A Primer on the History and Proper Drafting of Qualified Domestic Relations Orders

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Abstract

The divorce rate in the United States is slightly more than one-half the marriage rate. Divorce is a fact of life in this country, and will likely be so for the foreseeable future. On August 23, 1984, the divorce lawyer’s job got more complicated when Congress created the Qualified Domestic Relations Order (“QDRO”) as part of some significant amendments to ERISA. QDROs are necessary because before those 1984 ERISA amendments, a lot of divorced persons discovered that they could be deprived of their marital or community property interest in their former spouses’ retirement plans. For most divorcing couples, the two largest assets of the marriage are the marital home and retirement accounts. Over ninety-nine million persons participate in private sector retirement plans, and those plans’ assets total more than $4 trillion, which exceeds the total value of all residential real estate in the United States. Dividing retirement accounts is not as simple as a court decreeing that each party gets one-half of the other party’s account. It takes a properly drafted QDRO to make sure each party gets his or her marital or community property share of the other’s retirement benefits. Drafting a QDRO can be time consuming, complex, and frustrating in part because it requires lawyers who primarily practice state law to have a working knowledge of parts of the notoriously lengthy and complex ERISA. A substantial number — perhaps a majority — of QDROs are not prepared properly because they do not reflect the parties’ understanding of what they were awarded in the divorce proceeding. In fact, a former administrator for a retirement plan stated that between fifteen and 20% of the time, lawyers fail to see a QDRO through to completion. This article will detail the history leading to the creation of QDROs, explain what QDROs are, and offer suggestions on what pitfalls to look for and avoid in drafting them.

Abstract

1 Assistant Professor of Law, University of Arkansas at Little Rock William H. Bowen School of Law. I owe a deep debt of gratitude to the following persons at the law school where I am privileged, honored, and happy to work: Jada Aitchison, Adjoa A. Aiyetor, Theresa M. Beiner, Jessie Wallace Burchfield, Paula Casey, John M.A. DiPippa, Michael Dinnerstein, Felecia Epps, Frances S. Fendler, Michael T. Flannery, Lynn Foster, Charles W. Goldner, Jr., Kenneth S. Gould, Sarah Howard Hobbs, Philip D. Oliver, Ranko Shiraki Oliver, Kelly Browe Olson, Melissa M. Serfass, Joshua M. Silverstein, J. Thomas Sullivan, and Kelly S. Terry. I also want to offer a special thank you to the Honorable Robin Mays, Judge for the Sixth Judicial District of the State of Arkansas (Retired), Kristen Green, and Caleb Garcia. Judge Mays taught me domestic relations, including what a QDRO is and why it is important. Ms. Green and Mr. Garcia are former students and current inspirations who are always there to remind me when I get disillusioned to keep my focus on the students. Any errors in this article are solely my responsibility.
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Introduction.

In 2009, 2,080,000 couples got married in the United States.\(^2\) That same year, 840,000 couples got divorced.\(^3\) Many divorces require the division of marital

\(^2\) United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, *National Marriage and Divorce Rate Trends*, [http://www.cdc.gov/nchs/nvss/marriage_divorce_rate_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_rate_tables.htm) (last updated Mar. 7, 2011). The national rate of marriages per 1,000 persons is 6.8. *Id.* The rates of marriages per 1,000 persons in the individual states and the District of Columbia (in descending order) are: Nevada (40.9), Hawaii (17.9), Arkansas (10.7), Idaho (8.9), Vermont (8.7), Tennessee (8.4), Alabama (8.3), Utah (8.2), Wyoming (8.2), Indiana (7.9), Alaska (7.8), Kentucky (7.6), Florida (7.5), Montana (7.4), South Carolina (7.4), Maine (7.2), South Dakota (7.2), Louisiana (7.1), Texas (7.1), Iowa (7.0), Virginia (7.0), Oklahoma (6.9), West Virginia (6.9), Colorado (6.8), Nebraska (6.7), North Carolina (6.7), North Dakota (6.6), Oregon (6.6), Georgia (6.5), Kansas (6.5), Missouri (6.5), New Hampshire (6.4), New York (6.4), Washington (6.0), Connecticut (5.9), Rhode Island (5.9), California (5.8), Maryland (5.8), Ohio (5.8), Illinois (5.6), Massachusetts (5.5), Arizona (5.4), Delaware (5.4), Michigan (5.4), Minnesota (5.3), Pennsylvania (5.3), Wisconsin (5.3), New Mexico (5.1), New Jersey (5.0), Mississippi (4.8), District of Columbia (4.7). United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, *Marriage Rates by State: 1990, 1995, and 1999-2009*, [http://www.cdc.gov/nchs/nvss/marriage_rates_90_95_99-09.pdf](http://www.cdc.gov/nchs/nvss/marriage_rates_90_95_99-09.pdf) (last visited Apr. 7, 2011).

\(^3\) United States Department of Health and Human Services, Centers for Disease Control and Prevention, National Center for Health Statistics, National Vital Statistics System, *National Marriage and Divorce Rate Trends*, [http://www.cdc.gov/nchs/nvss/marriage_divorce_rate_tables.htm](http://www.cdc.gov/nchs/nvss/marriage_divorce_rate_tables.htm) (last updated Mar. 7, 2011). The national rate of divorces per 1,000 persons is 3.5. *Id.* The national divorce count and rate are higher than reported because California, Georgia, Hawaii, Indiana, Louisiana, and Minnesota do not report divorce counts and rates. Betzaida Tejada-Vera & Paul D. Sutton, *Births, Marriages, Divorces, and Deaths: Provisional data for 2009*, National Vital Statistics Reports, Vol. 58, No. 25, at 1-3, 5-6, Aug. 27, 2010. The rates of divorces per 1,000 persons in the individual states and the District of Columbia (in descending order) are: Nevada (6.7), Arkansas (5.7), West Virginia (5.2), Wyoming (5.2), Idaho (5.0), Oklahoma (4.9), Kentucky (4.6), Alabama (4.4), Alaska (4.4), Colorado (4.2), Florida (4.2), Maine (4.1), Mississippi (4.1), Montana (4.1), New Mexico (4.0), Oregon (3.9), Tennessee (3.9), Washington (3.9), North Carolina (3.8), Kansas (3.7), Missouri (3.7), New Hampshire (3.7), Virginia (3.7), Delaware (3.6), Utah (3.6), Arizona (3.5), Vermont (3.5), Nebraska (3.4), Michigan (3.3), Ohio (3.3), South Dakota (3.3), Texas (3.3), Connecticut (3.1), Rhode Island (3.0), South Carolina (3.0), Wisconsin (3.0), North Dakota (2.9), Maryland (2.8), New Jersey
assets owned by the couple, which may be done differently depending on whether the couple resides in a community property state or a common law property state. In community property states, marriage is considered an equal partnership, therefore, any asset acquired during the marriage belongs to both spouses, which entitles each spouse to a one-half ownership interest in the asset. Any effort expended during the marriage resulting in an acquisition of property produces something belonging to both spouses, regardless of which spouse expended the effort.

A majority of the common law property states operate similarly to the community property states in that assets obtained during the marriage are presumed to be marital, which means each spouse owns one-half. This presumption can be rebutted; however, if a court determines that an equal division of marital


5 The remaining states are common law property states. Jaffke, *supra* note 4, at 268.

6 Jaffke, *supra* note 4, at 268.

7 *Id.*

8 *Id.* at 269.
property would be inequitable in a particular case, the court can order an unequal division.9

In most divorces, the two largest assets couples own are the marital home and retirement funds.10 Dividing a marital home is governed by state domestic relations law and is not a factually or legally complex undertaking. A court could, for example, grant ownership of the home to one spouse on the condition that he11 “buy out” the other spouse’s one-half interest. Conversely, a court could order the

9 Id.

10 Joshua A. Dean, Wilson v. Wilson: The Effect of QDROs on Appealing Divorce Decrees, 42 Akron L. Rev. 639, 639, 640 (2009) (citing David L. Baumer & J.C. Poindexter, Women and Divorce: The Perils of Pension Division, 57 Ohio St. L.J. 203, 204 (1996) (for most couples, the most valuable assets they own are the family home and their pension plans); Hilary Greer Fike, Qualified Pension Trends and Divorce Considerations, 14 Am. J. Fam. L. 234, 234, 235 (2000) (Pension plans contain the largest block of private capital in the United States. In 2000, the Federal Reserve estimated that pension funds held 25% of the United States’ financial assets compared with 2% in 1950. In 2000, the total value of pension assets exceeded the total value of all residential real estate. The average American couple has pension assets that are worth as much as the gross value of their home.); Mark S. Maddox & Margaret K. Cassidy, Division of Employee Benefits Upon Divorce: An Analysis of the Retirement Equity Act of 1984 and a Framework for Distribution of Benefits, 58 Ohio St. B. Ass’n Rep. 436, 436 (1985) (in many divorces, the pension rights or employee benefits of one or both spouses are the most significant marital assets owned by the couple and are subject to division in divorce proceedings); Jessica Straub, Note, Erb v. Erb: A Step Toward Clarification in Public Pension Division, 33 U. Tol. L. Rev. 915, 916 (2002) (pension plans are crucial in divorce because they, along with the marital home, are often the largest marital asset); Dylan A. Wilde, Student Article, Obtaining an Equitable Distribution of Retirement Plans in a Divorce Proceeding, 49 S.D. L. Rev. 141, 141 (2003) (a 1998 United States Department of Labor study indicated that over ninety-nine million persons participated in private retirement plans, and those plans’ assets total more than $4 trillion dollars)); The Division of Retirement Benefits Through Qualified Domestic Relations Orders, http://www.dol.gov/ebsa/publications/qdros.html (last visited May 11, 2011) (more than forty-eight million private sectors workers have employer provided retirement plans, and for many of these workers, these plans represent one of their most significant assets).

11 Throughout this article I use “he” to denote “he” and “she,” and I use “his” to denote “his and her.” I also use “he” to describe participants and plan administrators and “she” to describe alternate payees fully recognizing that females can be participants and plan administrators, and males can be alternate payees. I do this not to perpetuate notions of male supremacy or hegemony, rather, for brevity and readability.

marital home sold with the parties equally dividing the proceeds. Retirement plans, however, are not so neatly or easily divided.

The division of a retirement plan as an incident of divorce must not only comply with state domestic relations law, it must also comply with federal law, namely the Employee Retirement Income Security Act of 1974 ("ERISA")$^{12}$ and the Retirement Equity Act of 1984 ("REA").$^{13}$ Under ERISA$^{14}$ and the REA, a person’s pension benefits can only be assigned to another if the state court domestic relations order recognizing the right of a spouse, former spouse, child, or other dependent to receive a part or all of an individual’s pension benefits constitutes a Qualified Domestic Relations Order ("QDRO").$^{15}$

Two facts make QDROs necessary in virtually every divorce proceeding. First, there are over 800,000 ERISA qualified retirement plans in the United States, and those plans contain over $4 trillion in assets for more than ninety


$^{14}$ Reading this article is going to require putting up with a lot of acronyms. Trs. of the Dirs. Guild of Am. – Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 419 (9th Cir. 2000) (stating that an analysis of ERISA’s QDRO provision is a task requiring tolerance for acronyms).

million workers. Second, the current divorce rate is more than one-half the current marriage rate. Simply put, those who practice domestic relations law, need to know how to draft and construe a QDRO, and this requires more than uncritically filling in the blanks of a QDRO obtained from a form book or an individual’s retirement plan administrator. The failure to properly handle QDRO issues is professional misconduct and can result in malpractice liability. The liability exposure of attorneys for QDRO failures has increased greatly over the last ten years. David Clayton Carrad, one of the preeminent QDRO authorities in the United States, has posited four reasons why.

First, understanding QDROs requires some understanding of certain parts of ERISA, a notoriously lengthy, complex, and detailed set of statutes spanning two titles and 192 sections of the United States Code. Although one need not be conversant with the entirety of ERISA to properly handle a QDRO, even those parts

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17 The national rate of marriages per 1,000 persons is 6.8; the divorce rate per 1,000 is 3.5. See supra notes 2, 3.


19 Shulman, supra note 18, at § 16.01.

20 Carrad, supra note 11, at 6, 7.

of it that one does need to understand can be difficult to comprehend. ERISA can bedevil even those who work with it on a daily basis, let alone a domestic relations practitioner addresses it only in connection with a divorce.

Second, ERISA grants employers wide discretion to design a variety of employee retirement plans so long as certain minimum standards are met. Plans differ greatly with respect to benefits, options, terms, and procedures, which makes it difficult to create a template to use for subsequent clients. Third, QDROs require the application of state domestic relations law, federal tax law, and labor law. Drafting a QDRO that complies with state law, federal law, and the wishes of the client is no easy task. Fourth, the emotions of divorcing spouses can occasionally turn bitter or vindictive, which can prolong the QDRO drafting and approval process. After all, if a marriage one thought would last for a lifetime is coming to an end, one of the last things a spouse might want to do is see a sizeable part of his retirement funds assigned to the other spouse.

These four factors make drafting a QDRO and getting it approved effectuated an undertaking fraught with the potential for costly missteps. Doing it right is time

22 Carrad, supra note 11, at 11-29.
23 Id. at 6.
24 Id.
25 Id. at 6, 7.
26 Id.
27 Id. at 7.
The purpose of this article is to detail the history leading to the creation of QDROs, explain what QDROs are, to assist QDRO drafters so they avoid mistakes that are all too common in this aspect of domestic relations practice. As difficult as QDROs, they are not beyond the ken of lawyers who are willing to devote the time, skill, and effort to learning how to do them correctly.

Part I of this article recounts the status of employee pensions and retirement plans that pre-date ERISA and the effect of ERISA in protecting the retirement income security of American workers. Part II explains the REA and how it filled gaps ERISA left open. Part III explains what QDROs are, including definitions of key terms that are employed by those involved in the QDRO process. Part IV identifies errors and omissions in QDROs that most often lead to professional misconduct, malpractice liability, and client dissatisfaction. This article will not only identify these pitfalls; it will offer concrete suggestions on avoiding them.

28 In re Gendreau, 122 F.3d 815, 819 (9th Cir. 1997) (obtaining a QDRO is a process everyone, including Congress, recognizes is time consuming); Dean, supra note 10, at 642 (citing Aaron Klein, Note, Divorce, Death, and Posthumous QDROs: When is it Too Late for a Divorcee to Claim Pension Benefits under ERISA? 26 Cardozo L. Rev. 1651, 1654, 1655 (2005)) (the process of drafting a QDRO and getting it approved is long and complex).

29 This article builds on the following: Carrad, supra note 11, at 3, 96, 172-174; Shulman, supra note 18, at §§ 16.01-16.08; Margaret R. Cooper, A Family Practitioner’s Guide to Overcoming QDRO Phobia, 8 Del. L. Rev. 213, 214-23 (2006); Fike, supra note 10, at 234, 235; Leslie A. Kulick, What are the Limitations on QDROs? 61 J. Mo. B. 89, 89-91 (2005); Paul L. Behling, Not all Domestic Relations Orders Satisfy QDRO Rules, 24 Tax’n for Law. 212, 214-17 (1996); Paul L. Behling, Not all Domestic Relations Orders Satisfy QDRO Rules, 55 Tax’n for Acct. 337, 339-42 (1995); Emily W. McBurney, Failure to Handle Qualified Domestic Relations Orders Properly, 38033 NBI-CLE 117, 121-36 (2007); Emily W. McBurney, Failure to Handle Qualified Domestic Relations Orders Properly, 30446 NBI-CLE 78, 81-95 (2005); Robert Preston, Strategies to Help Drafters Avoid Common Traps in Qualified Domestic Relations Orders, 19 No. 12 Matrim. Strategist 1 (Jan. 2002); Jerry Reiss, Dividing Pension Property: Underrated Malpractice Concerns, 16 No. 7 Divorce Litig. 116 (July 2004); Sherwin P. Simmons, Tax Matters and QDROs in the Context of Dissolution of Marriage Proceedings, SC06 ALI-ABA 1203, 1224-38 (June 30, 1997); Sherwin P. Simmons, Tax
I. The Status of Employee Pensions and Retirement Plans Before ERISA.

