interest" (explained shortly) giving her sole discretion regarding the time to move her share of Fred's pension to pay status. Alma, with this right, in 2012 moves her benefit to pay status. She was encouraged in this action by her attorney.

Alma's attorney reasoned as follows:

Fred's Monthly Benefit Payable at age 65: \$3,600.00

Reduction Factor in Fred's plan: 2% for each year prior to age 65.

Total Reduction: (10 yrs X 2%): 20%

Resulting Monthly Benefit: \$2,880.00

Alma's Share of Monthly Benefit: 50%

Alma's attorney advised Alma will receive: \$1,440.00

Based on her attorney's advice and the language her attorney inserted into the Domestic Relations Order, Alma moved her pension benefit to pay status when Fred attained age 55. The plan accepted Alma's request and sent her first monthly check.

The monthly amount actually paid to Alma: \$630.00

Alma was devastated and contacted her attorney. Both then are advised of the difference between a subsidized and an actuarially equivalent monthly benefit.

It was also suggested that the parties revisit the applicable sections of the Retirement Equity Act.[18]

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Since, Fred had not attained his Normal Retirement Age the Plan was bound by the actuarial equivalence mandates of the Internal Revenue Code. The plan then provided Alma and her attorney with the following calculation.

Actuarial Reductions: 6.5% for each year prior to age 65.

Actuarial Reduction ten years: 65%

(ten years multiplied by 6.5%)

Fred's monthly benefit payable at his age 65: \$3,600.00

Alma's benefit prior to mandatory reduction: \$1,800.00

Alma's Benefit subsequent to mandatory reduction: \$630.00

$(\$1,800.00 \times .35 = \$630.00)$

Alma then contacted Listajo Pacaro the evil Pension Evaluator who advised Alma that the present cash value of her "loss" was \$157,590.40. This is likely to lead to an unpleasantry.

Form of Benefit Assigned to Alternate Payee.

The above discussion was based on an award to Alma of a "separate interest" in Fred's pension. There are two forms of assignment of a benefit to an alternate payee.

Separate Interest

Shared Payment

Separate Interest Benefit:

A specified or definitely determinable portion of the participant's pension is treated as the sole and separate property of the alternate payee. The death of the participant is without effect on the alternate payee's award. All payments to the alternate pay end with her or his death.

Caveat:

There will be further commentary on other traps that may exist in "separate interest" awards. These additional traps are discussed under the topic of survivor benefits.

Shared Payment Benefit:

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A monthly benefit payable to an alternate payee over the lifetime of the participant/retiree. Upon the death of the participant/retiree all payments to the alternate payee cease. This loss of benefits to the alternate payee is avoided by insertion into the Domestic Relations Order of an award to the alternate payee of a Joint and Survivor Annuity.

Caveat:

There will be further commentary on traps that may exist in "shared payment" awards. Discussed under the topic of survivor benefits.

Timing of Distributions to an Alternate Payee (Qualified Defined Benefit Plan).

As prior discussion indicates giving discretion to an alternate payee as to the timing of distributions can be inimical to the economic interests of an alternate payee. It is suggested that absent meaningful circumstances to the contrary the alternate payee's benefit should become payable upon the earlier of:

Participant's attaining Normal Retirement Age

Earliest age participant can begin to receive his or her benefit without actuarial penalty

Commentary.

The above suggestion regarding limiting the discretion of an alternate payee to move benefits to pay status must be qualified. Experienced preparers of Domestic Relations Order are aware of the fact that the above is a fine idea. However, there is a serious problem with the above suggestion. Plan Administrators are reluctant to accept a Domestic Relations Order that denies an alternate payee discretion as to her or his Annuity Starting Date. Nevertheless, it is worth asking a Plan Administrator if they will accept the limiting language suggested. If the Plan Administrator refuses then it is again strongly suggested that the attorney representing the alternate payee can fully document her or his efforts to alert and inform the alternate payee of the dangers inherent in early commencement of their benefit.

Commentary:

This timing is limited to distributions from a Qualified Defined Benefit Plan. Different timing will be suggested for distributions from Qualified Defined Contribution Plans.

