

THE PRACTITIONER
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Part of the Plan

Gaining Access to Retirement Benefits to Enforce Marital Property Agreements

The California Court of Appeal, in *In re Marriage of Marshall*, 95 Daily Journal D.A.R. 9588 (1st Dist. July 19, 1995), refused to circumvent the Employment Retirement Income Securities Act's policy to protect an employee's accrued benefits for retirement purposes. The court held that retirement plans subject to ERISA are exempt from enforcement of nonsupport judgments.

In *Marshall*, the wife had appealed the lower court's denial to allow garnishment of the husband's retirement benefits. The parties divorced in 1988 after almost 24 years of marriage. In a marital settlement agreement, they had agreed, among other things, to file a joint tax return for the prior year. The husband also promised to indemnify and hold the wife harmless for the tax liability.

The wife had signed the return expecting the husband to file it; he did not. Eventually, the wife paid the taxes. She then sought to enforce the indemnity provision by levying upon the husband's retirement annuity.

The court upheld the plan administrator's and husband's claim that ERISA exempted the annuity from garnishment for enforcement of the nonsupport debt. The court determined that ERISA allows retirement benefits to be assigned only pursuant to a qualified domestic relations order (QDRO). A QDRO can issue only pursuant to a state court order that, among other requirements, "relates to the provision of child support, alimony payments or marital property rights." 29 U.S.C. Section 1056(d)(3)(B)(i)(I).

The court rejected the wife's argument that enforcement of the marital settlement's indemnity provision "relates to the provision of marital property rights" and reasoned that "ERISA's anti-assignment provision has been vigorously enforced and exceptions to the provision read narrowly." *Marshall*, 95 D.A.R. at 9590.

Moreover, the limited exceptions allowing assignment of retirement income pursuant to a QDRO were created to "protect the financial security of women who had contributed to their marriage and anticipated sharing in their husband's retirement income," and to provide support. Id. Since the retirement plan benefits had already been conferred to the husband as his separate property, and the wife was not seeking support, the husband's interest in the plan could not be assigned to the wife. Therefore, plans covered by ERISA are essentially immune from levy for enforcement of nonsupport judgments.

How, then, should an ex-spouse in the same situation as the wife in *Marshall* proceed? One option is to bring a motion to set aside part or all of the stipulated judgment and marital settlement agreement, if any.

Family Code Section 2121(a) allows a party to bring a motion to set aside a judgment six months after the time for bringing a motion under Code of Civil Procedure Section 473 expires. This set-aside motion must be based on one of five grounds stated in Family Code Section 2122.

In this situation, Section 2122(c) is applicable. It provides that a motion may be brought to set aside a stipulated or uncontested judgment that was entered into based on one or both of the parties' mistake, "either mutual or unilateral, whether mistake of law or mistake of fact."

This motion must be made within one year after the date the judgment was entered. Presumably, the court can exercise its equitable powers to set aside the underlying marital settlement agreement. Hogoboom, California Practice Guide: Family Law 16:142 (1995).

One could argue that the "unilateral mistake" was entering into the judgment on the mistaken belief that the opposing party would comply with the judgment. Of course, the opposing party would argue that noncompliance with the judgment was a risk that both parties assumed by entering into the judgment. However, the assumption of that risk does not diminish the fact that the aggrieved party made a mistake.

It is, of course, only worthwhile to bring this motion if there are sufficient community-property assets to award the aggrieved party to offset the amount owed under the prior

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judgment. For example, assume the wife failed to pay a \$10,000 credit card bill that she was ordered to pay. To protect his credit, the husband pays the bill. The judgment includes an indemnity provision for this debt. The only asset the judgment awarded to the wife was a house with little equity and one-half the husband's pension. Under *Marshall*, the husband will be hard-pressed if the wife does not have wages that can be garnished.

As an alternative, the husband could bring a motion to set aside the portion of the judgment ordering the wife to pay the credit card bill and the provision awarding the wife one-half the pension. The husband would ask the court to enter a further judgment ordering him to pay the credit card bill and awarding the wife one-half the community portion of the pension, less \$10,000.

This result would not totally satisfy the husband because the additional \$10,000 he receives from the pension is in pretax dollars. However, this result may be the best that can be obtained.

For plans not subject to ERISA's anti-alienation provision, such as individual retirement accounts, 29 U.S.C. Section 1051(6), C.C.P. Section 704.115(e) provides that benefits are exempt only to the extent that the debtor

needs those benefits during retirement for his or her support and the support of the debtor's spouse and dependents. Amounts needed to pay federal and state taxes are also exempt. The remaining benefits are subject to levy, whether or not they have been paid.

With respect to enforcement of support judgments, the relevant statute for levying upon private retirement plans is C.C.P. Section 704.115(c). These plans include private retirement plans, profit-sharing plans designed and used for retirement purposes, Keoghs and IRAs. C.C.P. Section 704.115(a). Benefits that have already been paid are exempt, except for benefits from non-ERISA covered plans, as discussed above.

The enforcement procedure for benefits that are payable but have not yet been paid depends on whether or not benefits are payable periodically. If the benefits are not payable periodically, the supported spouse must bring a noticed motion before the court to determine the amount of the benefits that are exempt from enforcement. C.C.P. Section 704.115(c)(1).

The amount that is exempt depends on an evaluation of the needs of both parties and "all other relevant circumstances." C.C.P. Section 703.070(c). If the benefits are payable periodically, then the benefits are subject to an earnings assignment order "or any other applicable enforcement procedure." C.C.P. Section 704.115(c)(2).

Despite Section 704.115, a pension plan may not pay the benefits pursuant to a wage and earnings assignment order, and will require a QDRO. One should check with the pension plan administrator to determine if a wage and earnings assignment order will be honored. If they will not, then a QDRO should be obtained.

Thus, the practitioner should anticipate which assets of the opposing spouse could be available for levy if the spouse fails to comply with the judgment. It may be possible to structure the settlement in a way that would best deal with noncompliance. For example, if the debtor spouse will agree, one alternative is for the judgment to provide that delinquent, unsatisfied property-division payments will be automatically converted into nontaxable support. See *Marriage of McGhee*, 131 Cal.App.3d 408 (1982).

The party who is ordered to pay money or to indemnify the other party may consider a provision in the marital settlement agreement that neither party's noncompliance with the judgment will constitute a ground for setting aside the judgment, and that each party waives the right to assert that ground to set aside the settlement agreement.

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