

THE PRACTITIONER | MITCHELL A. JACOBS

Qualified Domestic Relations Orders Used for Child Support

Family lawyers use qualified domestic relations orders — known as QDROs — frequently in their practice to divide qualified retirement benefits. However, QDROs are frequently overlooked as vehicles for the payment of child support to the child of a retirement plan participant.

Generally, a qualified pension plan may only pay plan benefits to plan participants pursuant to the statutory exception to the anti-alienation rule codified at section 206(d)(3)(A) of the Employee Retirement Income Security Act of 1974, ERISA. The rules, and the exceptions, go back to the basic anti-alienation rule of ERISA and the Internal Revenue Code. A pension plan must provide that benefits payable under the plan may not be assigned or alienated. ERISA section 206(d)(1). An employee benefit trust, to be qualified, must be tied to a plan which provides that benefits payable from the plan may not be assigned or alienated. IRC section 401(a)(13). These anti-alienation provisions do not apply, however, if the payments are made under a QDRO. ERISA section 206(d)(3)(A).

Distributions to a spouse or former spouse who is an alternate payee under a QDRO generally are includable in the spouse's or former spouse's income. ERISA section 402(a)(9). The general principle is that spouses or former spouses who are alternate payees treat QDRO accounts, distributions or benefits as their

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Attorneys should be aware of QDROs as useful tools in support actions.

own, as if they are the employees. Alternate payees, therefore, become subject to all taxes, including the 15 percent excise tax on excess distributions, as if the accounts, distributions or benefits belonged to them from the beginning.

There is no similar provision for distributions to nonspouse alternate payees, however, such as the children of the parties. Thus, distributions to an alternate payee who is the child of the participant and of the spouse or former spouse during the lifetime of the participant are not includable in the child's income but instead are included in the gross income of the plan participant.

In many cases the participant's pension may be the only liquid source from which child support can be obtained. The family law practitioner who successfully obtains from the court a QDRO that provides for child support payable to an alternate payee child in the custody of the practitioner's client has made enforcement of that order relatively simple by way of a levy against the plan if the plan does not pay pursuant to the order. Family Code section 5103(a) provides that, notwithstanding Family Code section 2060, a child support judgment may be enforced against a pension plan regardless of whether the plan has been joined as a party.

Since, however, California has an easy

statutory framework for joining the plan as a party to the dissolution of marriage action, the best practice is to join the pension plan to the dissolution action. Family Code sections 2060-2065 set forth the procedure for joining the plan. First of all, joinder of the plan assists with enforcement of any order against the plan. Once the plan becomes a party to the action, as with any other party the plan is now subject to the contempt powers of the court. Also, the practitioner may be able to obtain an award of attorneys fees and costs against the plan if the plan wrongfully refuses to pay the support to the child after having been served with the QDRO. Both the 9th U.S. Circuit Court of Appeals and the California court of appeal have upheld the award of fees against a pension plan under ERISA section 502(g). See *Board of Trustees of Carpenters Pension Trust Fund v. Reyes*, 688 F.2d 571 (9th Cir. 1982), and *Johns v. Retirement Fund Trust*, 117 Cal.App.3d 113 (1981).

Finally, the tax effect of child support paid pursuant to a QDRO is the same as if the participant had paid the child support directly from taxed income. If paid by the participant from after-tax income (not paid directly from the plan), the participant pays income tax on money paid to the child's parent. The child's parent receives the money tax-free, and the payor receives no deduction. Money paid by the plan is generally paid with pre-tax dollars, which are then taxed to the participant, and the child (rather than the parent) still receives the money tax-free.

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