Alert:

Although this Program urges the attorney representing the alternate payee to avoid permitting an alternate payee to move her benefit to pay status prior to the earlier of the participant's attaining

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Normal Retirement Age or actual retirement, virtually all plans will give an alternate payee full discretion as to his or her Annuity Starting Date. It is for this reason that the attorney representing the alternate payee have documentation in his or her file clearly explaining the dangers inherent in such "premature" action by an alternate payee.

Form of Distribution to an alternate payee.

The normal form of distribution to an unmarried retiree: "single life annuity".

Single Life Annuity: also termed "life annuity". A series of payments, generally monthly over the lifetime of the retiree. Upon the death of the retiree all payments cease.

The normal form of distribution to a married retiree: "Joint and Survivor Annuity.[19]

Defined:

an annuity—

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

Optional Forms of Retirement Benefits (Qualified Defined Benefit Plan).

These optional forms are generally termed "period certain" annuities since they are guaranteed for the greater of the guaranteed period or the lifetime of the annuitant. In the following examples the term "C&C" means "continuous and certain". For example:

10 C&C: A monthly annuity payable for the greater of 120 months or the life of the retiree. If the retiree dies prior to receipt of 120 monthly annuity payments the unpaid balance is paid in either lump sum (commuted value) or the balance of the monthly guarantee period.

Pop-Up Annuity. This is a Joint and Survivor Annuity with a special feature. If the alternate payee dies during the "payout period", the annuity will pop-up to an amount almost equal to that which would have been paid under a single life annuity. This is a feature that is most likely to be found in some city and state plans, e.g. New York City and State and State of New Jersey.

Caution:

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Regarding the Form of Distribution to an alternate payee; The following indicates Language Not To Be Inserted Into A Domestic Relations Order.

When crafting the form of distribution to an alternate payee the practitioner is urged to be mindful of ERISA's statutory prohibitions.[20] You may not insert into a Domestic Relations Order language providing for a form of distribution to an alternate payee that is not available to a participant pursuant to the plan. Hence, the following formats are to be avoided as there are no known Qualified Defined Benefit Plan that offer such forms of distribution to participants.

The alternate payee shall be paid \$700.00 each month for a period of seventy-two months. The alternate payee shall be paid \$84,000.00 over the five year period beginning with the participant's retirement.

When composing language for your Property Settlement Agreement and Domestic Relations Order confirm with your pension expert that the distribution format is consistent with the subject plan's provisions.

## NEGOTIATION AND DRAFTING AWARDS OF SURVIVOR ANNUITY BENEFITS TO AN ALTERNATE PAYEE.

Definitions:

Qualified Pre-Retirement Survivor Annuity (QPSA)[21]

Qualified Joint and Survivor Annuity [22]

Survivor Language Depends on the Form of Award to the Alternate Payee.

Recall there are two separate and distinct forms:

Separate Interest

Shared Payment

Separate Interest Language.

Recall that pursuant to assignment to an alternate payee of a separate interest in a Qualified Defined Benefit Plan, that the interest assigned to this alternate payee, becomes his or her "sole and separate" property. Nevertheless, the experienced practitioner understands that it remains necessary to present the following question to the Plan's Administrator:

At what point is this "sole and separate" interest of an alternate payee perfected?

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It is unwise to presume that this property interest of an alternate payee is perfected upon qualification of the Domestic Relations Order. In the majority of matters this is a flawed presumption that is at variance with the position of most ERISA Plan Administrators. The majority of Plan Administrators treat the administration of a QDRO with the view that the "sole and separate" interest of an alternate payee begins upon the commencement of the alternate payee's benefit payments. Should the participant die prior to the earlier of either the participant's or the alternate payee's Annuity Starting Date the result is the end of the "sole and separate interest" of the alternate payee. What is virtually certain is that any expectancy of the alternate payee and those depending upon him or her will not be met. The "property interest of the alternate payee" is extinguished.

#### Commentary:

Absence of recognition of this "evaporation" potential by an attorney representing the alternate payee can lead to an unpleasantness. It will be difficult for an alternate payee to grasp that his or her "sole and separate" interest has evaporated. This again, is a moment when clients turn to the evil pension evaluator Listajo Pacaro to quantify their "loss".