A. The Most Glorious Story of Failure in the Business.\(^{30}\)

The December 9, 1963 shutdown of the Studebaker automobile plant in South Bend, Indiana is widely considered to be the catalyst leading to the enactment of ERISA.\(^{31}\)

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This article does not address non-ERISA plans such as federal civil service pensions, military pensions, and state and local government pensions, nor does it explain how to draft a QDRO in its entirety. For one interested in those subjects, some excellent resources are: Carrad, supra note 11; Shulman, supra note 18; Michael B. Snyder, Qualified Domestic Relations Orders (2011); and The Division of Retirement Benefits Through Qualified Domestic Relations Orders, http://www.dol.gov/ebsa/publications/qdros.html (last visited May 11, 2011). Some have suggested consulting “A Handbook for Attorneys on Court Ordered Retirement, Health Benefits and Life Insurance under the Civil Service Retirement Benefits, Federal Employees Retirement Benefits, Federal Employees Health Benefits, and Federal Employees Group Life Insurance Program.” This handbook is available from the United States Office of Personnel Management and can be downloaded from http://www.opm.gov/retire/pubs/pamphlets/ri83-116.pdf (last visited May 12, 2011). I do not quarrel with those who suggest reviewing this handbook, but I do not think much good would come of it because it is 137 pages of inscrutable prose (look at the title for goodness’ sake). David Clayton Carrad described it thusly, “While it is thorough and comprehensive, the handbook is written in a turgid and tedious bureaucratic style.” Carrad, supra note 11, at 200. Emily W. McBurney echoed the sentiment: “An extraordinarily complex and confusion publication. This handbook is notorious because it is nearly impenetrable” Emily W. McBurney, Failure to Handle Qualified Domestic Relations Orders Properly, 38033 NBI-CLE 117, 131 (2007).


In 1945, about one-fifth of private sector employees had pension plans, and only a fraction had collectively bargained plans.\(^{32}\) In the late 1940s, the Congress of Industrial Organizations ("CIO"), the United Auto Workers ("UAW"), and the United Steelworkers led the "Great Gold Rush of ’49," which resulted in pensions for millions of union employees, including production workers at the Studebaker and Packard Motor Car Company.\(^{33}\) The push for pension benefits resulted from the post-World War II boom economy and the aging of the labor market.\(^{34}\) During the war, many businesses encouraged older workers to keep working, and some asked retirees to return to the work force.\(^{35}\) The war added significantly to unions’ membership rolls, while wartime inflation eroded the purchasing power of social

The “Studebaker Incident” is not the sole reason Congress enacted ERISA. On December 31, 1969, three persons hired by the United Mine Workers of America ("UMWA") murdered Joseph “Jock” Yablonski, age fifty-nine; his wife, Margaret, age fifty-nine; and their daughter, Charlotte, age twenty-five, in their Washington County, Pennsylvania home. [http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_%20659597.html#](http://www.pittsburghlive.com/x/pittsburghtrib/news/regional/s_%20659597.html#) (last visited Sept. 1, 2011). The murders followed Mr. Yablonski’s loss in a vigorously contested election for the presidency of the UMWA. Paul J. Schneider & Brian M. Pinheiro, *ERISA:A Comprehensive Guide* § 1.03 (3d ed., Aspen 2008). The murders sparked a public outcry and led to an investigation by the Labor Subcommittee of the United States Senate. \(Id.\) Because incumbent UMWA president Tony Boyle faced accusations of misuse of union health and retirement funds, the subcommittee conducted a general study of pension and welfare funds, with a special emphasis on employee protection. \(Id.\) Senator Jacob K. Javits of New York, a leader in the pension reform movement in the Senate, led the investigation, and it resulted in findings that caused such an outrage, political opposition to pension reform seemed repellant. \(Id.\) Those findings included losses caused by harsh vesting provisions, lax funding of plans, and the lack of portable insurance programs. \(Id.\) Although pension reform still had its opponents, including Ralph Nader, who opined that the ERISA bill constituted a “comprehensive fraud” incapable of securing its goal because of heavy-handed editing by the Finance Committee of the United States Senate. \(Id.\) Notwithstanding the opposition, ERISA passed, and President Gerald R. Ford signed it into law on Labor Day 1974. Schneider & Pinheiro § 1.01.

\(^{32}\) Wooten, supra note 30, at 686.

\(^{33}\) \(Id.\) at 686, 687.

\(^{34}\) \(Id.\) at 687.

\(^{35}\) \(Id.\)
Consequently, many older workers delayed leaving the workforce, which resulted in most companies having a greater proportion of men over age sixty-five on their payrolls than at any time in their history.\textsuperscript{37}

In September 1949, the UAW and Ford agreed to a pension plan for hourly employees, and, following a strike, the steel companies followed suit.\textsuperscript{38} Studebaker adopted a defined benefit pension plan in June 1950, and Packard did the same two months later.\textsuperscript{39} The Studebaker plan called for employees to receive pension credit of $1.50 per month for each year of service up to a maximum of thirty years.\textsuperscript{40} The collective bargaining agreement set a voluntary retirement age of sixty-five and a mandatory retirement age of sixty-eight, but allowed for early retirement at sixty if the employee had ten years of service.\textsuperscript{41} Studebaker financed the pension plan by contributing to a pension trust, but it did not accept direct contractual liability for paying retirement benefits; instead, it limited its liability to making trust contributions.\textsuperscript{42} Contributions to the pension trusts, however, came at a cost, i.e., monies paid into the trust did not get paid as wages.\textsuperscript{43} The size of these

\textsuperscript{36} Id.
\textsuperscript{37} Id. at 687.
\textsuperscript{38} Wooten, supra note 30, at 690.
\textsuperscript{39} Id. See Part III.B, infra for a more detailed description of defined benefit plans.
\textsuperscript{40} Wooten, supra note 30, at 691.
\textsuperscript{41} Id.
\textsuperscript{42} Id. at 692.
\textsuperscript{43} Id.
contributions depended the magnitude of pension benefits and the eligibility requirements employees had meet to receive those benefits.\textsuperscript{44} The agreement between the UAW and Studebaker promised generous pensions to retiring employees, so in order to hold down costs, the union agreed to strict eligibility requirements.\textsuperscript{45} This meant that as the auto manufacturers encountered financial difficulties in the 1950s, younger workers risked losing their pensions.\textsuperscript{46} Studebaker and Packard were prospering when it made pension agreements with the UAW, but that prosperity would prove to be short lived.\textsuperscript{47} 

In 1953, the automobile industry faced a recession and the end of the postwar seller’s market for cars.\textsuperscript{48} Packard lost money in the second half of 1953, and though Studebaker made a profit, it was significantly less than the prior reporting period.\textsuperscript{49} In October 1954, Packard and Studebaker merged in an effort to stanch the financial hemorrhaging.\textsuperscript{50} The merger revealed the fiscal infirmities underpinning the UAW’s 1949 and 1950 collectively bargained retirement plans.\textsuperscript{51} Although those plans gave employees pension credit at the rate of $1.50 per month for up to thirty

\begin{flushright}
\textsuperscript{44} Id.
\textsuperscript{45} Id.
\textsuperscript{46} Wooten, supra note 30, at 692.
\textsuperscript{47} Id. at 692, 693.
\textsuperscript{48} Id. at 693.
\textsuperscript{49} Id.
\textsuperscript{50} Id. at 694.
\textsuperscript{51} Id.
\end{flushright}
years of service, accruing that credit did not entitle an employee to receive a pension.\textsuperscript{52} Under the Studebaker plan, an employee did not receive an entitlement to a pension until he qualified to retire under the terms of the plan; if he resigned or got fired, he received nothing.\textsuperscript{53} This was no accident.\textsuperscript{54} The UAW bargained for this term with the understanding that in a plan with limited funding, a less restrictive vesting provision would mean more workers would be eligible for benefits, which meant less generous benefits for workers who qualified to receive benefits under the plan.\textsuperscript{55} The union prioritized higher benefits for older workers to induce them to retire, which had the effect of providing more job security to younger workers.\textsuperscript{56} This increase in job security, however, meant younger workers assumed a greater risk that they would forfeit their pensions if they did not remain in the employed by Studebaker until they reached at least age sixty with at least ten years of service.\textsuperscript{57}

In 1955, the UAW negotiated a plan that entitled its workers to 100\% of their pension accruals when they accumulated ten years of service after age twenty-nine.\textsuperscript{58} The union sought to insulate inactive, laid off, or displaced workers from

\textsuperscript{52} Wooten, supra note 30, at 694.

\textsuperscript{53} Id.

\textsuperscript{54} Id. at 695.

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} Id.

\textsuperscript{58} Wooten, supra note 30, at 697.
forfeiting their pension credits if they had not reached retirement age.\textsuperscript{59} This left younger workers with a greater sense of pension security, but events at Studebaker-Packard would soon show that those benefits were less secure than they seemed.\textsuperscript{60} In a properly funded pension plan, the employer funds pension obligations in advance of their becoming due by setting aside monies as employees earn credit.\textsuperscript{61} The plans between the UAW and the automobile manufacturers were not funded in this fashion, thereby dooming them from the start.\textsuperscript{62} The unions and management created pension plans with promised benefits that far exceeded the resources devoted to paying them.\textsuperscript{63} Additionally, whenever the parties negotiated increases in retirement benefits, those increases created more unfunded obligations, which exacerbated the original funding problem.\textsuperscript{64} An employer’s ability to fulfill its pension funding obligations depended solely on the health of its balance sheet, so if a company experienced financial difficulty, which Studebaker-Packard eventually did, the costs of funding pensions would become unsustainable.\textsuperscript{65}

\textsuperscript{59} Id.
\textsuperscript{60} Id.
\textsuperscript{61} Id. at 697, 698.
\textsuperscript{62} Id. at 698.
\textsuperscript{63} Id.
\textsuperscript{64} Wooten, supra note 30, at 698.
\textsuperscript{65} Id.
When Studebaker and Packard merged in October 1954, they were both in fiscal distress.\textsuperscript{66} In the third quarter of 1954, Studebaker lost $13,825,000, and Packard failed to meet its expenses by $11,755,000.\textsuperscript{67} In the first two months of 1956, sales of Packard cars fell 67\% from the 1955 level.\textsuperscript{68} For much of 1956, Studebaker-Packard operated on the cusp of bankruptcy, barely surviving after selling its defense business and leasing several of its manufacturing facilities to the Curtiss-Wright Corporation for approximately $37 million.\textsuperscript{69} From that point forward, Studebaker-Packard’s sole domestic automobile production facility was the plant in South Bend, Indiana.\textsuperscript{70} In 1957, Studebaker-Packard did not lose as much money as it did in 1956, but the company’s financial condition remained precarious.\textsuperscript{71} In 1958, the economy went through another recession, and the company failed to make the first payments on a $55 million long term debt.\textsuperscript{72} The prospects for the company’s continued existence seemed poor, so company executives decided to terminate the pension plan of the Packard employees.\textsuperscript{73}

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\textsuperscript{66} Id.

\textsuperscript{67} Id.

\textsuperscript{68} Id.

\textsuperscript{69} Id. at 698, 699.

\textsuperscript{70} Wooten, supra note 30, at 699.

\textsuperscript{71} Id. at 706, 707.

\textsuperscript{72} Id. at 707.

\textsuperscript{73} Id.
Before Studebaker and Packard merged in October 1954, both used a pension trust to finance their retirement plans.\textsuperscript{74} Following the merger, the UAW insisted that the Studebaker and Packard pension plans merge as well, which management agreed to do, so the plans combined in 1955.\textsuperscript{75} Although the pension plans merged in 1955, the pension trusts that financed the plans did not.\textsuperscript{76} In fact, the company maintained separate trusts with different banks serving as trustees, and company actuaries continued to calculate separate pension liability for the Studebaker and Packard divisions.\textsuperscript{77} This meant the Studebaker trust paid pensions to Studebaker retirees, and the Packard trust paid pensions to Packard retirees.\textsuperscript{78} At the end of 1957, the Packard trust had $9.6 million in assets and pension liabilities of approximately $27 million. Packard retirees received their full pension benefits until January 1959 when Studebaker-Packard and the local union agreed that benefits should be reduced pending the outcome of litigation between the union and the company regarding the validity of the termination of the Packard plan.\textsuperscript{79} In October 1959, Studebaker-Packard and the UAW entered into a settlement that reduced benefits for Packard retirees to 85% of the level prior to the termination.\textsuperscript{80}

\textsuperscript{74} Id. at 709.

\textsuperscript{75} Id.

\textsuperscript{76} Wooten, supra note 30, at 709, 710.

\textsuperscript{77} Id. at 710.

\textsuperscript{78} Id.

\textsuperscript{79} Id. at 716.

\textsuperscript{80} Id.
Packard employees who were eligible to retire when the plan terminated but who failed to submit a pension application after September 2, 1958 received a lump sum payment of approximately $43 per year of service; others got nothing.\textsuperscript{81}

In 1961, the Studebaker trust had $19.2 million in assets and owed $22 million in promised benefits.\textsuperscript{82} In the meantime, the company continued to struggle to make a profit.\textsuperscript{83} In 1962 and 1963, the company diversified through non-automotive acquisitions in the hope of relying less on automobile production for its economic sustenance.\textsuperscript{84} Because of the acquisitions, the company showed a profit in 1962, but not in the automotive division.\textsuperscript{85} The best automotive model year in industry history up to that point happened in 1963, yet in the first half of that year, Studebaker-Packard's automotive division's losses exceeded the profits generated by all the other company's divisions by $7.5 million.\textsuperscript{86} On December 9, 1963, Studebaker-Packard announced the closing of the South Bend, Indiana plant.\textsuperscript{87} Six weeks later, the company announced that Studebaker retirees and retirement eligible employees would receive their full pension benefits.\textsuperscript{88} Other Studebaker

\textsuperscript{81} Id.
\textsuperscript{82} Wooten, supra note 30, at 728.
\textsuperscript{83} Id. at 729.
\textsuperscript{84} Id.
\textsuperscript{85} Id.
\textsuperscript{86} Id. at 729, 730.
\textsuperscript{87} Id.
\textsuperscript{88} Wooten, supra note 30, at 729, 730.
workers would not be as fortunate. The pension liabilities of the Studebaker pension trust exceeded its assets by $15 million, which meant the retirement funds of 4,392 existing and former Studebaker employees stood to be extinguished.

Leaders of the local union stated that the pension plan represented a private promise by the company that it had a social, moral, and equitable obligation to keep. When the company did not keep that promise, the union and its members had little recourse. On October 15, 1964, the company and the local union entered into an agreement that terminated the Studebaker pension plan. The agreement called for retirees and retirement eligible employees over sixty to receive their full pension benefits. Workers less than age sixty, some of whom worked for the company for forty years, received a lump sum worth approximately 15% of the full value of their pension. Those not fully vested in their benefits, including everyone under age forty, got nothing.

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89 Id. at 726, 730.
90 Id.
91 Id. at 730, 731.
92 Id. The UAW filed a grievance, arguing the shutdown violated the collective bargaining agreement with the local union. Wooten, supra note 30, at 731. Even if the union had prevailed, it would have been a Pyrrhic victory because the pension trust simply lacked the funds necessary to pay all of its obligations. The trust was judgment-proof. Id.
93 Wooten, supra note 30, at 731.
94 Id.
95 Id.
96 Id.
The shuttering of the Studebaker plant has been described as “the most glorious story of failure in the business” because it pushed the topic of pension termination insurance squarely into the public debate on pension reform.97

B. The Long Wending Path to Pension Termination Insurance.

Because of a flawed funding mechanism and the lack of insurance that could be used to cover losses, neither the UAW nor the government could do much to stop the Studebaker pension plan from defaulting on its obligations to the thousands of workers who relied on the promise of retirement income security from the plan.98 A few years before collapse of the plan, public officials and private sector pension experts considered federal legislative proposals to protect workers in private pension plans, specifically insurance that would pay the difference between the cost of some or all of the benefits a plan promised and the value of plan assets available to pay those benefits.99 In 1958, Congress passed the Welfare and Pension Plans Disclosure Act,100 the first federal legislation to regulate private sector employee benefit plans, and in March 1962, President John Kennedy set up the President’s Committee on Corporate Pension Funds to study the country’s private pension plans and make legislative recommendations.101 Union leaders urged the

97 Id. at 686.

98 Id. at 732.

99 Wooten, supra note 30, at 723, 732.

100 Pub. L. No. 85-836, 72. Stat. 997 (repealed 1976). Congress limited the scope of this law to disclosure only. Jaffke, supra note 4, at 260. The law did not set minimums with respect to funding or employee participation, nor did it establish fiduciary responsibilities for plan administrators. Id.

101 Wooten, supra note 30, at 732.
Committee to recommend the establishment of pension termination insurance, but when the Committee submitted an interim report in November 1962, it did not recommend legislation to create pension termination insurance because of concerns about the feasibility of insuring private pensions.\textsuperscript{102} The Committee did, however, urge further study of the idea, and in January 1963, President Kennedy tasked another committee – the President’s Labor Management Advisory Committee – with the responsibility of reviewing the report of the Committee on Corporate Pension Funds.\textsuperscript{103} Like its sister committee, the Labor Management Advisory Committee did not recommend establishing pension termination insurance, but did recommend further study of the issue.\textsuperscript{104}

Refusing to let a crisis go to waste, union officials recognized that the publicity from the shutdown of the Studebaker plant provided an excellent opportunity to revive the issue of pension termination insurance, so they persuaded Walter Reuther, a member of Labor Management Advisory Committee and the UAW president, to raise the South Bend shutdown and the need for pension termination insurance with President Lyndon Johnson at a January 1964 meeting.\textsuperscript{105} President Johnson did not embrace the idea because he needed business

\textsuperscript{102} Id. at 733.

