

The Utilitarian QDRO: An Important But Underused Collection Vehicle

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December 1999

Matrimonial practitioners are familiar with qualified domestic relations orders (QDROs) as vehicles for dividing up spousal interests in qualified pension and profit-sharing plans. For many divorcing couples, such retirement or deferred-income caches will be their most significant assets to divide, aside from the marital home. However, many divorce lawyers do not realize that QDROs can have other important functions such as: the enforcement of spousal maintenance and child support obligations, the recovery of arrearages related to such obligations and the recovery of litigation expenses incurred in the enforcement of such obligations.

Prior to the addition of the QDRO provisions to the Employee Retirement Income Security Act (ERISA) in the Retirement Equity Act of 1984, garnishment and execution orders could issue against interests in retirement plans to enforce support and maintenance obligations in New York pursuant to Civil Practice Law and Rules (CPLR) §§ 5241 and 5242. See *Cody v. Riecker*, 594 F.2d 314 (2d Cir. 1979). After the QDRO provisions were added to ERISA, however, all enforcement measures against plan interests under those CPLR sections were changed so that enforcement could only occur in compliance with and under the QDRO provisions. See *Arnold v.*

Arnold, 154, Misc. 2d 715, 586 N.Y.S.2d 449 (Sup. Ct. Onondaga Cty. 1992).

In enacting the QDRO provisions, it appears that Congress did not intend to narrowly limit the items that could be recovered from a defendant spouse's plan interest. Thus, ERISA § 206(d)(3)(B)(ii), 29 U.S.C. § 1056(d)(3)(B)(ii), broadly provides that a QDRO is any "judgment, decree, or order . . . which relates to a spouse, former spouse, child or other dependent of a participant, and . . . is made pursuant to a State domestic relations law . . ." While many practitioners may be under a misconception that a QDRO is available only to divide an asset (i.e., a pension), it can also effectively be employed in a matrimonial action, pendente lite or post-judgment, to enforce any order relating to child support, maintenance or other property divisions.

For instance, when a spouse has defaulted on his or her support obligations, a QDRO can be obtained under CPLR §§ 5241 or 5242 in lieu of an execution or income deduction order, which would be ineffective against a plan. *Keegan v. Keegan*, 204 A.D.2d 606, 612 N.Y.S.2d 187 (2d Dep't 1994); see also *Graves v. Graves*, 177 Misc. 2d 358, 675 N.Y.S.2d 843 (Sup. Ct. Richmond Cty. 1998). The QDRO may also cover obligations arising under interim awards of

maintenance and support, as well as obligations under final divorce decrees or settlement agreements. *Renner v. Blatte*, 170 Misc. 2d 579, 650 N.Y.S.2d. 943, (Sup. Ct. NY Cty. 1996). The courts have even been willing to include in a QDRO an amount as security for future payment obligations. *Id.*

QDROs may also issue to recover support or maintenance obligation arrearage and interest award thereon that have been reduced to judgments. *Bumstead v. Raisbeck*, 230 A.D.2d 759, 646 N.Y.S. 2d 368 (2d Dep't 1996). The support and maintenance arrearages that can be so collected may be longstanding, as was the case in *Bumstead*. There, the Second Department approved the issuance of a QDRO to collect a money judgment for child support arrearages, even though the QDRO was to be issued at a time when the children were already emancipated and, presumably, the spouse's obligation for support had ceased. *Id.*

A QDRO can even be used to recover collection expenses of a spouse. As already noted, ERISA, by its terms, requires only that a QDRO "relate" to support or maintenance obligations or marital property divisions. In a number of cases, the courts have approved QDROs as collection vehicles for money judgments that a spouse or a former

spouse has obtained for attorney fees incurred in seeking to collect arrearages. *Adler v. Adler*, 224 A.D. 2d 282, 638 N.Y.S.2d 29 (1st Dep't 1996); *Renner v. Blatte*, 170 Misc. 2d 579, 650 N.Y.S.2d 943, (Sup. Ct NY Cty. 1996). It appears that a spouse's expenses for expert witnesses may also be recovered in this manner.

Practitioners should note in drafting and preparing a QDRO, that a QDRO may only issue in favor of a spouse or former spouse. Thus, an attorney will not be able to recover his or her fees directly from a defendant's plan interest, since a QDRO may be payable only to a narrowly defined class of individuals—essentially former spouses and dependents. See *Johnson v. Johnson*, 320 N.J. Super. 371, 727 A. 2d 473 (Super. Ct. App. Div. 1999).

Consider, for example, the following scenario:

- If a QDRO is effectively obtained and enforced to satisfy the pendente lite support obligations of a spouse, and the asset (i.e., pension or profit-sharing plan) is to be divided later at trial, is the nontitled spouse entitled to a credit against that portion of the pendente lite QDRO necessitated by the titled spouse's refusal to pay his or her pendente lite obligations?

In this connection, a trial court recently approved a QDRO to enforce a pendente lite support obligation, but stated that the money to be distributed should be charged against the participant's interest in the plan. *Renner v. Blatte*, *supra*. This holding is certainly useful where recourse to a QDRO is had to collect provisional maintenance or support obligations before final division of marital property takes place. However, it also suggests that the converse should be true, i.e., that QDROs can issue to collect post-divorce support or maintenance obligations arising after the plan interest has been divid-

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ed as marital property. Perhaps the subsequent QDRO may even apply to benefits that accrued after the marriage has terminated. We must await additional case law for further guidance.

In any event, practitioners should not disregard a defendant's interest in his plan merely because the client has already obtained a QDRO to recover a portion of the plan interest as marital property. One caveat: How such an approach will fare is uncertain if the divorce decree or settlement agreement includes a full waiver of rights by a former spouse against a participant's plan interests.

Another consideration when a QDRO is used to recover support, maintenance or litigation expenses is that the distribution from a plan in satisfaction of a QDRO may be taxable to the recipient, even if a direct payment of such items by the defendant would not be. At least one court has recognized this problem and has ordered that the QDRO be “grossed up” to reflect the income tax which would be paid upon receipt of a payment by the former spouse thereunder. *Renner v. Blatte*, *supra*. While QDROs are probably more useful than is commonly thought, they are not always ideal. The practitioner who seeks to use a QDRO as a collection vehicle must bear in mind that the client may, in fact, have to wait a considerable length of time before an actual recovery of money through the aegis of a QDRO comes to fruition. This is because a QDRO cannot require a qualified plan to distribute funds at a time earlier than mandated under the plan document.

Under most defined benefit plans (i.e., traditional pension plans), benefits do not manifest until the participant has attained a stated retirement age. Most defined contribution plans (e.g., profit-sharing or 401(k) plans) do not provide for benefits until the participant's termination of employment. However, some defined contribution plans may provide for earlier payments to former spouses pursuant to a QDRO by treating the spouse as, in essence, a terminated employee. Therefore, a practitioner should always review a plan to ascertain whether the service of an enforcement QDRO may result in an immediate payment or whether payment will only be forthcoming sometime in the future based on the plan's original definition of retirement.

The precise parameters of these techniques have not yet been articulated by the courts. Nevertheless, alert practitioners should consider the utilization of QDROs to achieve significant enforcement results other than equitable distribution of retirement benefits.



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