To avoid this circumstance it is suggested that the attorney representing the alternate payee:

Confirm that the "sole and separate" interest is perfected upon qualification of the Domestic Relations Order

If, as is probable, the Order is not perfected upon Qualification, then the attorney representing the alternate payee is to provide to the alternate payee, in addition to the "sole and separate" interest a Preretirement Survivor Annuity that insulates this spouse from loss of entitlement as a result of the death of the participant prior to either parties Annuity Starting Date.

Absent insertion of this additional language in your Property Settlement Agreement and Domestic Relations Order the alternate payee will experience a loss of a valuable asset if the QPSA is not integral to your "separate interest" QDRO.

#### Summary:

A properly crafted Separate Interest Domestic Relations Order does not require any post-retirement Joint and Survivor Annuity language, other than the above caveat regarding the Qualified Preretirement Survivor Annuity.

When an attorney representing an employee spouse in a true separate interest Qualified Domestic Relations Order, also permits in addition, a post-retirement Joint and Survivor Annuity the alternate payee will enjoy a "double-dip". Upon the death of the retiree the alternate payee will continue with his or her separate interest benefit, but, in addition will also be paid all or part of

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the retiree's survivor benefit (on her or his remaining benefit). It is suggested that the attorney representing an employee spouse confirm that this "double-dip" language is not present in the Property Settlement Agreement or ensuing Domestic Relations Order.

### Shared Payment Domestic Relations Orders

Unlike separate interest Orders, Shared Payment awards to an alternate payee require the formal insertion into the Domestic Relations Order of clear language which can be understood by the Plan's Administrator to provide to the alternate payee a definable Joint and Survivor Annuity. Central to this process is an early determination as to which spouse will assume the cost of the Joint and Survivor Annuity.

Joint and Survivor Annuities are Expensive. Which Spouse Pays This Cost?

Prior to discussion of this issue, recall the definition of "actuarial equivalence"

### Of Equal Value

This knowledge will be useful in the discussion that follows. The cost of a survivor annuity is expressed as a reduction to the member's Single Life Annuity. All other forms of retirement annuities must be actuarially equivalent to a Single Life Annuity. This is accomplished by reducing the benefit.

For example.

Assume a monthly Single Life Annuity benefit is: \$2,500.00

An actuarially equivalent Joint and 50% Survivor Annuity: \$2,350.00

In this illustration the "cost" of the Joint and 50% Survivor Annuity is expressed as a six percent (6%) reduction to the monthly benefit. The greater the age disparity between the participant and the alternate payee (assumed younger spouse) the greater the "cost". It is a statistical certainty that the younger the alternate payee the longer his or her potential payout (life expectancy), thus, the greater cost. Thus, the above Joint and 50% Survivor Annuity is of equal value to the participant's Single Life Annuity.

At this point it should be clear that a survivor benefit award to an alternate payee has a cost. This cost is expressed as a reduction to the benefit to be paid to both spouses. In the following illustration and explanation the full benefit is shown as marital. Understandably this is not often the case, however, our intent is to illustrate a concept and not immerse the practitioner in

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mathematics overload. For the math in cases in which the total retirement benefit is not marital, consult your pension expert for the necessary calculations. In many cases calculations can be avoided by use of language suggested in this discussion.

Explanation of Benefit Reduction to Both Spouses.

Assume monthly benefit is fully marital: \$3,600.00

Reduction for Joint and 50% Survivor Annuity: 8%

Resulting divisible monthly benefit: \$3,312.00

Monthly reduction from Single Life Annuity: \$288.00

Argument of Participant's Attorney (The burden should follow the benefit).

The Joint and 50% Survivor Annuity is solely for the advantage of the alternate payee. Thus, the alternate payee should pay the full cost and the alternate payee's benefit reduced accordingly.

Benefit Allocation:

Mo. Benefit Single Life Annuity: \$3,600.00

Participant's benefit: \$1,800.00

Alternate Payee's benefit: \$1,512.00

Total Monthly Payout: \$3,312.00

Argument of Alternate Payee's Attorney:

The cost of the Joint and 50% Survivor Annuity is to be proportionately allocated between the spouses.