\textsuperscript{103} Id.

\textsuperscript{104} Id.

\textsuperscript{105} Id. at 733, 734.
leaders’ support in his election campaign, and he did not want to expend political
capital on a proposal that might antagonize them.\footnote{Id. at 734.}

Having failed to persuade President Johnson to champion their cause, proponents of pension termination insurance next turned to Senator Rupert Vance Hartke of Indiana.\footnote{Wooten, supra note 30, at 734.} On August 3, 1964, Senator Hartke introduced the Federal Reinsurance of Private Pensions Act.\footnote{S.3071, 88th Cong. (1964): 110 Cong. Rec. 17,725 (1964); Wooten, supra note 30, at 734, 735. The term “Reinsurance” in the title is a misnomer. The proposal was not intended to “reinsure” anything. Id. at 734. Union officials insisted that the term be used to make the proposal more politically palatable. Id. at 734, 735.} He stated that the need for termination insurance had been evidenced by the closing of the Studebaker plant in South Bend.\footnote{110 Cong. Rec. 17,725 (1964): Wooten, supra note 30, at 735.} The shutdown played a prominent role in the discussions of pension reform and termination insurance.\footnote{Wooten, supra note 30, at 735 (citing Michael Allen, The Studebaker Incident and its Influence on the Private Pension Plan Reform Movement, in John H. Langbein & Bruce A. Wolk, Pension and Employee Benefit Law 68, 70 (3d ed. 2000)).} Having comfortably won the 1964 election,\footnote{On November 3, 1964, President Johnson defeated Senator Barry Goldwater of Arizona 486 electoral votes to 52. http://www.archives.gov/federal-register/electoral-college/scores.html#1964 (last visited May 15, 2011). President Johnson received 43,129,566 (61.34%) popular votes to Senator Goldwater’s 27,178,188 (38.66%), and won forty-four states to Senator Goldwater’s six (Alabama, Arizona, Georgia, Louisiana, Mississippi, and South Carolina). Id.} President Johnson’s administration started preparing pension reform legislation in 1966 that included termination insurance.\footnote{Wooten, supra note 30, at 736.} In 1967, Senator Jacob K. Javits of New York introduced comprehensive pension reform legislation that contained a
termination insurance proposal modeled after a revised version of the bill Senator Hartke introduced three years earlier. In 1968, the Department of Labor introduced a comprehensive pension reform measure that also included termination insurance. In 1970, a staff member of the House Labor Committee likened the shutdown of the Studebaker plant to the mine explosion in Farmington, West Virginia that led Congress to pass the Federal Coal Mine Health and Safety Act of 1969, and an AFL-CIO lobbyist compared it to the Triangle fire episode that led to the regulation of sweatshops in the garment industry. Notwithstanding all of the legislative and political activity around the issues of the Studebaker shutdown, pension reform, and termination insurance, ERISA as we know it did not become the law of the land until November 2, 1974, more than a decade after the collapse of the Studebaker plant and its employees’ pension plan.

C. The Enactment of ERISA.

The Studebaker plant closure provided a searing example of what could happen to employee pensions in a completely unregulated environment. That environment produced a number of problems including a lack of disclosure to employees regarding their pension rights and the termination of pension plans brought on by the bankruptcy or poor economic performance of employers.

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116 Carrad, supra note 11, at 1.
Employers could design plans making benefits conditional gifts forfeitable at the
time of their whim, and some reserved the right to terminate pension benefits if former
employees did or said anything during retirement that struck their former
employers as contrary to the employers’ interests.117 The “law” of the retirement
plan often consisted of little more than a handshake.118 A worker eligible to receive
a pension after forty years of service could be terminated twenty-four hours prior to
reaching his fortieth year and receive nothing.119 Adding insult to injury, the
employer could do this with legal impunity.

In response to these issues and others such as administrative ineptness,
corruption, and graft, as well as the lack of uniformity in how states regulated
pensions, Congress enacted ERISA.120 Congress stated ERISA’s most important
purpose was to assure American workers a retirement with financial security and
dignity, without fear that this period of life would be lacking in the necessities to
sustain them as human beings.121

117 Id; Reece, supra note 31, at 382.

118 Dean, supra note 10, at 647 (citing Michael B. Snyder, Qualified Domestic Relations Orders, § 1:4
(2007)).

119 Carrad, supra note 11, at 1.

120 Ablamis v. Roper, 937 F.2d 1450, 1452, 1453 (9th Cir. 1991) (citing H.R. Rep. No. 93-1280, at 7
(1974), reprinted in 1974 U.S.C.C.A.N. 4639) (Congress enacted ERISA to ensure the continued well-
being and security of millions of employees and their dependents who rely on retirement plans); H.R.
Roper: Preemption of the NonEmployee Spouse’s Community Property Rights in ERISA Pension
Plans, 49 Wash. & Lee L. Rev. 1085, 1086, 1087 (1992) (Before ERISA, the lack of national
regulation resulted in financially unstable plans and a lack of uniformity among states in how they
governed pensions. This instability and lack of uniformity often caused employees and their
dependents to lose their anticipated benefits).

Congress divided ERISA into multiple parts, all of which are designed to protect plan participants¹²² and their beneficiaries.¹²³ One part requires plan administrators to regularly make certain disclosures and reports to plan participants and their beneficiaries.¹²⁴ These disclosure and reporting requirements are enforced by the Department of Labor Employee Benefits Security Administration.¹²⁵ A second part limits the amount of time an employee must wait before he is allowed to participate in an employer’s pension plan.¹²⁶ A third part sets minimum funding requirements for plans.¹²⁷ The fourth part imposes fiduciary duties on plan administrators, which requires them to act like prudent investors.¹²⁸

¹²² A participant is an employee or former employee of an employer, or a member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan that covers employees of an employer or members of an employee organization, or whose beneficiaries may be eligible to receive the benefit. 29 U.S.C. § 1002(7).

¹²³ A beneficiary is a person designated by a participant, or by the terms of an employee benefit plan, who is or may become entitled to a benefit under that plan. 29 U.S.C. § 1002(8).

¹²⁴ 29 U.S.C. §§ 1021-1031; Jaffke, supra note 4, at 261; Reece, supra note 31, at 382, 383. The plan administrator can be a person designated under the plan, the plan sponsor, the employer, or anyone the Secretary of Labor prescribes if she cannot find a named administrator or sponsor. 29 U.S.C. § 1002(16); Dean, supra note 10, at 648. The administrator must provide an annual report that includes a financial statement and an opinion by an independent public accountant that the statement conforms to generally accepted auditing standards. 29 U.S.C. § 1023; Dean, supra note 10, at 648. The annual report must also state the number of employees in the plan, the name and address of any fiduciary, and an actuarial statement. 29 U.S.C. § 1023; Dean, supra note 10, at 648. The administrator must provide a plan description to all participants and beneficiaries of the plan. 29 U.S.C. § 1024; Dean, supra note 10, at 649. Upon written request by a plan participant or beneficiary, the administrator must provide a written statement of what benefits have accrued or will become non-forfeitable under the plan. 29 U.S.C. § 1025; Dean, supra note 10, at 649.


¹²⁶ 29 U.S.C. §§ 1051-1061; Jaffke, supra note 4, at 261; Reece, supra note 31, at 382, 383.


¹²⁸ 29 U.S.C. §§ 1101-1114; Jaffke, supra note 4, at 261; Reece, supra note 31, at 382, 383.
These fiduciary duties include providing adequate benefits to plan participants, minimizing plan expenses, and diversifying plan investments. Finally, the fifth part contains enforcement and administrative rules.

ERISA also established the Pension Benefit Guaranty Corporation (“PBGC”), a non-profit public corporation that guarantees all non-forfeitable benefits under ERISA governed defined benefit plans. The PBGC has enforcement powers, including the authority to investigate pension plans and sue for violations of ERISA. It can also collect payments from employers who terminate pension plans with outstanding benefits liabilities. The establishment of the PBGC is the pension termination insurance so many toiled for so before and after the Studebaker plant closure.

ERISA covers employee pension benefits plans and employee welfare benefits plans. Most workers participate in defined benefit plans, defined

129 29 U.S.C. §§ 1101-1114; Dean, supra note 10, at 649.


131 29 U.S.C. §§ 1302, 1303; Dean, supra note 10, at 648; The PBGC insures pension benefits of a corporation’s employees if the company sponsoring an underfunded defined benefit pension plan becomes insolvent. Pension Benefit Guaranty Corporation Investment Policy Statement, GAO/HEHS-99-37R, PBGC’s Financial Condition (Nov. 9, 1994). The PBGC becomes trustee of the plan and its assets, and is then responsible for investing those assets and paying benefits to the plan’s participants. Id.


133 29 U.S.C. §§ 1361-1368; Dean, supra note 10, at 650.

134 Wooten, supra note 30, at 736-39.

135 An employee pension benefit plan is a plan sponsored by employer to provide either retirement income or a deferral of income until the termination of employment or beyond. 29 U.S.C. § 1002(2)(A).
contribution plans\textsuperscript{138}, and cash balance plans\textsuperscript{139} The specifics of each of these plans will be discussed in Part IV of this article. ERISA does not, however, cover all pension or retirement plans.\textsuperscript{140} It does not cover military,\textsuperscript{141} federal,\textsuperscript{142} state, or local government retirement plans.\textsuperscript{143} Likewise that are maintained for workers’ compensation or unemployment\textsuperscript{144} are not covered, nor are church plans or Individual Retirement Accounts.\textsuperscript{145}

\textsuperscript{136} An employee welfare benefit plan is a plan, fund, or program established or maintained by an employer or by an employee organization for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services. 29 U.S.C. § 1002(1).

\textsuperscript{137} 29 U.S.C. § 1002(34).

\textsuperscript{138} 29 U.S.C. § 1002(35).

\textsuperscript{139} 29 U.S.C. § 1054(b)(5)(A)-(G).

\textsuperscript{140} Dean, \textit{supra} note 10, at 652.

\textsuperscript{141} Military plans are governed by the Uniformed Services Former Spouses’ Protection Act, which is codified as 10 U.S.C. § 1408.

\textsuperscript{142} Federal government employees who are not members of the armed services are covered by either the Federal Employees Retirement System or the Civil Service Retirement System. 5 U.S.C. §§ 83450(j), 8467; 5 C.F.R. §§ 838.101-1018. Railroad employees who are not employed by private railroads are covered by the Railroad Retirement Act of 1974, codified as 45 U.S.C. §§ 231-231v. Carrad, \textit{supra} note 11, at 226-28.

\textsuperscript{143} ERISA exempts government plans from its coverage. 29 U.S.C. § 1003(b)(1). Government plans include plans established or maintained for employees by the federal government, by any state government or political subdivision, or by any agency or instrumentality of a state or subdivision of a state. 29 U.S.C. § 1002(32). On the other hand, public educational institutions such as state universities, may establish and maintain ERISA covered plans for their employees pursuant to 26 U.S.C. § 26 U.S.C. §§ 403(b)(1)(A)(i), (ii). These are known as 403(b) plans. \textit{See infra} § III.B.

\textsuperscript{144} 29 U.S.C. § 1003(b)(3).

\textsuperscript{145} 29 U.S.C. § 1003(b)(2). Church plans can elect to be covered, which some may find desirable if their plans lack rules for dividing pensions in divorce proceedings. Dean, \textit{supra} note 10, at 652 (citing Gary A. Shulman \& David I. Kelley, \textit{Dividing Pensions in Divorce} § 21.1 (2d ed. 1999)). Individual Retirement Accounts are not governed by ERISA. 29 U.S.C. § 1051((6)).
Two parts of ERISA specifically relate to QDROs: the spendthrift provision\textsuperscript{146} and the preemption provision.\textsuperscript{147}

1. ERISA’s Spendthrift Provision.

Employers have an incentive to establish and maintain plans covered by ERISA because the legislation allows them to take tax deductions on the contributions they make to the plans on behalf of participating employees.\textsuperscript{148} Participating employees have this same incentive because the contributions they make to their plans and the earnings on those contributions are tax deferred.\textsuperscript{149}

For employers to take advantages of the tax benefits afforded under ERISA, their retirement plans must expressly prohibit the assignment or alienation of benefits provided to employees.\textsuperscript{150} Congress included this provision to protect employees from their own financial imprudence, and to protect them from others who might use their retirement plans as a means to retaliate against them, which employers frequently did prior to the enactment of ERISA.\textsuperscript{151} Congress intended

\textsuperscript{146} 29 U.S.C. § 1056(d)(1). “Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.” \textit{Id.}

\textsuperscript{147} 29 U.S.C. § 1144(a). Section 1144(a) states in part that ERISA supersedes all State laws relating to any employee benefit plan. \textit{Id.}

\textsuperscript{148} 26 U.S.C. § 404.

\textsuperscript{149} U.S.C. § 402(a).

\textsuperscript{150} \textit{See supra} note 146 and accompanying text.

\textsuperscript{151} \textit{Boggs v. Boggs}, 520 U.S. 833, 863, 864 (1997) (citing \textit{Guidry v. Sheet Metal Workers Nat’l Pension Fund}, 493 U.S. 365, 376 (1990)) (ERISA’s anti-alienation provision reflects a congressional policy choice to safeguard a stream of income for pensioners and their dependents); \textit{Am. Tel. & Tel. Co. v. Merry}, 592 F.2d 118, 124 (2nd Cir. 1979) (the purpose of the anti-alienation and anti-assignment provision is to protect an employee from his own financial improvidence in dealings with third parties); \textit{Reece, supra} note 31, at 383, 386-388.
that the employee’s accrued benefits would actually be available at retirement, therefore, neither the employee nor the employer can assign or alienate the benefits.\(^{152}\) The Internal Revenue Service (“IRS”)\(^ {153}\) will not consider a plan qualified under ERISA unless the plan explicitly provides that benefits under the plan cannot be assigned at law or in equity, alienated, or subject to attachment, garnishment, levy, execution, or other legal or equitable process.\(^ {154}\) This spendthrift provision has teeth, as reflected in some significant Supreme Court decisions.\(^ {155}\)

One such decision is *Guidry v. Sheet Metal Workers National Pension Fund*.\(^ {156}\) In *Guidry*, a union official pleaded guilty to embezzling from his union.\(^ {157}\) The union obtained at $275,000 judgment against him, and the district court imposed a constructive trust on his pension benefits.\(^ {158}\) The union official appealed,

\(^{152}\) Reece, *supra* note 31, at 387.

\(^{153}\) Jurisdiction over ERISA is divided between the United States Department of Labor and the Internal Revenue Service, however, the Department of Labor has jurisdiction over QDROs. 26 U.S.C. § 401(n); 29 U.S.C. §§ 1056(d)(3); 1201-1242. The Department of Labor originally had the authority to issue regulations for the funding and vesting of ERISA plans, but on December 31, 1978, President James Earl Carter, Jr. issued an executive order transferring this authority to the Internal Revenue Service. Dean, *supra* note 10, at 650 (citing 44 Fed. Reg. 1065 (Jan. 3, 1979) (the effective date of the Reorganization Plan No. 4 of 1978 is December 31, 1978); Reorganization Plan No. 4 of 1978, 43 Fed. Reg. 47,713 (Oct. 17, 1978); Michael B. Snyder, *Qualified Domestic Relations Orders*, § 1:4 (2007)).


\(^{157}\) 493 U.S. at 367.

\(^{158}\) *Id.* at 367-70 (citing *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 641 F. Supp. 360, 360-63 (D. Colo. 1986)). The United States Court of Appeals for the Tenth Circuit affirmed the district court judgment. *Id.* at 370-71 (citing *Guidry v. Sheet Metal Workers Nat’l Pension Fund*, 856 F.2d 1457, 1460-61 (10th Cir. 1988)).
arguing the constructive trust violated the anti-alienation and anti-assignment provision of ERISA.\textsuperscript{159} The Supreme Court agreed with the union official, and in so doing, refused to create an exception to ERISA’s prohibition on the assignment or alienation of benefits, even in cases of employee malfeasance or criminal conduct.\textsuperscript{160} The Court stated that Congress made the policy choice to safeguard a stream of income for pensioners and their dependents, even if doing so meant preventing parties wronged by pensioners from securing relief.\textsuperscript{161} The Court acknowledged that ERISA’s spendthrift provision would hinder the collection of lawful debts, and stated that if an exception to that provision should be created, Congress, rather than the Court, should create it.\textsuperscript{162}

In \textit{Patterson v. Shumate},\textsuperscript{163} the Court considered the question of whether a bankruptcy debtor’s pension worth $250,000 had to be included in his bankruptcy estate, and hence, reachable by his creditors.\textsuperscript{164} The debtor argued his pension should be excluded from the bankruptcy estate based on ERISA’s spendthrift clause and 11 U.S.C. § 541(c)(2),\textsuperscript{165} a section of the Bankruptcy Code that excludes from

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\textsuperscript{159} 493 U.S. at 367.