Benefit Allocation:

Resulting divisible monthly benefit: \$3,312.00

Participant's benefit: \$1,656.00

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Alternate Payee's benefit: \$1,656.00

Total Monthly Payout: \$3,312.00

This Course takes no position on this issue, as our purpose is to inform and educate not advocate. It is essential that counsel be aware of the impact of the differences in "cost" allocations on the respective spouses. After divorce, chatter can be inimical to practitioners. It is suggested especially to the attorney representing an employee spouse that the allocation of Joint and Survivor Annuity costs be made clear in writing to the participant.

Alert:

Regarding this issue of the allocation of the costs of a survivor award to an alternate payee it is to be noted that unfortunately, most Qualified Defined Benefit Plans are not willing to allocate the costs of the Survivor Benefit only to the alternate payee. The standard procedure of Plan Administrators is to proportionately allocate this cost. If negotiations on this "cost" begin early in the matter there is a higher probability of success. However, to prevail, it is generally necessary to present calculations in support of this argument. If a true Coverture Fraction is used to allocate the benefits from a Qualified Defined Benefit Plan this negotiation becomes more difficult since the actual retirement benefit is not ascertainable (at the time of divorce). This statistic can be "imputed" but is difficult and to some extent speculative. It remains, that in particular, the attorney representing an employee spouse must be mindful of client discontent when the impact of proportionate allocation of the costs benefit becomes known.

Taxation of Distributions from a Qualified Defined Benefit Plan.[23]

The great majority of Defined Benefit Plans do not provide a Lump Sum Option. The normal form of distribution to a retiree or alternate payee is an annuity. The person to be taxed is generally the "deemed distributee". If the alternate payee qualifies as a deemed distributee then the tax consequence will be attributed to the alternate payee.

Caution:

If the deemed distributee is not a spouse or former spouse alternate payee, then the tax consequence will be attributed to the retiree. Thus, if the Domestic Relations Order calls for payments to another eligible alternate payee other than the spouse or former spouse, such as the participant's child or other dependent of the participant, the tax will be attributed to the retiree.[24]

Recognition of Federal Income Tax Consequences Attributable to an Immediate Offset Pension

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## Evaluation.

The federal income tax consequences of a Deferred Distribution Settlement are not complex as each spouse will be directly taxed on the amounts of annuity distributed to each spouse. However, there are times when the settlement mode is Immediate Offset. The experienced practitioner remains aware of the fact that although there will not be an immediate federal income tax liability there will without question be a tax liability beginning on the employee's Annuity Starting Date. In this scenario it is the attorney representing an employee spouse that is the burdened attorney. To briefly illustrate this tax consequence issue consider the following.

Lilly and Herman Nadel divorce when Herman is age 51. At the time of divorce the marital part of Herman's monthly accrued benefit was \$3,900.00. The present cash value of Herman's Qualified Defined Benefit Plan was agreed to be \$211,500.00. It was further agreed that Lilly was entitled to half of this asset or \$105,750.00.

To satisfy Lilly's interest in Herman's pension, Lilly was assigned full possession of the marital home and Herman kept his entire pension.

Pursuant to 26 U.S.C. 1041(a), this transfer to Lilly of full ownership of the marital home was "tax free". However, what Herman's attorney did not argue was that the present cash value of the marital part of the pension did not recognize the fact that when Herman began to receive that portion waived by Lilly it would be fully taxable to him. Failure to recognize the eventual federal income tax resulting from an Immediate Offset Settlement is to the detriment of the employee spouse. For this reason this Course emphasizes the fact that consideration should be given at the outset of negotiations to the tax cost to the employee spouse of a "tax free" 1041 transfer to the alternate payee in return for this spouse's waiver of pension benefits. To compute this tax cost to the employee/retiree the attorney representing an employee spouse should compute the present cash value of the "tax stream" resulting from the waived annuity portion of the alternate payee. This present value should then offset the "pre-distribution" present cash value of the marital pension.

### Calculation Alert:

The greater the time between divorce and retirement the less the worth of the offsetting tax consequence. Regardless, this is a sum that at the least should be recognized in negotiations.

### Reversionary Interests (Qualified Defined Benefit Plans).

The issue for the family practitioner to consider is:

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What happens to the award to an alternate payee if she or he dies:

Prior to the retirement of the employee

Subsequent to the retirement of the employee

Death of an Alternate Payee Prior to the Retirement of the Employee BUT Subsequent to the Alternate Payee's Benefit Being In Pay Status.

Clearly, this can only happen when the award to the alternate payee is "separate interest". Under this scenario the death of the alternate payee extinguishes that portion of the benefit. There can be no reversion.

Separate Interest and the alternate payee dies prior to either spouse's retirement. The most probable result is a reversion of the alternate payee's award to the employee. Hence, those dependent on this alternate payee for future sustenance will be without such support.

Shared Payment and the alternate payee dies prior to the retirement of the employee. In this scenario the benefit will revert to the employee. This reversion can be avoided by drafting into the Property Settlement Agreement a provision for a "successor alternate payee". Upon the death of the initial alternate payee the successor alternate becomes the primary alternate payee. Attorneys representing employee spouses should be reluctant to accept a "successor alternate payee" provision as the tax consequence on distributions to other than a former spouse alternate payee will fall on the employee.

Shared Payment and the alternate payee dies subsequent to the retirement of the employee. The award to the decedent alternate payee reverts to the employee. In this scenario, the probability of a Plan Administrator accepting successor alternate language is remote.

## QUALIFIED DEFINED CONTRIBUTION PLANS

Drafting Process: Qualified Defined Contribution Plans.

With Defined Contribution Plans the focus is not a participant's monthly accrued benefit. For Defined Contribution Plans the focus is the participant's "Individual Account Balance". The term "Individual" is misleading. For all but the smallest Defined Contribution Plans, the form of funding is "aggregate". The individual participant's account is actually part of a "common" or "pooled" account in which the plan "separately accounts for" each participant's share in the aggregate assets of the Plan. The Plan provides participants with a "statement of account" not less frequently than annually. However, many plans provide detailed quarterly statements. A detailed statement should indicate the following information:

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Balance as of first day of accounting period  
Balance as of last day of accounting period  
Employee Contributions for accounting period  
Employer Contributions for accounting period  
Gain or Loss for accounting period  
Expenses charged against account for period  
Loans or withdrawals for accounting period  
Outstanding loans  
Amount of outstanding loan repaid for accounting period  
Investment portfolio held for accounting period  
Absent this information for each relevant period for which calculations are required it will be difficult to perform the "equalization" of benefits found in many settlements of Defined Contribution Plans.

Alert:

The practitioner is cautioned when interpreting a participant's "account balance statement". What must be ascertained is considerably more than the participant's account balance as of a current or recent date. In particular the attorney representing the alternate payee must confirm the existence of loans or any other action of the participant that resulted in a dilution of the participant's account.

Starting Information: The practitioner is likely to be in possession of the participant's most recent Individual Account Balance Statement. Unfortunately, a current account balance statement is in most cases insufficient to ascertain the marital portion of the participant's account balance due to pre-marital accumulations. Frequently, the periods of plan participation and marriage are not contemporaneous. Because of this difference, calculation problems, drafting problems and most likely unanticipated attorney time and expense emerge. To perform "equalization" calculations or to compute the marital portion of a Defined Contribution Plan(s) asset is likely to require more statistical data than is available (or even exists).[25] A costly and time consuming challenge emerges when practitioners attempt to craft a settlement without a clear understanding of the statistical data essential for mathematically valid calculations. Experience dictates that presumptions of data availability are rarely realized. A premature presumption of data availability can tilt the practitioner toward mathematically invalid alternatives. It is strongly suggested that you confirm and validate that all of the data required to implement the terms of your agreement is available and in readable form.

Practice Aid: Attorney calculations should be finalized and agreed upon, prior to inserting allocation of benefits language into a Property Settlement Agreement.

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Contrary to the prevailing view, when dates of plan participation are not contemporaneous with the marital period, it becomes a challenge to craft a Domestic Relations Order for a Qualified Defined Contribution Plan which accurately expresses the assets of each spouse. Defined Contribution Calculation Issues are exacerbated in the following circumstances.