\textsuperscript{160} \textit{Id.} at 376.

\textsuperscript{161} \textit{Id.}

\textsuperscript{162} \textit{Id.} at 376-77.

\textsuperscript{163} 504 U.S. 753 (1992).

\textsuperscript{164} \textit{Id.} at 755-57.

\textsuperscript{165} 11 U.S.C. § 541(c)(2) states that a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under applicable non-bankruptcy law is enforceable in a bankruptcy proceeding.
the bankruptcy estate trusts that have transfer restrictions imposed on them under “applicable non-bankruptcy law.”\textsuperscript{166} The district court disagreed, holding “applicable non-bankruptcy law” meant state law only, and that under Virginia law, the debtor’s pension did not qualify as a spendthrift trust.\textsuperscript{167} The United States Court of Appeals for the Fourth Circuit reversed, holding the phrase “applicable non-bankruptcy law” included ERISA’s non-alienation provision, and that it restricted the transfer of the debtor’s pension to the bankruptcy estate.\textsuperscript{168} The Supreme Court affirmed the Fourth Circuit, and in so doing noted that it would be inconsistent to allow a creditor to reach a debtor’s ERISA covered pension in a bankruptcy proceeding, but disallow that same creditor access to that pension in a garnishment or collection action outside of a bankruptcy case.\textsuperscript{169} The Court resolved this inconsistency in favor of shielding debtors’ ERISA pensions from the reach of creditors, even in bankruptcy proceedings.\textsuperscript{170}

At bottom, ERISA’s spendthrift provision makes an employee’s pension benefits off limits to creditors, even those who became creditors as a result of wrongs committed by the pensioner.\textsuperscript{171} Creditors, however, are not the only parties

\textsuperscript{166} \textit{Patterson}, 504 U.S. at 755-57.

\textsuperscript{167} \textit{Id.} at 755-56 (citing \textit{Creasy v. Coleman Furniture Corp.}, 83 B.R. 404, 406 (W.D. Va. 1988)).

\textsuperscript{168} \textit{Id.} at 756-57 (citing \textit{Shumate v. Patterson}, 943 F.2d 362, 365-66 (4th Cir. 1991)).

\textsuperscript{169} \textit{Id.} at 764 (citing Donna Litman Seiden, \textit{Chapter 7 Cases: Do ERISA and the Bankruptcy Code Conflict as to Whether a Debtor’s Interest in or Rights Under a Qualified Plan can be Used to Pay Claims?}, Am. Bankr. L.J. 301, 317 (1987)).

\textsuperscript{170} \textit{Patterson}, 504 U.S. at 764-65.

left in the lurch by ERISA’s spendthrift provision. Before the enactment of the REA, divorced persons could be treated like creditors and be denied their marital share of their former spouses’ retirement plans based on ERISA’s spendthrift and preemption provisions.\footnote{Pub. L. No. 98-387, reprinted in 1984 U.S.C.C.A.N. (98 Stat. 1426) 2547, 2549, 2564-68.} 

2. ERISA Preemption.

Within Constitutional limits, Congress can preempt state authority by stating so in express terms.\footnote{Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n, 461 U.S. 190, 203 (1983) (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).} The preemption doctrine, which has its roots in the Supremacy Clause,\footnote{U.S. Const. art. VI states, “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”} requires courts to examine congressional intent.\footnote{Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 152, 153 (1982).} Preemption may be express or implied, and is compelled whether Congress’s command is explicitly stated by a statute’s language or implicitly contained in its structure and purpose.\footnote{Id. at 153 (citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977)).}

Absent explicit preemptive language, Congress’s intent to trump state law may be inferred in three instances: first, when the scheme of federal regulation is so
pervasive that it is reasonable to infer that Congress left no room for the states to
supplement it; second, if the congressional enactment touches a field where the
federal interest is so dominant that the federal system will be assumed to preclude
enforcement of state laws on the same subject; and third, the object sought to be
obtained by federal law and the character of obligations imposed by it reveals the
same purpose as state law. Even where Congress has not completely displaced
state regulation in a specific area, state law is nullified to the extent it actually
conflicts with federal law. Such conflicts arise when compliance with federal and
state law is a physical impossibility or when state law stands as an obstacle to the
accomplishment and execution of the full purposes and objectives of Congress.

Given the centrality of pension plans in the national economy and their
importance to the financial security of the country’s workforce, Congress sought to
bring uniformity to the regulation of employee benefit plans. Congress
accomplished this by having ERISA expressly preempt all state laws related to
employee benefit plans. Even if a federal law contains an express preemption
clause – as ERISA does – a court still must determine the substance and scope of
Congress’s displacement of state law, i.e., whether Congress intended federal law to

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177 *Id.* at 153 (citing *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

178 *Id.* at 153.

179 *Id.* at 153 (citing *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977); *Florida Lime & Avocado


181 *Boggs*, 502 U.S. at 841 (citing 29 U.S.C. § 1144(a)).
occupy the legislative field, or if there is an actual conflict between state and federal law.\textsuperscript{182} The former type of preemption is called field preemption, and applies when Congress assumes exclusive jurisdiction to regulate a subject.\textsuperscript{183} When it does, any state activity in the field is void, including state laws that are consistent with the federal act.\textsuperscript{184} The latter type is called conflict preemption, and under it, states possess concurrent authority with the federal government to regulate the subject area.\textsuperscript{185} If state law and federal law conflict, the Supremacy Clause dictates that the federal law will prevail; otherwise, states may enforce their consistent and supplemental laws in the federally regulated area.\textsuperscript{186} The case of Boggs v. Boggs\textsuperscript{187} presented the Supreme Court with the question of what type of preemption, if any, applies under ERISA with respect to state community property and succession laws.\textsuperscript{188}

Isaac Boggs (“Mr. Boggs”) worked for South Central Bell from 1949 until 1985.\textsuperscript{189} When he went to work for the company, Mr. Boggs was married to Dorothy


\textsuperscript{183} Rice v. Sana Fe Elevator Corp., 331 U.S. 281, 229-31 (1947); Jaffke, supra note 4, at 263 (citing Donald T. Bogan, Protecting Patient Rights Despite ERISA: Will the Supreme Court Allow States to Regulate Managed Care?, 74 Tul. L. Rev. 951, 961 (2000)).

\textsuperscript{184} Rice, 331 U.S. at 229-31; Jaffke, supra note 4, at 263 (citing Bogan, 74 Tul. L. Rev. at 961).

\textsuperscript{185} Rice, 331 U.S. at 229-31; Jaffke, supra note 4, at 263 (citing Bogan, 74 Tul. L. Rev. at 961).

\textsuperscript{186} Rice, 331 U.S. at 229-31; Jaffke, supra note 4, at 263 (citing Bogan, 74 Tul. L. Rev. at 961).

\textsuperscript{187} 520 U.S. 833 (1997).

\textsuperscript{188} 520 U.S. at 835.

\textsuperscript{189} Id. at 836.
Boggs ("Dorothy") and remained so until she died in 1979.\textsuperscript{190} Their marriage produced three sons.\textsuperscript{191} Following Dorothy’s death, Mr. Boggs married Sandra Boggs ("Sandra") and he remained so married to her until he died in 1989.\textsuperscript{192} Mr. Boggs retired in 1985, at which time he received a lump sum distribution from his South Central Bell retirement plan in the amount of $151,628.94, which he rolled over into an individual retirement account ("IRA").\textsuperscript{193} When he died, the account contained $180,778.05.\textsuperscript{194} In addition to the lump sum payment, Mr. Boggs received ninety-six shares of stock and a monthly annuity payment of $1,777.67.\textsuperscript{195}

Before she died, Dorothy executed a will that left Mr. Boggs one-third of her estate and a life estate in the remaining two-thirds.\textsuperscript{196} She also left her three sons ownership in the remaining two-thirds subject to their father’s life estate.\textsuperscript{197} Under Louisiana law, Dorothy’s will controlled the distribution of her community property\textsuperscript{198} interest in Mr. Boggs’s undistributed pension plan benefits.\textsuperscript{199} In 1980, a

\begin{enumerate}
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id.
\item Id. at 836, 837.
\item Id. at 836, 837.
\item Boggs, 520 U.S. at 840 (citing 1 W. de Funiak, \textit{Principles of Community Property} 11, 85-89 (1943)).
\end{enumerate}
Louisiana state court ruled that her interest in those benefits had a value of $21,194.29. Sandra challenged the validity of Dorothy’s testamentary transfer, arguing that Mr. Boggs’s will left his undistributed benefits to her, and she had an entitlement to them under ERISA. Mr. Boggs’s will left Sandra the family home and a life estate in the remainder of his estate. He also left his sons the remainder of his estate, subject to Sandra’s life estate.

Following their father’s death, two of Mr. Boggs’s sons filed a state court action seeking a judgment awarding them a portion of the IRA, the stock, and the monthly annuity payments Mr. Boggs received during his life. They also requested that the court award them the survivor annuity payments Sandra had already been paid as well as future annuity payments that would be paid to her. Sandra responded by filing a complaint in the United States District Court for the Eastern District of Louisiana, seeking a declaratory judgment that ERISA preempted Louisiana community property and succession laws to the extent they

199 *Boggs*, 520 U.S. at 837.

200 *Id.*

201 *Id.* Sandra relied 29 U.S.C. § 1055(a), the part of ERISA creating a “qualified joint and survivor annuity,” which requires that when a plan participant dies after his annuity starts, the accrued benefit owed to him must be paid to his surviving spouse so long as the surviving spouse did not execute a written waiver of her right to the survivor’s annuity. 29 U.S.C. §§ 1055(c)(2); 1055(d)(1). The surviving spouse receives at least 50% of the amount of the annuity the participant received during his life. 29 U.S.C. § 1055(d)(1).

202 *Boggs*, 520 U.S. at 837.

203 *Id.*

204 *Id.*

205 *Id.*
recognized the sons’ claim to an interest the survivor’s annuity.\textsuperscript{206} The sons filed a motion for summary judgment, and the court granted it, finding that under Louisiana community property law, Dorothy had an ownership interest in Mr. Boggs’s pension plan benefits that accrued during their marriage.\textsuperscript{207} The court further held that Dorothy’s ownership interest did not contravene ERISA’s spendthrift provision because Congress did not intend ERISA to alter traditional familial or support obligations.\textsuperscript{208} The court did not consider Dorothy’s testamentary transfer an assignment or alienation of the pension benefits because she acquired her right to those benefits under community property law, not by a transfer from Mr. Boggs.\textsuperscript{209} The United States Court of Appeals for the Fifth Circuit affirmed, agreeing with the district court that Dorothy’s testamentary transfer did not constitute a prohibited assignment or alienation.\textsuperscript{210} The Fifth Circuit’s decision conflicted with \textit{Ablamis v. Roper},\textsuperscript{211} a Ninth Circuit case that held that ERISA preempts a testamentary transfer by the spouse of a plan participant of her community property interest in undistributed pension plan benefits.\textsuperscript{212} This circuit

\begin{flushleft}
\textsuperscript{206} \textit{Id.} at 837, 838 (citing \textit{Boggs v. Boggs}, 849 F. Supp. 462 (E.D. La. 1994)).

\textsuperscript{207} \textit{Id.}

\textsuperscript{208} \textit{Boggs}, 520 U.S. at 838 (citing 29 U.S.C. 1056(d)(1)).

\textsuperscript{209} \textit{Boggs}, 520 U.S. at 838.

\textsuperscript{210} \textit{Boggs}, 520 U.S. at 838 (citing \textit{Boggs v. Boggs}, 82 F.3d 90 (5th Cir. 1996)).

\textsuperscript{211} 937 F.2d 1450 (9th Cir. 1991).

\textsuperscript{212} \textit{Boggs}, 520 U.S. at 839.
\end{flushleft}
split presented the Court with the question of whether and how ERISA preempted state community property and succession laws.\footnote{Id.}{213}

The Court ruled that ERISA did preempt state community property law, and did so using a conflict preemption analysis.\footnote{Id. at 841.}{214} The Court started by asking if Louisiana’s community property and succession laws conflicted with ERISA or if they operated to frustrate ERISA’s objectives.\footnote{Id.}{215} The Court concluded they did, so it did not reach the question of whether field preemption applied.\footnote{Id.} The Court concluded that the objective of the qualified joint and survivor annuity provision of ERISA\footnote{29 U.S.C. § 1055(a)(1). The objective of § 1055(a)(1) is to provide a stream of income to surviving spouses. Boggs, 520 U.S. at 843. A “joint and survivor annuity” is an annuity payable for the joint lives of two persons that terminates when the survivor dies. 29 U.S.C. § 1055(d)(1). An alternate payee who is a former spouse has to have been married to the participant throughout the one year period ending on the earlier of the participant’s death or annuity starting date. 29 U.S.C. §§ 1055(b)(4), (f); Carrad, supra note 11, at 70.}{217} would be frustrated if states allowed predeceasing spouses’ heirs and

legatees to have a community property interest in the survivor’s annuity.\textsuperscript{218}
Additionally, the Court found that testamentary transfers could reduce a surviving spouse’s guaranteed annuity below the minimum set by ERISA, which is 50\% of the annuity payable to the plan participant during the joint lives of the participant and spouse.\textsuperscript{219} The Court deemed this a direct clash between state law and ERISA, hence state law could not stand.\textsuperscript{220} Allowing Dorothy’s testamentary transfer would undermine ERISA’s mandatory survivor’s annuity and defeat Sandra’s entitlement to the annuity guaranteed to her as Mr. Boggs’s surviving spouse.\textsuperscript{221} This is not something ERISA allows states to do through their community property or testamentary laws.\textsuperscript{222}

Dorothy’s testamentary transfer also violated ERISA’s prohibition on the assignment or alienation of plan benefits intended for plan participants and their beneficiaries.\textsuperscript{223} Under ERISA, beneficiaries of a plan participant are a surviving spouse, a living former spouse, a child, or other dependent, so long as one or more of these persons are designated a beneficiary in a QDRO.\textsuperscript{224} Dorothy’s will did not

\textsuperscript{218} Boggs, 520 U.S. at 843.

\textsuperscript{219} Id. at 844.

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Id. at 844–52.

\textsuperscript{224} Boggs, 520 U.S. at 846, 847 (citing 29 U.S.C. § 1056(d)(3)).
constitute a QDRO, thus her sons could not be considered beneficiaries.225 Dorothy’s interest in Mr. Boggs’s undistributed plan benefits terminated when she died.226 On the other hand, Sandra’s interest in those same benefits existed by virtue of ERISA’s qualified joint survivor annuity provision.227 This meant Mr. Boggs’s sons had no entitlement to any of his retirement benefits upon his death because they were not participants in the retirement plan nor were they beneficiaries under the statutory definition of the term.228

In deciding this case in Sandra’s favor, the Court had to address the contention that when state domestic relations law collides with federal law, preemption should not be presumed given that domestic relations law has historically been the domain of the states.229 Nonetheless, the Court held that community property laws that conflicted with ERISA had to be preempted in order to ensure the implementation of the federal statutory scheme, particularly the goal of making sure retirement funds remained untouched until retirement.230

225 Id. at 848.

226 Id. at 842-44.

227 Id. at 841-44.

228 Id. at 851-54.


The combination of ERISA’s preemptive sweep and its spendthrift provision created a dilemma for state domestic relations courts. Because pension benefits could not be assigned or alienated, and because ERISA preempted all state laws relating to employee benefits plans, some courts held that a party’s retirement benefits could not be touched, even if that party owed family support obligations such as alimony, separate maintenance, or child support. Those courts also held that pension plan benefits could not be divided in connection with a divorce, even if part of those benefits plainly constituted marital or community property under state domestic relations law. Other courts reached the opposite conclusion, holding that ERISA did not preempt state domestic relations law allowing the attachment of pension benefits to satisfy family support obligations, and that state courts could still use community property law to award a divorced spouse her marital share of her ex-spouse’s retirement benefits. Adding to the confusion, the IRS ruled that

234 Monsanto Co. v. Ford, 534 F. Supp. 51, 54 (E.D. Mo. 1981) (divorce related garnishments or attachments for family support obligations would violate ERISA’s spendthrift clause); Francis v. United Techs Corp., 458 F. Supp. 84, 86 (N.D. Cal. 1978) (Congress intended ERISA to prevent the voluntary or involuntary assignment or alienation of benefits, with no exception for divorce proceedings); Gen. Motors Corp. v. Townsend, 468 F. Supp. 466, 470 (E.D. Mich. 1976) (ERISA forbids the garnishment of a plan participant’s retirement benefits to satisfy a judgment obtained in a divorce); Kerbow v. Kerbow, 421 F. Supp. 1253, 1260 (N.D. Tex. 1976) (Congress intended ERISA to supersede any and all state laws regulating employee benefit plans).
235 See supra note 234.
236 Sav. & Profit Sharing Fund of Sears Emps. v. Gago, 717 F.2d 1038, 1041-1045 (7th Cir. 1983) (ERISA preemption inapplicable in divorce proceedings); Operating Eng'rs Local No. 428 Pension Fund v. Zamborsky, 650 F.2d 196, 198-202 (9th Cir. 1981) (an implied exception exists to ERISA's
ERISA’s spendthrift clause did not prohibit a pension plan administrator from honoring a state court order requiring the distribution of a plan participant’s benefits if the participant had started receiving benefits and the court ordered the distribution to fulfill the participant’s alimony or child support obligations.237 The IRS did not express an opinion on situations in which the participant had not started receiving benefits.238

This judicial uncertainty caused a particular hardship on women in divorce cases.239 When Congress passed ERISA, it did not clearly state whether a spouse would have an interest in her spouse’s pension benefits in the event of the death of,


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or a divorce from, that spouse.\textsuperscript{240} Because of this ambiguity, a spouse could be deprived of her marital or community property share of her spouse’s pension benefits if that spouse died or if the couple divorced.\textsuperscript{241}

Before ERISA, pensions were viewed as contracts between employers and employees subject to regulation primarily under state law.\textsuperscript{242} ERISA federalized pension law and established national rules governing the creation, administration, and termination of most pension plans.\textsuperscript{243} In short, ERISA was a congressional tour de force. Almost a decade after it became effective, however, Congress had to act again to address ERISA’s unintended consequences, namely, undercutting the marital and succession rights of widows to their husbands’ pension benefits.\textsuperscript{244}

II. The REA, Survivors’ Annuities, and the Birth of the QDRO.

A. Survivors’ Annuities.

President Ronald Reagan signed the REA into law on August 23, 1984.\textsuperscript{245} Congress passed the REA primarily to safeguard the financial security of widows

\textsuperscript{240} Ablamis v. Roper, 937 F.2d 1450, 1453 (9th Cir. 1991) (citing 29 U.S.C. § 1001(a)).

\textsuperscript{241} Id. at 1453 (citing Pension Equity for Women: Hearings on H.R. 2100 Before the Subcomm. on Labor-Management Relations of the Committee on Education and Labor, 98th Cong. 26–28 (1983)).

\textsuperscript{242} In re Schenectady Ry. Co., 93 F. Supp. 67, 70 (N.D.N.Y. 1950) (pensions are part of the terms of the contract); Zimmerman v. Brennan, 56 Wis.2d 623, 627, 628, 202 N.W.2d 923, 926 (1973) (actions under employee benefit plans are typically grounded in contract); Cantor v. Berkshire Life Ins. Co., 171 Ohio St. 405, 408, 409, 171 N.E.2d 518, 521 (1960) (pension arrangements give rise to contractual rights enforceable by the employee); T.P. Gallanis, ERISA and the Law of Succession, 65 Ohio St. L.J. 185, 185, 186 (2004).

\textsuperscript{243} Gallanis, supra note 242, at 186.


and divorcees.\textsuperscript{246} The REA afforded protection to widows and widowers by requiring pension plans to provide automatic survivor benefits.\textsuperscript{247} Once a plan participant earns a non-forfeitable right to any part of his accrued pension benefits, the participant’s spouse is assured of receiving a survivor’s annuity if the participant predeceases his spouse.\textsuperscript{248} In such cases, the plan administrator must pay the surviving spouse between 50\% and 100\% of the participant’s benefits.\textsuperscript{249} This is called a “qualified joint survivor annuity.”\textsuperscript{250} If the plan participant dies before he starts receiving pension benefits, the surviving spouse can still receive benefits in the form of a “qualified pre-retirement survivor annuity.”\textsuperscript{251} In such cases, the annuity must be at least equal to the payments that would have been made under a qualified joint survivor annuity.\textsuperscript{252}

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\textsuperscript{246} \textit{Ablamis v. Roper}, 937 F.2d 1450, 1453 (9th Cir. 1991) (citing \textit{Mackey v. Lanier Collections Agency & Serv.}, 486 U.S. 825 (1988) (the primary focus of the QDRO exception to ERISA’s anti-alienation clause is to allow spouses to enforce domestic support orders); \textit{Heisler v. Jeep Corp.-UAW Ret. Income Plan}, 807 F.2d 505, 509 (6th Cir. 1986) (the REA sought to rectify certain inequities by providing automatic survivor benefits to spouse of vested plan participants); \textit{Gabrielson v. Montgomery Ward & Co.}, 785 F.2d 762, 765 (9th Cir. 1986) (Congress amended 29 U.S.C. § 1055 to enlarge the rights of surviving spouses to receive benefits)).

\textsuperscript{247} \textit{Ablamis}, 937 F.2d at 1453 n.4 (citing \textit{Pension Equity for Women: Hearings on H.R. 2100 Before the Subcomm. on Labor-Management Relations of the Committee on Education and Labor, 98th Cong. 26-28 (1983)) (although Congress primarily concerned itself with widows, the REA’s survivorship clauses benefit widowers also).

\textsuperscript{248} \textit{Ablamis}, 837 F.2d at 1453 n.6 (citing 29 U.S.C. § 1055(d)(1)).

\textsuperscript{249} 29 U.S.C. § 1055(d)(1).

\textsuperscript{250} \textit{Id}.

\textsuperscript{251} 29 U.S.C. § 1055(e). An alternate payee who is a former spouse has to have been married to the participant throughout the one year period ending on the participant’s death. 29 U.S.C. §§ 1055(b)(4), (f)

\textsuperscript{252} \textit{Id}.
The survivor annuity is mandatory and cannot be waived unless a writing is executed by the plan participant and his spouse, and the writing is notarized or the signing witnessed by a plan representative.253 Once the surviving spouse dies, the annuity terminates.254 The surviving spouse cannot bequeath the annuity benefits.255

B. The Birth of the QDRO.

Prior to the REA, federal and state courts split on the question of whether state court orders issued in domestic relations proceedings could affect the distribution of pension benefits governed by ERISA, with some courts holding ERISA barred such distributions and others holding it did not.256 Responding to this uncertainty and taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership made by spouses who work in the home and outside the home, the REA created an exception to ERISA’s spendthrift provision.257 The exception specifically

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254 Ablamis, 937 F.2d at 1454.
255 Boggs v. Boggs, 520 U.S. 833, 841–45 (1997); Ablamis, 937 F.2d at 1454.
256 Trs. of theDirs. Guild of Am. – Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 419 (9th Cir. 2000); See supra, notes 234–236 and accompanying text.
allows state court ordered assignments of plan benefits to former spouses and dependents. This exception to ERISA’s spendthrift clause is called a QDRO.

A QDRO is a particular type of domestic relations order, which is an order made pursuant to state domestic relations law or community property law relating to the provision of child support, alimony, or marital property rights to a spouse, former spouse, child, or other dependant of a pension plan participant. A QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee’s right to, or assigns to an alternate payee the right to, receive all or part of the benefits payable to a participant in an ERISA pension plan. The order cannot require a plan to provide any type or form of benefit or option not otherwise provided under the plan; it cannot require the plan to provide increased benefits; and it cannot require the plan to pay benefits to an alternate payee that must be paid to another alternate payee under another QDRO. Finally, the order must clearly specify the following: 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.

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258 Tise, 234 F.3d at 419 (citing S. Rep. 98-575, at 1, 1984 U.S.C.C.A.N. at 2547; Stewart, 207 F.3d at 1149; Ablamis, 937 F.2d at 1452, 1453).


261 An “alternate payee” is a 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 the participant. 29. U.S.C § 1056(d)(3)(K).


to each alternate payee, or the manner in which the amount or percentage is to be determined; the number of payments or period to which the order applies; and each plan to which the order applies.\footnote{264}{29 U.S.C. § 1056(d)(3)(C).}

The QDRO is not only an exception to ERISA's spendthrift clause, it is also an exception to ERISA’s preemption of state domestic relations law.\footnote{265}{Trs. of theDirs. Guild of Am. – Producer Pension Benefits Plans v. Tise, 234 F.3d 415, 419 (9th Cir. 2000) (citing 29 U.S.C. § 1144(b)(7)).} This does not mean, however, that all domestic relations orders are exempt from these two provisions; only domestic relations order that are QDROs as defined by the REA are exempt from ERISA’s spendthrift and preemption clauses.\footnote{266}{29 U.S.C. § 1056(d)(3)(A).} State domestic relations orders can create enforceable interests in a person’s ERISA plan benefits, provided those orders comply with the REA’s QDRO requirements.\footnote{267}{S. Rep. 98-575, at 19 (1984), reprinted in 1984 U.S.C.C.A.N. (98 Stat. 1426) 2547, 2565 (ERISA's spendthrift rules should be clarified by creating a limited exception that permits benefits under a pension plan to be divided under certain circumstances. Changes to the ERISA preemption provision are necessary to ensure that only those orders that are excepted from the spendthrift provisions are not preempted by ERISA).} All other domestic relations orders are expressly subject to the spendthrift and preemption clauses.\footnote{268}{Id.}

The primary responsibility for determining whether a domestic relations order is a QDRO rests with the ERISA plan to which it is directed.\footnote{269}{When the plan administrator receives a domestic relations order, he must promptly notify the participant and each alternate payee of the receipt of the order and the plan’s procedures for determining the qualified status of domestic relations orders, and within a reasonable period after
have a person designated as the plan administrator who undertakes this responsibility.\textsuperscript{270} Plan administrators need not be, and in most cases are not, lawyers.\textsuperscript{271} Once a plan administrator receives a domestic relations order for the purpose of determining if it is a QDRO, ERISA does not allow him to look beneath the surface of that order or to second guess state judges’ decisions under state law.\textsuperscript{272}

After obtaining a domestic relations order in a state court proceeding, an alternate payee must present the order to the plan administrator so he can determine if it is a QDRO.\textsuperscript{273} Once the administrator receives the order, he must promptly notify the participant and each alternate payee of the receipt of the order and the plan’s procedures for determining the qualified status of the order.\textsuperscript{274} Additionally, within a reasonable time, the plan administrator must determine whether it is a QDRO and notify the participant and each alternate payee of that determination.\textsuperscript{275} Thus, whether an alternate payee has an interest in a participant’s pension plan is a matter decided in a state court proceeding under that

\begin{itemize}
\item \textsuperscript{270} 29 U.S.C. § 1002(16)(A).
\item \textsuperscript{271} \textit{Blue v. UAL Corp.}, 160 F.3d 383, 386 (7th Cir. 1998).
\item \textsuperscript{272} \textit{Id.} at 385, 386.
\item \textsuperscript{273} 29 U.S.C. § 1056(d)(3)(G)(i).
\item \textsuperscript{274} 29 U.S.C. § 1056(d)(3)(G)(i)(D).
\item \textsuperscript{275} 29 U.S.C. § 1056(d)(3)(G)(i)(II).
\end{itemize}
state’s domestic relations law.\textsuperscript{276} Whether that state court order meets the statutory requirements to be a QDRO and is enforceable against the pension plan, however, is a matter to be determined in the first instance by the plan administrator, and if necessary, by a court of competent jurisdiction.\textsuperscript{277}

While the plan administrator is determining whether a domestic relations order is a QDRO, he must segregate the benefits that would be due the alternate payee under the terms of the order during the first eighteen months those benefits would be payable if the order is ultimately determined to be a QDRO.\textsuperscript{278} If within the benefit segregation period, the order is determined to be a QDRO, the plan administrator must pay the segregated benefits, including interest, to the alternate payee.\textsuperscript{279} If, however, during the benefit segregation period the order is determined not to be a QDRO, the plan administrator must pay the segregated benefits, including interest, to whoever would have been entitled to the benefits if there was no QDRO.\textsuperscript{280} If the plan administrator thereafter determines that a domestic relations order is a QDRO, the plan must start paying benefits to the alternate payee, however, the plan cannot make payments retroactively.\textsuperscript{281}

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\item \textsuperscript{276} \textit{Ttrs. of the Dirs. Guild of Am. – Producer Pension Benefits Plans v. Tise}, 234 F.3d 415, 421 (9th Cir. 2000).
\item \textsuperscript{279} 29 U.S.C. § 1056(d)(3)(H)(ii).
\item \textsuperscript{280} 29 U.S.C. § 1056(d)(3)(H)(iii).
\end{itemize}
Underlying this benefits segregation period is the assumption that benefits might be payable during the period the plan administrator is determining if the domestic relations order is a QDRO.\textsuperscript{282} Congress contemplated that additional state court proceedings might ensue during the QDRO determination period, during which an alternate payee might attempt to cure any defects in the original domestic relations order and get it qualified as a QDRO.\textsuperscript{283} Congress did not, however, intend that plan administrators take eighteen months to determine if a domestic relations order qualifies as a QDRO.\textsuperscript{284} The point of the eighteen month period is to allow enough time to cure any defects in the order one seeks to have qualified as a QDRO.\textsuperscript{285} This is reflected in the language of the statute,\textsuperscript{286} which provides that an alternate payee may, within the eighteen month benefit segregation period, present the plan administrator with modifications to the original domestic relations order.\textsuperscript{287} If the plan administrator determines before the end of the segregation

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\textsuperscript{282} \textit{Trs. of the Dirs. Guild of Am. – Producer Pension Benefits Plans v. Tise}, 234 F.3d 415, 422 (9th Cir. 2000).

\textsuperscript{283} \textit{Tise}, 234 F.3d at 422.

\textsuperscript{284} \textit{Id.} Plan administrators must determine whether a domestic relations order is a QDRO within a reasonable time after receiving the order. 29 U.S.C. § 1056(d)(3)(G)(i)(II). The Department of Labor's position is that the eighteen month benefit segregation period is not the measure of the reasonable period for determining the qualified status of an order and in most cases would be an unreasonably long period of time to take to review an order. The Division of Retirement Benefits Through Qualified Domestic Relations Orders, Questions 2·10, 2·12 \texttt{http://www.dol.gov/ebsa/publications/qdros.html} (last visited May 11, 2011)

\textsuperscript{285} \textit{Id.}

\textsuperscript{286} 29 U.S.C. § 1056(d)(3)(H)(ii); \textit{Tise}, 234 F.3d at 422.

\textsuperscript{287} 29 U.S.C. § 1056(d)(3)(H)(ii); \textit{Tise}, 234 F.3d at 422.
\end{footnotesize}
period that a modified order is a QDRO, the alternate payee’s entitlement to the benefits is fully protected.\textsuperscript{288}

The foregoing seems straightforward enough: draft a domestic relations order that includes what the REA says it must include to be qualified as a QDRO; present the order to the plan administrator; and wait to hear whether the order qualifies as a QDRO or not. If it does not: make whatever changes are necessary to satisfy the plan administrator; submit it anew; get it qualified as a QDRO; and take satisfaction in knowing that you served your client well by securing her interest in her ex-spouse’s pension benefits that are marital or community property. As with so many things, however, there is a quite a bit of distance between theory and reality. The journey from domestic relations order to QDRO can be treacherous. This article will now turn to helping those involved in this journey avoid the most common traps for the unwary.

III. Plans Covered by ERISA.

Before preparing a domestic relations order one intends to get qualified as a QDRO, the drafter must have some understanding of the type of plan he is attempting to divide with a QDRO. ERISA does not apply to all pension plans; it does, however, govern most pension plans in the United States.\textsuperscript{289} Most of these

\textsuperscript{288} 29 U.S.C. § 1056(d)(3)(H)(ii); \textit{Tise}, 234 F.3d at 422.