There are significant pre-marital accruals of assets

There is more than one plan with pre-marital accruals of assets

The initial plan was terminated and the balance "rolled" into a new plan

A "traditional" Defined Benefit was converted into a Cash Balance Account Plan[26]

There is an attempt to "equalize" the assets of the parties combined Defined Contribution Plans and Defined Benefit Plans and give effect to this settlement with one Domestic Relations Order

The form of the Plan changed. A prior Qualified Defined Benefit Plan was terminated and the employee's interest was converted to a lump sum amount and this sum was then "transferred" to a Qualified Defined Contribution Plan

Caveat:

Many Plans are not willing to make calculations. Further complicating the calculation request is the fact that plans change "record keepers". There is no assurance that the records of an earlier record keeper are available to subsequent record keepers. Hence, language akin to the following is to be avoided unless you or your expert has confirmed that the relevant Plan Administrator is able and "willing" to make the requested calculations.

The plan will determine participant's account balance as of June 16, 2006. Half of this account balance is to be the property interest of the alternate payee and separately accounted for. From the settlement date up to the date of distribution, the alternate payee's account balance is to be adjusted for gains and losses.

Language for the Property Settlement Agreement.

The attorney representing the alternate payee will insert into her or his Property Settlement Agreement one or more of the following assignment of benefits provisions:

Award of a stated percentage of the account as of a date certain

Award of a dollar amount as of a date certain

Adjustment of award for "investment results" (gains or losses)

Award to the alternate payee of a death benefit in an amount equal to the alternate payee's accumulated account balance on the participant's date of death

Caution.

An award as of a date certain, thereafter adjusted for investment results up to the date of

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distribution to the alternate payee may produce a greater or lesser value than the initial award to an alternate payee. The expectancy of the alternate payee is for a greater sum. However, positive investment returns are not a guarantee, hence, it is suggested that the attorney representing the alternate payee make this possible outcome clear in a writing to her or his client.

#### Practice Aid:

At an early stage of the action when it has been determined that at least one Individual Account Balance Plan exists and to avoid "surprise", it is suggested that the attorney representing the alternate payee formally advise the Plan of the pending assignment of benefits from this plan to an alternate payee and request that the plan "freeze" the participant's account for XX days so that a Domestic Relations Order may be presented to the plan. A written reply to this "advisory" is necessary to insulate counsel from a subsequent challenge.

#### Timing of Distributions to an Alternate Payee.

Technically, a plan may not make a distribution to an alternate payee prior to the participant's attaining his or her earliest retirement age.[27] Based on the statute payment to an alternate payee incident to a Qualified Domestic Relations Order may be made upon 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.

However, it is useful to note that many plans will in fact make a distribution pursuant to a Domestic Relations Order upon Qualification of the Order, without reference to the above citation. It is suggested that counsel interrogate the plan as to their position regarding timing of distributions to an alternate payee.

#### Caution.

Prior to assigning a stated dollar amount to an alternate payee it is suggested that the attorney representing the alternate payee confirm that the amounts intended to be assigned to the alternate payee are in fact available from the plan. Be aware that some plans when stating the participant's "current balance" do not subtract loans. Rather loans are treated as a plan asset. It is best to

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examine the participant's most recent statement and then reconfirm that there has been no dilution from this stated amount.

#### Domestic Relations Orders - Qualified Defined Contribution Plans - Death Benefits.

Qualified Defined Contribution Plans protect the participant's accumulated account balance from extinction as a result of the participant's death by means of death benefits rather than survivor annuities. The death benefit payable as a result of the death of the participant in a Qualified Defined Contribution Plan is the participant's "vested" account balance as of the date of the participant's death.[28] A survivor annuity may be obtained, but, in the overwhelming majority of cases the normal form of distribution as a result of the death of the participant is a Single Lump Sum to the indicated beneficiary(s). The controlling document to determine who is the beneficiary is the beneficiary designation on file with the Plan Administrator on the date of the employee's death.

Caveat:

Be mindful of Federal Preemption Statutes.

Failure to understand the impact of federal preemption statutes can operate to the detriment of the family practitioner. ERISA preemption is well settled law. [29]

Consider the Following Scenario.