\textsuperscript{289} Dean, \textit{supra} note 10, at 652-55; \textit{See supra} notes 136-41 and accompanying text.
plans are defined benefit plans,\textsuperscript{290} defined contribution plans,\textsuperscript{291} or cash balance pension plans.\textsuperscript{292}

A. Defined Benefit Plans.

In a defined benefit pension plan, the employer promises to provide the employee a fixed benefit upon retirement, usually related to the employee’s service, pay, or some combination of the two.\textsuperscript{293} Retirement benefits depend on a calculation of average earnings under a final average or career average formula.\textsuperscript{294} The final average formula bases benefits on earnings averaged, for example, over the last three years of employment or over the three consecutive years in a ten year period immediately prior to retirement in which earnings are the highest.\textsuperscript{295} The career average formula bases benefits on earnings averaged over the entire career of

\begin{footnotesize}
\begin{itemize}
  \item A defined benefit plan is a pension plan other than a defined contribution plan. 29 U.S.C. § 1002(35).
  \item A defined contribution plan is a pension plan that provides an individual account for each participant and 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 that may be allocated to the participant’s account. 29 U.S.C. § 1002(34).
  \item Anenson & Lahey, \textit{supra} note 292, at 500.
  \item \textit{Id.} at 500.
  \item \textit{Id.} at 500 (citing Everett T. Allen, Jr., Joseph J. Melone, Jerry S. Rosenbloom & Dennis P. Mahoney, \textit{Pension Planning: Pension, Profit-Sharing, and Other Deferred Compensation Plans} 229-34 (9th ed. 2003)).
\end{itemize}
\end{footnotesize}
The employee is paid for the remainder of his life, and subsidized early retirement benefits are usually included in the plan.297

The employee may or may not contribute to the plan, but if he does, those contributions are usually fixed.298 The employer’s contributions, however, are not fixed because if the plan’s investments perform below expectations, the employer will have to pay more into the fund in order to fulfill its obligation to pay the retirement benefits promised in the plan.299 On the other hand, if the plan’s investments perform better than expected, the employer may not have to contribute as much and instead may rely on the fund’s investment earnings to pay promised benefits.300 The employer bears the risk that the employee or his spouse will live long enough to receive all the benefits paid into the plan because if there are insufficient funds in the plan to pay for those benefits, the employer has to make up the difference.301 The employer’s costs also include the amount necessary to provide the benefit as well as administrative and actuarial expenses.302

296 Id. at 500 (citing Allen, Melone, Rosenbloom & Mahoney at 229-34).

297 Id. at 500.

298 Montgomery v. United States, 18 F.3d 500, 501 (7th Cir. 1994).

299 Id. at 501.

300 Id. at 501, 502.


302 Anenson & Lahey, supra note 292, at 500.
Defined benefit pensions are insured against default by the PBGC,\textsuperscript{303} and employers pay insurance premiums per employee for each employee participating in the pension plan.\textsuperscript{304} Employers also pay variable rate premiums should their funding ratios fall below a statutory average.\textsuperscript{305} These plans can be very expensive for employers because the formula for determining the benefits promised can become back loaded due to the high salaries of long time employees in the last three to five years of employment.\textsuperscript{306} At one time, defined benefit plans constituted the most popular type of pension plan in the United States, but now fewer than 20\% of private sector employees are covered by defined benefit plans.\textsuperscript{307}

B. Defined Contribution Plans.

In a defined contribution plan, the employee and the employer make fixed contributions to a retirement fund for the employee.\textsuperscript{308} The fund is invested, and when the employee retires, he can cash out the account, receive income from the account, or receive some combination of the two.\textsuperscript{309} The balance at retirement

\begin{itemize}
\item \textsuperscript{303} See supra notes 131-134 and accompanying text.
\item \textsuperscript{304} Anenson \& Lahey, supra note 292, at 500, 501.
\item \textsuperscript{305} 29 U.S.C. § 1082; Anenson \& Lahey, supra note 292, at 500, 501.
\item \textsuperscript{306} Angela Boothe Noel, Comment, The Future of Cash Balance Plans: Inherently Illegal or a Viable Pension Option?, 56 Ala. L. Rev. 899, 899-902 (2005).
\item \textsuperscript{307} Dean, supra note 10, at 653 (citing Matthew Venhorst, Note, Helping Individual Investors Do What They Know is Right: The Save More for Retirement Act of 2005, 13 Conn. Ins. L.J. 113, 115 (2006-2007)) (62\% of all workers had defined benefit plans in the 1970s; that number dropped to 13\% by 1997).
\item \textsuperscript{308} Montgomery v. United States, 18 F.3d 500, 501 (7th Cir. 1994).
\item \textsuperscript{309} Dean, supra note 10, at 654 (citing Edward A. Zelinsky, The Defined Contribution Paradigm, 114 Yale L.J. 451, 463, 464 (2004) (defined contribution plans normally pay participants in a lump sum

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consists of the employee’s contributions, plus the employer’s contributions, plus investment gains of the fund, minus investment losses of the fund.\textsuperscript{310} The benefit is not “defined” because it depends on the investment performance of the retirement fund.\textsuperscript{311} Employees assume the investment risk and the risk that they may outlive the amount in their accounts at their retirement.\textsuperscript{312} Two popular defined contribution plans are 401(k)\textsuperscript{313} and 403(b)\textsuperscript{314} plans. The defined contribution plan is the most popular private sector retirement plan because employers prefer that the risk of funding retirement be borne by employees.\textsuperscript{315} These plans are not insured by the PBGC.\textsuperscript{316}

In 2002, employees and their employers contributed over $84 billion to defined contribution pension plans, bringing the amount held in such plans on behalf of many of America’s workers to nearly $2 trillion.\textsuperscript{317} This amount exceeded

\begin{flushleft}
\textsuperscript{310} Montgomery, 18 F.3d at 501.
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\textsuperscript{311} Id.
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\textsuperscript{312} Anenson & Lahey, supra note 292, at 501.
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\textsuperscript{313} 26 U.S.C. § 401(k).
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\textsuperscript{314} 26 U.S.C. § 403(b). Section 403(b) plans are essentially 401(k) plans for persons who work for tax exempt organizations or public schools.
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\textsuperscript{315} Dean, supra note 10, at 654.
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\textsuperscript{316} General FAQs About PBGC, \url{http://www.pbgc.gov/about/faq/pg/general-faqs-about-pbgc.html} (last visited May 24, 2011).
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by over $200 million the amount held in defined benefit pension plans.\textsuperscript{318} Over one-half of private pension plan assets are held in defined contribution plans.\textsuperscript{319} By way of comparison, in 2002, workers contributed $80 billion to defined contribution plans and $39 billion to defined benefit plans.\textsuperscript{320}

C. Cash Balance Pension Plans.

The cash balance plan is a defined benefit plan with many features of a defined contribution plan.\textsuperscript{321} It is similar to a defined contribution plan because it creates a hypothetical account for the employee based on his contributions at a specified rate of interest.\textsuperscript{322} It is a defined benefit plan because the employer bears the investment risk and guarantees a particular benefit at retirement.\textsuperscript{323} If the account earns more interest on the funds than are necessary to pay benefits, the employer keeps the excess.\textsuperscript{324} If the account earns less interest, the employee is still assured an amount at the specified interest rate.\textsuperscript{325} Cash balance plans provide fairly uniform increases in benefits during a worker’s employment and do not have

\textsuperscript{318} Donahue, \textit{supra} note 317, at 9.

\textsuperscript{319} Donahue, \textit{supra} note 317, at 11.

\textsuperscript{320} \textit{Id}.


\textsuperscript{323} Anenson & Lahey, \textit{supra} note 292, at 502 (citing Zelinsky, 19 Va. Tax Rev. at 693).

\textsuperscript{324} Anenson & Lahey, \textit{supra} note 292, at 502 (citing Zelinsky, 19 Va. Tax Rev. at 693, 694).

the substantial increase in benefits embodied in the final average formulas of traditional defined benefit plans. Rather than offering deferred annuity payments based on a salary and service formula, cash balance plans typically distribute retirement benefits in one lump sum. The plans are insured by the PBGC. Cash balance plans have become quite popular, particularly among employers with cash strapped defined benefit plans, and thousands of employers have converted their defined benefit plans into cash balance plans.

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327 Id.
329 Fike, supra note 10, at 236, 237. This conversion process has proved to be quite controversial. Carrad, supra note 11, at 17, 18; Shulman, supra note 18, at § 14.01: Reiss, supra note 30. Under a traditional defined benefit plan, a participant’s benefits are typically based on his final average earnings when his pay is usually at an apex. Shulman, supra note 18, at § 14.01. For example, a plan may base a participant’s pension on the average salary he earns between the ages of sixty and sixty-five. If the employee retires with forty years of service at age sixty-five, his final average salary will be multiplied by a factor incorporating all forty years of his service. Id. Thus, as the employee continues to work year after year, his pension benefits will increase substantially because the previous years of employment will push up his final average salary. Under a cash balance plan, however, the participant receives an annual pension credit for each year’s salary, i.e., the contribution to the employee’s cash balance account will be based on a percentage of his salary earned in that particular year. Id. These credits must be valued based on an annuity for the employee beginning at age sixty-five. 29 U.S.C. §§ 1002(23)(A), (24). For an age sixty-five annuity, the credits will always be more valuable for a younger worker than an older one. Cooper v. IBM Personal Pension Plan, 274 F. Supp. 2d 1010, 1012, 1013 (S.D. Ill. 2003). Each year as a cash balance participant ages, contributions made for him in prior years decline in value in annuity terms. Id. at 1021 (citing Edward A. Zelinsky, The Cash Balance Controversy, 19 Va. Tax Rev. 683, 733 (2000)). Additionally, cash balance plans measure accrued benefits in terms of annuities, not in terms of annual contributions. Cooper, 274 F. Supp. 2d at 1021 (citing Zelinsky, 19 Va. Tax. Rev. at 733).

The rate of a participant’s benefit accrual decreases as he approaches age sixty-five. Cooper, 274 F. Supp. 2d at 1021, 1022. For example, a forty-nine year old worker with twenty years of service accrues an age sixty-five annuity of $8,093 in the year 2000. Id. The next year, he accrues an additional $622, and by 2010, his additional accrual is $282. Id. This forty-nine year old’s benefit accrual is reduced for each year he ages. Id. Had this employee been a participant in a defined benefit plan, his pension calculation would not be based on a single year’s earnings, but on his average annual earnings during the last years of employment when his earnings are much higher. Shulman, supra note 18, at § 14.01. This disadvantages older workers because benefits accrued
Once the domestic relations practitioner learns what type of plan he has to divide for his client, the drafting process begins.

IV. Common QDRO Errors.

A. Lack of an Awareness that QDROs Exist or are Required.

QDRO’s came into existence on August 23, 1984 when President Ronald Reagan signed the REA.\(^\text{330}\) Initially, the most common error in the preparation of QDROs was the lack of awareness that QDROs even existed.\(^\text{331}\) The law of marriage and divorce in this country dates to the establishment of the American colonies, so under a cash balance plan will be substantially less than those accumulated under a defined benefit plan. \textit{Id}; Reiss, \textit{supra} note 30.

In 1999, a group of IBM employees filed a class action in federal district court arguing that IBM’s conversion of its defined benefit pension plan to a cash balance plan violated ERISA’s prohibition on age discrimination. \textit{Cooper v. IBM Personal Pension Plan}, 274 F. Supp. 2d 1010, 1012, 1013 (S.D. Ill. 2003). The court agreed and ruled that IBM’s conversion violated ERISA. \textit{Id.} at 1013-23. The United States Court of Appeals for the Seventh Circuit reversed, holding that IBM’s cash balance plan did not unlawfully discriminate on the basis of age. \textit{Cooper v. IBM Personal Pension Plan}, 457 F.3d 636, 637-43 (7th Cir. 2006), \textit{cert. denied}, 549 U.S. 1175 (2007). The court agreed with the employees’ basic premise that the funding of IBM’s cash balance plan advantaged younger workers while disadvantaging older ones, but found the argument insufficient to establish age discrimination because it is inapposite to compare the time value of money with age discrimination. \textit{Id.} at 640-42. The court stated it is essential to separate age discrimination from characteristics that may be correlated with age. \textit{Id.} at 642 (wages rise with seniority and with age, but distinctions based on wage levels do not discriminate based on age). A plaintiff alleging age discrimination must demonstrate an adverse action because of age, and the Court found IBM’s plan to be age neutral. \textit{Id.}

The Second, Third, Sixth, and Ninth Circuit followed \textit{Cooper} in cases where employees alleged cash balance plans violate ERISA’s ban on age discrimination. \textit{Hurlic v. S. California Gas Co.}, 539 F.3d 1024, 1028 (9th Cir. 2008); \textit{Hirt v. Equitable Ret. Plan for Emps., Managers, & Agents}, 533 F.3d 102, 104, 110 (2d Cir. 2008); \textit{Drutis v. Rand McNally & Co.}, 499 F.3d 608, 615 (6th Cir. 2007); \textit{Register v. PNC Fin. Servs. Grp., Inc.}, 477 F.3d 56, 67-74 (3d Cir. 2007). The Fifth Circuit suggested in dictum that it would join the Second, Third, Sixth, Seventh, and Ninth Circuits had the employee not abandoned the argument on appeal. \textit{Rosenblatt v. United Way of Greater Houston}, 607 F.3d 413, 417 (5th Cir. 2010). The Eighth Circuit had the issue before it, but did not decide the question because the employees waived the argument on appeal. \textit{Sunder v. U.S. Bancorp Pension Plan}, 586 F.3d 593, 603 (8th Cir. 2009).


\(^{331}\) Simmons & Watson, \textit{supra} note 30, at 3-4.
by comparison, QDROs are of a fairly recent vintage. Thus, it is arguably understandable that fewer than three years after Congress created QDROs, some practitioners might have not been aware of their necessity or importance.\textsuperscript{332} Today, however, no one can reasonably make that claim.

It is not enough to add language to a separation agreement, divorce decree, or property settlement agreement that one spouse is to receive all or some portion of the other spouse’s retirement benefits. If that is all the lawyer does to secure a client’s marital or community property share of her spouse’s retirement benefits, the lawyer has invited side litigation on the issue of whether the separation agreement, divorce decree, or property settlement agreement substantially complies with the REA’s QDRO requirements.\textsuperscript{333} While courts have liberally construed the

\textsuperscript{332} One court has stated that by 1987, the REA and QDROs were firmly established law. \textit{In re Williams}, 50 F. Supp. 2d 951, 958 n.11 (C.D. Cal. 1999).

\textsuperscript{333} Two cases exemplify this. In \textit{Metro. Life Ins. Co. v. Wheaton}, 42 F.3d 1080, 1081-85 (7th Cir. 1994), the Seventh Circuit held that a divorce decree that failed to explicitly name the plan to which the order pertained, and failed to specify how the proceeds were to be divided between alternate payees, was nevertheless sufficient to qualify as a QDRO, because there was no ambiguity as to how to dispense the proceeds of the ERISA plan. In that case, the divorce decree simply referred to the plan at issue as “the life insurance which (sic) is presently carried through his/her employer.” \textit{Id.} at 1081. In so holding, the court stated:

\begin{quote}
It is asking too much of domestic relations lawyers and judges to expect them to dot every “i” and cross every “t” in formulating divorce decrees that have ERISA implications. Ideally, every domestic relations lawyer should be conversant with ERISA, but it is unrealistic to expect all of them to be. We do not think Congress meant to ask the impossible, not the literally, but the humanly, impossible, or to make a suit for legal malpractice the sole recourse of an ERISA beneficiary harmed by a lawyer’s failure to navigate the treacherous shoals with which the modern state-federal law of employee benefits abounds.
\end{quote}

\textit{Id.} at 1085.

The Ninth Circuit came to a similar conclusion when presented with the question of what degree of compliance with the REA will suffice to have a domestic relations order deemed a QDRO. \textit{Stewart v. Thorpe Holding Co. Profit Sharing Plan}, 207 F.3d 1143, 1149-55 (9th Cir. 2000).
criteria by which a domestic relations order will qualify as a QDRO,\textsuperscript{334} litigating the issue will cost the client time and money.

This can be avoided by making a QDRO checklist for each domestic relations order. The first four items on the checklist should include: (1) the name and address of each alternate payee; (2) the amount or percentage of benefits to be paid by the plan to an alternate payee, or a formula for determining that amount; (3) the number of payments or period to which the order applies; and (4) each plan to which the domestic relations order applies.\textsuperscript{335} Next, confirm that the order does not do any of the following: (1) require the plan to provide any type of benefit or option not otherwise provided under the plan; (2) require the plan to provide increased benefits; or (3) supersede any benefits already allocated under a previously approved QDRO.\textsuperscript{336}

These requirements exist to spare the plan administrator from litigation fomenting ambiguities about who the beneficiaries are.\textsuperscript{337} With all that said, whose responsibility is it to draft the order that will be submitted to the plan administrator for him to make a QDRO determination?\textsuperscript{338} The domestic relations

\begin{footnotes}
\textsuperscript{334} Even courts that are generally more conservative in their approach to ERISA requirements nonetheless caution against unduly narrow interpretations of the language within a domestic relations order. \textit{Hawkins v. Comm'r}, 86 F.3d 982, 988-990 (10th Cir. 1996). In rejecting a narrower approach by the Tax Court, the Tenth Circuit reasoned that nothing in the plain language of 26 U.S.C. § 414(p)(1)(A)(i) (the IRS. counterpart to ERISA) exhorts domestic relations lawyers to literally mimic the statutory language when drafting orders intended to be QDROs. \textit{Id.} at 990.