At the time of divorce the alternate payee waived his or her right to any death benefit from the subject Qualified Defined Contribution Plan. This waiver was incorporated into the Final Judgment of Dissolution of Marriage. Subsequent to the divorce the participant remarries (Wife two) and while still employed dies (after more than one year of marriage to Wife two). Wife two applies for the death benefit. Unfortunately, Wife two, is advised that this substantial sum is to be paid to the prior wife of the decedent as she was not removed as the designated beneficiary by the decedent at the time of his divorce.

Wife Two argues that the language of the waiver in the Final Judgment of Dissolution of Marriage controls. Wife One argues that the decedent's beneficiary designation controls.

Which document controls? [30]

The waiver in the Final Judgment of Dissolution of Marriage  
The beneficiary designation on file with the Plan Administrator  
No Contest! The plan beneficiary designation prevails. Federal law will preempt state law on this

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issue and the controlling document will be the beneficiary designation not the waiver in the Final Judgment of Dissolution of Marriage.

Practice Aid.

As a precaution it is suggested that the attorney representing an employee spouse routinely confirm that upon divorce the participant has harmonized the beneficiary designation with his or her new life.

Dealing With Plan Administrators.

It is suggested that family practitioners read *Blue v. UAL Corporation*, U. S. Ct of App., 7th Cir., 160 F.3d 383. In relevant part this court opined as follows:

...ERISA's allocation of functions--in which state courts apply state law to the facts, and pension plans determine whether the resulting orders adequately identify the payee and fall within the limits of benefits available under the plan--is eminently sensible. Pension plan administrators are not lawyers, let alone judges, and the spectacle of administrators second-guessing state judges' decisions under state law would be repellent...

Family practitioners are advantaged when they become aware of the limits of a Plan Administrator's authority. Absence of such awareness by family practitioners may account for instances when Plan Administrators exceed the scope of their ERISA authority. On these occasions, it is essential that attorneys challenge the Administrator. It is helpful if the practitioner is clear that the function of the Plan Administrator is to review your Domestic Relations Order to determine if it is in compliance with 29 U.S.C. 1056(d)(3)(C). To be in compliance the Domestic Relations Order must clearly provide the following information:

The name and the last known mailing address of the participant  
The name and mailing address of each alternate payee covered by the order,  
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  
The number of payments or period to which such order applies, and  
The precise name of the plan to which the Domestic Relations Order applies  
Additionally, to be in compliance a Domestic Relations Order must observe these "do not insert" items:

Do not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan

Do not require the plan to provide increased benefits (determined on the basis of actuarial value)

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Do 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

Any review by a Plan Administrator that bases rejection of a Domestic Relations Order on other than the above criteria is to be challenged. Moreover, assuming the rejection is predicated on one or more of the above criteria, the experienced practitioner will examine the content of the rejection letter to confirm its validity. At all times the practitioner should be prepared to use both ERISA and REA to her or his advantage.

Final note: This Short Course is relevant to Qualified Defined Benefit Plans and Qualified Defined Contribution Plans. It is suggested that you apply the contents of this Course with care to other Retirement Systems.

[1] Signed August 23, 1983. Effective date for most existing Qualified Plans, January 1, 1985

[2] Public Law 98-397

[3] 26 U.S.C. 401(a) contained at the time of this writing 37 separate sections covering the broad issue of "Requirements for qualification". It is useful reading for those seeking greater insight into the mechanics of "Qualified" Plans.

[4] Alternate Payee, 26 USC 414(p)(8), defined: any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

[5] See generally 26 USC 414(p).

[6] The reader is cautioned on the use of the term "alternate payee". This term is limited to ERISA plans and should be avoided for Federal and Military Domestic Relations Orders. In such Orders the preferred term is "former spouse".

[7] However, see ERISA "preemption" statute: 29 USC 1144. When a conflict exists between state law and ERISA, ERISA shall prevail.

[8] ERISA.

P.L. 93-406, 88 Stat. 829 (Sept. 2, 1974). ERISA is codified at §§1001 to 1453 of title 29, United States Code and in §§ 401-415 and 4972-4975 of the Internal Revenue Code.

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The Employee Retirement Income Security Act of 1974, designed to protect the assets of employee plans so that promised funds will be available when an employee retires. Toward this end minimum standards have been established for pension plans in private industry. Additionally ERISA seeks to do the following:

Requires plans to provide participants with information about the plan, e.g. key plan features and plan funding

Establishes minimum standards for participation, vesting, benefit accrual and funding.