\textsuperscript{337} \textit{In re Williams}, 50 F. Supp. 2d 951, 957 (C.D. Cal. 1999).

\textsuperscript{338} Carrad, supra note 11, at 97-99.
\end{footnotes}
judge will not do the drafting.\textsuperscript{339} Understanding QDROs requires being conversant with the tax and labor parts of ERISA. These areas of law arise infrequently in state court; thus, the judge who signs off on a domestic relations order may not be terribly familiar with the inner workings of ERISA or the REA.

Plan administrators will not draft QDROs either.\textsuperscript{340} They do not have to be lawyers,\textsuperscript{341} and even if one is, he should not engage in the unauthorized practice of law by drafting a domestic relations order for either party.\textsuperscript{342} The administrator might provide a model order and will comment on whether a submitted order qualifies as a QDRO, but that is all one is going to get out of the administrator.\textsuperscript{343}

The attorney for the plan participant is also not going to draft the QDRO.\textsuperscript{344} The plan participant has a lot to lose and nothing to gain with the entry of a QDRO.\textsuperscript{345} He stands to lose part or all of his retirement benefits to an ex-spouse, thus he hopes that a QDRO never gets entered.\textsuperscript{346} It is therefore unreasonable to

\textsuperscript{339} Id.
\textsuperscript{340} Id.
\textsuperscript{341} Blue v. UAL Corp., 160 F.3d 383, 386 (7th Cir. 1998).
\textsuperscript{342} Carrad, supra note 11, at 97-99.
\textsuperscript{343} Id.
\textsuperscript{344} Id.
\textsuperscript{345} Id.
\textsuperscript{346} Id.
expect the participant’s lawyer to actively assist in assigning part or all of what is probably his client’s most significant asset.\textsuperscript{347}

That leaves one other person responsible for the drafting: the attorney for the alternate payee.\textsuperscript{348} It is malpractice to fail to draft a domestic relations order and get it qualified by the plan administrator for the correct amounts specified by the domestic relations court.\textsuperscript{349} If you represent an alternate payee, it is your professional and ethical responsibility to make sure the drafting and qualification process is followed through to successful completion.\textsuperscript{350}

B. Delay in Drafting the QDRO.

The next question is when should you draft the order – before, during, or after the divorce proceedings? The answer is as soon as possible.\textsuperscript{351} Being dilatory in sending a domestic relations order to a plan administrator for qualification has been the subject of malpractice actions and attorney disciplinary proceedings.\textsuperscript{352} Litigation has also resulted from disparities in what the domestic relations court

\textsuperscript{347} \textit{Id.} see supra note 10 and accompanying text. Also, the participant is unlikely to want to pay his lawyer for doing this.

\textsuperscript{348} Carrad, supra note 11, at 97-99.

\textsuperscript{349} \textit{Id.}

\textsuperscript{350} \textit{Id.}

\textsuperscript{351} \textit{Id.} at 99, 100.

ordered or what the parties agreed to and what the QDRO ended up dividing. The longer one waits to draft the order, the greater the likelihood one will omit something from, or add something to, the order that differs from the parties’ agreement or the court’s directives.

In contested matters, the order should be drafted prior to a property division hearing. Often the parties agree on most aspects of the order except the percentage or dollar amount the alternate payee will receive. This is no reason for delay; draft the remaining clauses of the order and submit it to the plan administrator with the part designating the dollar amount or percentage left blank to be filled in once that figure is determined. Although this is not an “order” at this stage of the proceedings and cannot be qualified by the plan administrator, this gives the drafter an opportunity to determine early in the process what problems, if any, exist with the draft.

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354 Carrad, supra note 11, at 99, 100.

355 Id. at 100.

356 Id.

357 Id.

358 Id. The United States Department of Labor encourages plan administrators to provide advice and guidance to attorneys preparing domestic relations orders as early as possible in domestic relations proceedings. The Division of Retirement Benefits Through Qualified Domestic Relations Orders, Questions 2-1, 2-5, 2-7, http://www.dol.gov/ebsa/publications/qdros.html (last visited May 11, 2011).
Another issue that might arise if an order is not drafted on a timely basis is that the participant might terminate his employment.\textsuperscript{359} Termination of a participant’s employment can trigger his eligibility to receive a distribution under the employer’s pension plan; this is particularly so with respect to defined contribution plans like 401(k)s and 403(b)s.\textsuperscript{360} Once a distribution is made to a participant, it is too late for a QDRO to be effective in obtaining the alternate payee’s marital or community property share.\textsuperscript{361} If a participant terminates his employment before a QDRO is entered, serve a subpoena on the plan to determine if the funds are still in the plan.\textsuperscript{362} If they are, the alternate payee can use some other means to collect her share, but a QDRO is not one of them.\textsuperscript{363} If a participant does not terminate his employment prior to the entry of a QDRO, he may choose to retire.\textsuperscript{364} If this happens and the participant chooses to receive benefits in the form of a single life annuity\textsuperscript{365} with no survivor benefit, each day that goes by until a QDRO is entered costs the alternate payee benefits she would otherwise receive because the participant will be receiving payments with no

\textsuperscript{359} Shulman, supra note 18, at § 16.02[B].

\textsuperscript{360} Id.

\textsuperscript{361} Id.

\textsuperscript{362} Id.

\textsuperscript{363} Id.

\textsuperscript{364} Shulman, supra note 18, at § 16.02[C].

\textsuperscript{365} A single life annuity is an annuity payable for the life of one person. 29 U.S.C. § 1055(d)(1)(B).
obligation to share them with the alternate payee.\textsuperscript{366} When the QDRO is eventually entered, it is possible for the alternate payee to recover lost payments, but on a prospective basis only because ERISA forbids retroactive payments.\textsuperscript{367} For example, if an alternate payee lost $1,000 because the participant retired choosing a single life annuity and did so before the entry of a QDRO, the QDRO can include a provision stating that the alternate payee will receive an additional amount per month until the $1,000 has been fully recovered.\textsuperscript{368} The participant, however, would have to consent to this. If he does not, the matter would have to be decided by a court, and it is not the most tenable position to argue that the alternate payee should receive lost monies notwithstanding the fact that her lawyer failed to draft the order before the participant retired.

There is a second problem for alternate payees when it comes to participants retiring before the entry of a QDRO, and that is the loss of a lifetime stream of income.\textsuperscript{369} When a participant chooses a single life annuity, payments will cease when the participant dies.\textsuperscript{370} A properly drafted QDRO can require the participant to choose a qualified joint survivor annuity,\textsuperscript{371} which would guarantee the alternate payee a stream of payments for her life. It is essential to get the QDRO entered

\textsuperscript{366} Shulman, supra note 18, at § 16.02[C].
\textsuperscript{368} Shulman, supra note 18, at § 16.02[C].
\textsuperscript{369} Id.
\textsuperscript{371} 29 U.S.C. § 1055(d)(1).
prior to the participant retiring, otherwise, the alternate payee has to hope the participant outlives her so she can receive a stream of income for her lifetime.\textsuperscript{372}

There is one other thing that could happen to a plan participant prior to the entry of a QDRO that could have very adverse consequences for an alternate payee, and that is the death of the participant.\textsuperscript{373} A number of plan administrators will not qualify an order as a QDRO subsequent to the death of the participant.\textsuperscript{374} If this happens, there are two things the attorney for the alternate payee can do.

First, if the divorce decree, property settlement agreement, or separation agreement has enough information in it about the identities and addresses of the participant and alternate payee, the amount of benefits owed to the alternate payee and how long she will receive them, and the name of the benefit plan, a court may construe it as a QDRO.\textsuperscript{375} Likewise, if one of the foregoing documents contains survivorship benefits language, a plan administrator might agree to the alternate payee receiving benefits for her life.\textsuperscript{376}

Second, the plan might accept a \textit{nunc pro tunc} \textsuperscript{377} QDRO.\textsuperscript{378} If so, the alternate payee’s benefits might not be jeopardized. If the plan does not accept \textit{nunc

\textsuperscript{372} Shulman, supra note 18, at § 16.02[C].

\textsuperscript{373} Shulman, supra note 18, at § 16.02[D].

\textsuperscript{374} Id.

\textsuperscript{375} Shulman, supra note 18, at § 16.02[D].

\textsuperscript{376} Shulman, supra note 18, at § 16.02[D].

\textsuperscript{377} This phrase means having retroactive legal effect through a court’s inherent power. \textit{Black’s Law Dictionary} 1174 (9th ed. 2009).

\textsuperscript{378} Shulman, supra note 18, at § 16.02[D].
**pro tunc** QDROs, depending on the federal circuit where the case is, it might be worth suing the plan to put the matter before a judge. Some circuits hold the view that posthumous QDROs that otherwise comply with the REA are acceptable, but others have held that they are not.

C. Insufficient Understanding of How Annuities are Divided.

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379 *Patton v. Denver Post Corp.* 326 F.3d 1148, 1152-54 (10th Cir. 2003) (an ex-spouse's QDRO dated retroactive to before the plan participant's death is valid); *Hogan v. Raytheon, Co.*, 302 F.3d 854, 857 (8th Cir. 2002) (allowing for posthumous entry of a QDRO where plan had notice prior to death, but notice not essential to validity); *Trs. of the Dirs. Guild of Am. – Producer Pension Benefits Plans v. Tise*, 234 F.3d 415, 425, 426 nn. 9, 10 (9th Cir. 2000) (The court held a post-death QDRO is valid, provided plan has notice before death of the impending claim. The court did not decide whether a QDRO could issue after a participant’s death if the plan had no notice of the domestic relations order prior to the death. The court also did not decide whether the state court properly granted a *nunc pro tunc* order or whether the Full Faith and Credit statute, 28 U.S.C. § 1738, would require a federal court to honor a *nunc pro tunc* order.); but see *Carmona v. Carmona*, 544 F.3d 988, 993, 998, 1000-1004 (9th Cir. 2008) (The Ninth Circuit appeared to have moved away from *Tise* when it followed *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4th Cir. 1997), but did not adopt its entire rationale. The court held that a qualified joint survivor annuity irrevocably vests in the participant’s spouse at the time of the annuity start date and cannot be assigned to a subsequent spouse. The court identified the question before it as whether a participant’s retirement cuts off the putative alternate payee’s right to obtain a QDRO with respect to surviving spouse benefits. The court said *Tise* left that question open. The court did, however, reaffirm its holding in *Tise* that as long as a valid domestic relations order creates an alternate payee’s legally enforceable property right in a pre-retirement survivor annuity, a posthumous QDRO can be obtained.); see also *Torres v. Torres*, 100 Haw. 397, 403, 404, 415, 421, 422, 60 P.3d 798, 805, 806, 817, 822, 823 (2002) (relied on *Tise* to hold that survivor benefits did not vest in the participant’s widow on the date of his eligibility for retirement or upon his death. The court affirmed the trial court’s order amending the initial divorce decree after the participant’s death so it could be qualified as a QDRO, stating that as long as ERISA’s qualification requirements are met, a domestic relations order that is valid under state law should be binding on the plan.);

380 *Samaroo v. Samaroo*, 193 F.3d 185, 186, 190, 191 (3d Cir. 1999) (a posthumous QDRO is invalid); but see *Files v. ExxonMobil Pension Plan*, 428 F.3d 478, 479, 487, 488 (3d Cir. 2005) (The Third Circuit retreated from the full implications of *Samaroo* reiterating that *Samaroo* was “expressly limited to its facts.” The court held that a property settlement agreement granting an unmarried pension plan participant’s former spouse a separate interest in 50% of the participant’s pension as of the date of the agreement constituted a QDRO pursuant to 29 U.S.C. § 1056(d)(3), providing the former wife with a separate interest in the pension benefit prior to her ex-husband’s death. The court concluded that *Samaroo* did not control as the former spouse in *Files* was seeking a survivorship benefit provided for in the agreement. The court also distinguished *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4th Cir. 1997) on the grounds that *Hopkins* involved an attempt to divest benefits already vested in a subsequent spouse, whereas *Files* involved no suchvesting.); *Rivers v. Cent. & S. W. Corp.*, 186 F.3d 681, 683 (5th Cir. 1999) (post-retirement QDRO is not valid): *Hopkins v. AT&T Global Info. Solutions Co.*, 105 F.3d 153, 157 (4th Cir. 1997) (same).
If an ERISA qualified plan offers the employee the option to receive his benefits in the form of an annuity, there are typically three ways for the annuity to be paid: (1) a single life annuity for the participant’s life only; (2) a qualified joint survivor annuity for the lives of the participant and the alternate payee; (3) a qualified joint survivor annuity for the lives of the participant and his new spouse.\textsuperscript{381} Regardless of how the annuity is ultimately paid, the present actuarial value for the different payment methods will have to be the same so the total amount the plan pays will be the same.\textsuperscript{382} Present actuarial value is today’s value of an amount of money on hand in the future or a stream of payments owed in the future.\textsuperscript{383} For example: if you have $10 and a financial institution offers you 5% interest per year, if you deposit the $10 today, in one year it will be worth $10.50. Thus, the present value of $10.50 one year from now is $10.\textsuperscript{384}

Similarly, a single amount today and a stream of payments in the future can be compared and valued.\textsuperscript{385} For example: if interest rates are 5% and you want to make payments of $10 per month for twelve consecutive months starting four years from today, you will need to have $121.55 four years from now to fund that stream.

\textsuperscript{381} Raymond S. Dietrich, \textit{Qualified Domestic Relations Order: Strategy and Liability for the Family Law Attorney} § 1.02 (Matthew Bender 2009); David A. Pratt & Sharon Reece, \textit{ERISA and Employee Benefit Law: The Essentials} 435-442 (A.B.A. 2010); Schneider & Pinheiro, \textit{supra}, note 31, at § 3.11[B].

\textsuperscript{382} Under ERISA, a plan cannot be required to provide increased benefits to an alternate payee determined on the basis of actuarial value. 29 U.S.C. § 1056(d)(3)(D)(ii).

\textsuperscript{383} Carrad, supra note 11, at 74, 75; Shulman, supra note 18, at § 16.05[D][1].

\textsuperscript{384} Carrad, supra note 11, at 74, 75.

\textsuperscript{385} \textit{Id.}
of future payments. Hence, the present value of a stream of twelve monthly payments of $10 starting four years today is $100. Thus, one can say the value of $100 today and the value of a stream of twelve monthly payments of $10 starting four years from today are actuarially equivalent. One can also compare two different streams of future payments to determine if one stream is actuarially more, less, or equal to the other.

For example: Husband is fifty-five years of age and Wife is forty. Husband intends to retire in ten years at age sixty-five and receive pension payments of $1,000 per month for the remainder of his life. An actuary estimates that Husband will live to age eighty. Wife is divorcing Husband and wants a QDRO entered that will allow her to start receiving payments immediately. Her life expectancy is eighty-five. The domestic relations court orders that Husband and Wife are to divide his pension benefits equally. Should Wife receive $500 of Husband’s $1,000 monthly benefit? No. Wife will start receiving payments immediately, while Husband will have to wait a decade to start receiving his payments, and once payments start, Wife will get paid for forty-five years, while Husband gets paid for fifteen. Because Wife will start receiving payments earlier and for a longer period of time, her monthly payments must be less than $500 to make them actuarially equivalent to one-half the value of Husband’s stream of future $1,000 monthly benefit.

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386 Id.
387 Id.
388 Id.
389 Id.
payments. Assuming five percent interest rate, Wife’s actuarially equivalent payment would be $178.90 per month, not $500. This is because she will start receiving payments a decade before Husband starts receiving his, and she will get paid for forty-five years compared to his getting paid for fifteen.\(^{390}\)

For readers who are domestic relations practitioners and not financial analysts, statisticians, or actuaries, do not panic. You do not have to be an actuary or advanced at math to draft a QDRO.\(^{391}\) You do, however, have to understand actuarial equivalence and how it relates to interest rates, how soon payments will begin and for how long, and mortality rates.\(^{392}\) Just remember the basics: the longer the duration of the payments, the lower the periodic payment amount: conversely, the shorter the duration, the higher the payment. If you start with the same amount on hand to fund a future stream of periodic payments, you can pay a person a lot of money for a short time or a lesser amount for a longer time.\(^{393}\) Now, back to dividing annuities.