Establishes increasingly complex and detailed funding rules so that plans remain "actuarially sound".

Provides participants and to some extent beneficiaries with the right to sue for benefits and breaches of fiduciary duty.

Through the Pension Benefit Guaranty Corporation to some extent guarantees payment of certain benefits if a defined plan is terminated.

[9] For a Qualified Defined Benefit Plan 26 USC 415(b)(1)(A)

For a Qualified Defined Contribution Plan 26 USC 415 (c)(1)(A)

[10] For greater detail reference: 26 USC 421 (general rules), §421 (Incentive Stock Options), §422 (Employee Stock Purchase Plans, §424 (Definitions and Special Rules)

[11] See 26 USC 414(p)(1)(B)

[12] See 26 USC 414(p)(1)(A)

[13] This section provides as follows.

Transfers of property between spouses or incident to divorce

(a) General rule

No gain or loss shall be recognized on a transfer of property from an individual to (or in trust for the benefit of)—

(1) a spouse, or

(2) a former spouse, but only if the transfer is incident to the divorce.

[14] 26 U.S.C. 411(a)(7)(A)(i)

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[15] 26 U.S.C. 411(a)(7)(A)(ii)

[16] 26 U.S.C. 417(f)

[17] 703 So. 2d 451

[18] 26 U.S.C. 414(p)(3)(B), which provides that a Domestic Relations Order may:

...not require the plan to provide increased benefits (determined on the basis of actuarial value)...

[19] 26 U.S.C. 417(b).

[20] 26 U.S.C. 414(p)(3)(A)

[21] 26 U.S.C. 417(c).

a survivor annuity for the life of the surviving spouse of the participant if—

(A) the payments to the surviving spouse under such annuity are not less than the amounts which would be payable as a survivor annuity under the qualified joint and survivor annuity under the plan (or the actuarial equivalent thereof) if—

(i) in the case of a participant who dies after the date on which the participant attained the earliest retirement age, such participant had retired with an immediate qualified joint and survivor annuity on the day before the participant's date of death, or

(ii) in the case of a participant who dies on or before the date on which the participant would have attained the earliest retirement age, such participant had—

(I) separated from service on the date of death,

(II) survived to the earliest retirement age,

(III) retired with an immediate qualified joint and survivor annuity at the earliest retirement age, and

(IV) died on the day after the day on which such participant would have attained the earliest retirement age, and

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(B) under the plan, the earliest period for which the surviving spouse may receive a payment under such annuity is not later than the month in which the participant would have attained the earliest retirement age under the plan.

[22] 26 U.S.C. 417(b)

an annuity—

(1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (and is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and the spouse, and

(2) which is the actuarial equivalent of a single annuity for the life of the participant.

[23] See generally 26 U.S.C. 402.

[24] ...an alternate payee who is the spouse or former spouse of the participant shall be treated as the distributee of any distribution or payment made to the alternate payee under a qualified domestic relations order...

[25] Many Plans, aware of the costs of storage do not retain account performance data for an extended period. Increasingly, data going back more than five years is becoming scarce as firms are simply trashing this data. It is the view of the Plan that the maintenance of personal records is the obligation of the employee.

[26] Technically, a Cash Balance Account Plan is a Qualified Defined Benefit Plan, however, it has all of the indicia of a Defined Contribution Plan.

[27] See 26 U.S.C. 414(p)(4)(B).

[28] 26 U.S.C. 411(a)(2)(B).

Vesting Option One:

(ii) 3-year vesting A plan satisfies the requirements of this clause if an employee who has completed at least 3 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

Vesting Option Two:

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(iii) 2 to 6 year vesting A plan satisfies the requirements of this clause if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

The nonforfeitable Schedule for Option Two:

Years of service Percent Vested

2 20%

3 40%

4 60%

5 80%

6 100%

[29] See 29 U.S.C. 1144(a). This reads in relevant part;

Except as provided in subsection (b) of this section, the provisions of this subchapter... shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

[30] See Kennedy v. DuPont: 555 U.S. 285

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