As has already been mentioned, there are typically three ways for a plan participant to receive his annuity payments: (1) a single life annuity for the participant’s life only; (2) a qualified joint survivor annuity for the lives of the participant and the alternate payee; (3) a qualified joint survivor annuity for the

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\(^{390}\) Carrad, supra note 11, at 75-77.

\(^{391}\) Id. at 76, 77.

\(^{392}\) Id.

\(^{393}\) Id. at 80, 81.
lives of the participant and his new spouse.\textsuperscript{394} Once an election is made among the three choices, there are five ways to divide the annuity between the participant and his former spouse.\textsuperscript{395}

1. Participant is Retired and Receiving Payments.

If the participant has retired and is receiving payments from his plan, the form or amount of benefits available to an alternate payee are nearly impossible to change because the plan has started making payments based on the participant’s age and other actuarial factors, and it is entitled to rely on those factors.\textsuperscript{396} The plan administrator cannot be compelled to actuarially adjust the alternate payee’s payments to last for her lifetime.\textsuperscript{397} Under this circumstance, payments to the alternate payee will cease on the participant’s death.\textsuperscript{398}

2. Single Life Annuity on the Life of the Participant.

\textsuperscript{394} Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, \textit{supra} note 31, at § 3.11[B].

\textsuperscript{395} Carrad, supra note 11, at 81-84: Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18 at §§ 10.01-10.09.

\textsuperscript{396} Carrad, supra note 11, at 81-84: Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18 at §§ 10.01-10.09; \textit{but see} \textit{In re Marriage of Allison}, 234 Cal. Rptr. 671, 672-76, 189 Cal. App. 3d 849, 851-57 (Cal. Ct. App. 1987) (Court held that under California law, one spouse could not, by invoking a condition wholly within his control, defeat the community interest of the other spouse, and by opting to retire in the brief period between the judgment of dissolution and the division of property, the husband attempted to do just that. The court remedied the situation by awarding the wife the actuarial value of her forfeited interest).

\textsuperscript{397} Carrad, supra note 11, at 81-84: Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18 at § 10.03.

\textsuperscript{398} Carrad, supra note 11, at 81-84: Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18 at §§ 10.01-10.09.
If the participant has not retired yet, but chooses a single life annuity based on his life expectancy, payments will begin when he retires and will end on his death.\textsuperscript{399} The alternate payee facing this situation has to hope she outlives the participant if she wants to receive benefits for her lifetime.\textsuperscript{400}


This approach guarantees the alternate payee a stream of payments lasting for her lifetime. The only way to secure this benefit, however, is to insert language in a QDRO that designates the alternate payee as the spouse of the participant for the purpose of having the participant elect a qualified joint survivor annuity with the alternate payee.\textsuperscript{401}

4. Qualified Joint Survivor Annuity on the Lives of the Participant and his New Spouse.

If the participant is remarried, he may choose to elect a qualified joint survivor annuity with his current spouse.\textsuperscript{402} This does not preclude the former spouse from receiving a stream of payments that can continue past the death of the participant.\textsuperscript{403} Payments to the alternate payee will continue until the later of the death of the participant or his current spouse, but only if language is included in a

\begin{itemize}
\item \textsuperscript{399} Carrad, supra note 11, at 82; Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B].
\item \textsuperscript{400} Shulman, supra note 18, at § 16.02[C].
\item \textsuperscript{401} 29 U.S.C. §§ 1055(a)(1), (d); 1056(d)(3)(F).
\item \textsuperscript{402} 29 U.S.C. § 1055(c)(2).
\item \textsuperscript{403} Carrad, supra note 11, at 82, 83; Dietrich, \textit{supra} note 381, at § 1.02; Pratt & Reece, \textit{supra} note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B].
\end{itemize}
QDRO that states that if the participant dies, the alternate payee will continue to receive payments until she dies or the participant’s surviving spouse dies.\textsuperscript{404}

5. Single Life Annuity on the Life of the Alternate Payee

This is the preference of a majority of alternate payees because it gives them complete control over when the payments start and there is no risk of outliving the payments.\textsuperscript{405}

It is essential that attorneys in domestic relations proceedings explain these options and the consequences flowing from each to their clients.\textsuperscript{406} This can be quite the task depending on the level of education and sophistication of the client. Moreover, depending on what might happen to the participant’s employment or life prior to the entry of a QDRO, an alternate payee’s options can be narrowed significantly. Thus, it is vital to get an order drafted and qualified as soon as possible to preserve the maximum number options for the client.

D. Uncritically Using the Plan’s Model QDRO.

Many plan administrators will provide attorneys with a company generated model QDRO. This is done in part to follow Department of Labor guidelines\textsuperscript{407} that

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\textsuperscript{404} Carrad, supra note 11, at 82, 83; Dietrich, supra note 381, at § 1.02; Pratt & Reece, supra note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B].

\textsuperscript{405} Carrad, supra note 11, at 83, 84; Dietrich, supra note 381, at § 1.02; Pratt & Reece, supra note 381, at 435-442; Schneider & Pinheiro, supra note 31, at § 3.11[B].

\textsuperscript{406} Id. at 89-96.

require plan administrators to provide information about plans and plan benefits as early as possible in domestic relations proceedings. Mostly though, this is done so the administrator’s review and approval of the order as a QDRO will be easier and less costly. Plan administrators want to simplify their work and minimize the costs associated with the review and approval process. Therefore, the model orders provided to lawyers are not designed to obtain the maximum benefits for alternate payees – that is the responsibility and duty of the alternate payee’s lawyer. A plan administrator cannot, however, refuse to qualify a domestic relations order simply because the drafter did not use the company’s model form. The administrator has to accept any domestic relations order that satisfies the REA’s QDRO requirements. What follows are some of the more frequent omissions from employers’ model QDROs.

1. No Survivorship Protection.

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409 Carrad, supra note 11, at 100, 101; Shulman, supra note 18, at § 13.01.

410 Carrad, supra note 11, at 100, 101; Shulman, supra note 18, at § 13.01.


412 Id. Likewise, an administrator cannot reject a domestic relations order because the order omits information within the administrator’s knowledge or something he can easily obtain with a simple phone call, fax, or email to the lawyer who submitted the order. The Division of Retirement Benefits Through Qualified Domestic Relations Orders, Question 2-7, http://www.dol.gov/ebsa/publications/qdros.html (last visited May 11, 2011). Nevertheless, the drafter should try to be scrupulously exact in complying with the QDRO requirements because each day that the QDRO is not entered could work to the detriment of the client, particularly if she is an alternate payee.
It is not unusual for a model QDRO to omit any mention of survivorship benefits for alternate payees such as qualified pre-retirement survivor annuities (“QPSA”) or qualified joint survivor annuities (“QJSA”). Because this is the only way to guarantee that the alternate payee receives benefits after the death of the participant, the QDRO must explicitly state that she will be treated as the participant’s surviving spouse with respect to a QPSA and a QJSA to the extent of her assigned benefits under the QDRO. Some employers pay the costs associated with providing their employees a pre-retirement annuity benefit. Some, however, do not. Regardless, to make sure the benefit remains available to an alternate payee, her lawyer must included language in the QDRO requiring the participant to maintain coverage for the continued existence of the benefit or barring him from opting out of such coverage.

2. No Division of the Participant’s Tax Basis in Defined Contribution Plans.

Employees can make contributions to defined contribution plans on a pre-tax basis and post-tax basis, and the employer can also make contributions. Post-tax contributions by the employee are beneficial because when those contributions are

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413 Carrad, supra note 11, at 102, 103: Shulman, supra note 18, at § 13.01[B].

414 Carrad, supra note 11, at 102, 103: Dietrich, supra note 381, at § 1.02: Pratt & Reece, supra note 381, at 435-442: Schneider & Pinheiro, supra note 31, at § 3.11[B]: Shulman, supra note 18, at § 13.01[B].

415 Carrad, supra note 11, at 72.

416 Shulman, supra note 18, at § 13.01[B].

417 Dietrich, supra note 381, at § 1.02: Pratt & Reece, supra note 381, at 435-442: Schneider & Pinheiro, supra note 31, at § 3.11[B]: Shulman, supra note 18, at § 13.01[B].

418 Pratt & Reece, supra note 381, at 323-333.
withdrawn, the employee is taxed not on the full amount of the withdrawal, but on
the difference between the withdrawal and the employee’s basis.\textsuperscript{419} For example: if a
person sells something for $100 that he purchased for $50, he will be taxed on the
difference between the sale price and his purchase price, which is his basis.\textsuperscript{420} Post-
tax contributions by employees usually have a tax basis that equals the amount of
the contribution.\textsuperscript{421} If an alternate payee is going to receive one-half of the
participant’s benefits in a plan, she should also receive one-half of his basis,
otherwise she will end up with less than one-half the assets because of the tax
consequences.\textsuperscript{422}

For example: Assume that a participant has $200,000 in a 401(k) or 403(b)
that a court divides equally between him and his spouse, and his basis in that
balance is $40,000. Assume further that both parties are in a 31\% tax bracket. If
the alternate payee receives no part of the participant’s tax basis, her after tax
share of the benefits will be $69,000 ($100,000 marital share – 31\% tax of $31,000).
The participant, on the other hand, will receive an after tax share of $81,400
($100,000 marital share \cdot $40,000 basis = $60,000 taxable amount; 31\% tax on
$60,000 = $18,600; $100,000 marital share \cdot $18,600 tax = $81,400).\textsuperscript{423} One would
have an extremely difficult, if not impossible, time explaining to an alternate payee

\textsuperscript{419} Id.

\textsuperscript{420} Carrad, supra note 11, at 103.

\textsuperscript{421} Id.

\textsuperscript{422} Id. at 103, 104.

\textsuperscript{423} Id. at 103, 104, 147, 148.
how it is she got $12,400 less than her ex-spouse when a court explicitly ordered that she receive one half of a $200,000 benefit.

To avoid this disparity, include a provision in the QDRO that grants the alternate payee a percentage of the participant’s tax basis that equals the percentage of the plan assets assigned to her in the order.424 That language can simply state that the alternate payee is to receive 50% (or whatever percent she received of the participant’s plan benefits) of the participant’s basis in his account as of a certain date.425 This difference is significant as seen using the facts from the previous example: The participant has $200,000 in a 401(k) or 403(b) that a court divides equally between him and his spouse, and his basis in that balance is $40,000. Both parties are in a 31% tax bracket. If the alternate payee receives one-half of the participant’s tax basis, her after tax share of the benefits will be $75,200 ($100,000 marital share – 20,000 one-half of the participant’s basis = $80,000 taxable amount: 31% tax on $80,000 = $24,800: $100,000 marital share – $24,800 tax = $75,200). The participant’s after tax share will also be $75,200 ($100,000 marital share – $20,000 one half basis = $80,000 taxable amount: 31% tax on $80,000 = $24,800: $100,000 marital share – $24,800 tax = $75,200).

Most employer model QDROs do not contain a provision addressing the allocation of the participant’s tax basis, because the plan has no reason to concern

424 Id.

425 Id.
itself with the parties’ tax situations.\textsuperscript{426} The attorney for the alternate payee has a duty to make sure she is not short-changed by not receiving her marital share of her former spouse’s tax basis. Relying on the employer’s model QDRO will not fulfill this duty.


Some plan participants who receive monthly payments from their benefit plans receive periodic increases in those payments to offset the effects of inflation. These increases are called “cost of living adjustments.”\textsuperscript{427} Most employer model QDROs are silent on whether the alternate payee will receive a proportionate share of the participant’s cost of living adjustments.\textsuperscript{428} This benefits the participant because he will receive not only his share of the increase, but also his former spouse’s share. This result can be avoided, however, by including language in the QDRO that awards the alternate payee a proportionate share of any cost of living adjustment received by the participant.\textsuperscript{429}

4. No Early Retirement Subsidy Allocation.

Some employers offer an early retirement subsidy to their employees.\textsuperscript{430} For example: If a company’s pension plan allows a worker to retire at age sixty and still

\textsuperscript{426} Carrad, supra note 11, at 103, 104, 147, 148.

\textsuperscript{427} Carrad, supra note 11, at 104; Shulman, supra note 18, at § 13.02[I].

\textsuperscript{428} Carrad, supra note 11, at 104; Shulman, supra note 18, at § 13.02[I].

\textsuperscript{429} Carrad, supra note 11, at 104; Shulman, supra note 18, at § 13.02[I].

\textsuperscript{430} Carrad, supra note 11, at 104, 105; Dietrich, supra note 381, at § 10.04[4]; Pratt & Reece, supra note 381, at 126-128; Schneider & Pinheiro, supra note 31, at § 3.13[A]; Shulman, supra note 18, at § 13.02[C].
receive the same benefits he would have received at the normal retirement age,\textsuperscript{431} the company is subsidizing his early retirement.\textsuperscript{432} Under the ERISA provision addressing the form and payment of benefits,\textsuperscript{433} an alternate payee who elects to start receiving monthly payments after the participant reaches the “early retirement age,”\textsuperscript{434} as defined by the plan, but before he actually retires, cannot receive a share of the early retirement subsidy.\textsuperscript{435} This is because the employer offered the subsidy to encourage workers to retire early, and unless a participant actually does so, the employer does not receive the benefit of what it paid for, and in light of that, it is not equitable for the employer to be compelled to pay the alternate payee a portion of the early retirement subsidy.\textsuperscript{436}

On the other hand, if the alternate payee chooses to start receiving payments after the participant reaches the early retirement age and the participant retires

\textsuperscript{431} Normal Retirement Age is defined as the earlier of (A) the date a participant reaches the normal retirement age specified in the plan, or (B) the later of (i) the date the participant reaches age sixty-five, or (ii) the fifth anniversary of the time the participant started participating in the plan. 29 U.S.C. § 1002(24). In order to make sense of this definition, calculate it backwards, i.e., first decide the later of parts (B)(i) and (B)(ii), then compare that to part (A). Calculate the date of the fifth anniversary of the date the participant joined the plan (which may not coincide with the start of employment because ERISA allows employers to require their employees to work for one year before participating in the retirement plan). Next, determine the date the participant will turn sixty-five, and select the later of these two dates. Compare that date with the date the participant will reach the normal retirement age specified in the plan, and choose the earliest of these two dates. Carrad, supra note 11, at 15, 16.

\textsuperscript{432} Carrad, supra note 11, at 104, 105; Dietrich, supra note 381, at § 10.04[4]; Pratt & Reece, supra note 381, at 126-128; Schneider & Pinheiro, supra note 31, at § 3.13[A]; Shulman, supra note 18, at § 13.02[C].


\textsuperscript{436} Carrad, supra note 11, at 104, 105.
before the plan’s normal retirement age, the participant will receive the early retirement subsidy because he retired before the plan’s normal retirement age. In this instance the alternate payee can receive a proportionate share of the early retirement subsidy, but only if the QDRO explicitly says she does. The employer’s model QDRO almost never contains language awarding the alternate payee her proportionate share of the participant’s early retirement subsidy when the participant retires after reaching the early retirement age but before the normal retirement age. The alternate payee’s lawyer will have to make sure the QDRO includes such language.

5. Provision for Misdirected Payments.

Despite ever advancing technology and the highly developed knowledge, skill and sophistication of plan administrators, mistakes can still happen in the process of paying benefits to participants and alternate payees. Occasionally, a plan may send a payment intended for the alternate payee to the participant instead. The plan’s model QDRO will not address what should be done in this instance because the plan’s only concern is not paying out more than it is supposed to pay. Language should be included in the QDRO that requires the participant who receives a payment intended for the alternate payee to return the money to the plan administrator with a request that the funds be forwarded to the alternate payee.

437 Carrad, supra note 11, at 104, 105; Dietrich, supra note 381, at § 10.04[4]; Pratt & Reece, supra note 381, at 126-128; Schneider & Pinheiro, supra note 31, at § 3.13[A]; Shulman, supra note 18, at § 13.02[C].

438 Id.; Shulman, supra note 18, at § 13.02[C].

439 Carrad, supra note 11, at 106; Shulman, supra note 18, at § 11.06[N].
The participant should not forward the payment to the alternate payee directly because the party receiving the payment is responsible for paying the income taxes on the payment. If the participant does not involve the plan administrator in correcting the misdirected payment, the participant will owe taxes on the payment intended for the alternate payee.  

The plan administrator can spare the participant any unwanted tax consequences by forwarding the misdirected payment to the alternate payee, and then issuing the participant an IRS Form 1099 that would relieve him of any taxes associated with the misdirected payment. The language regarding the Form 1099 should be included with the language requiring the participant to return misdirected payments to the plan administrator.

6. The 10% Penalty on Early Distributions.

Following a divorce, many alternate payees want immediate access to their share of their ex-spouses’ retirement benefits. It is possible for them to get their money immediately, but they should be advised that doing so will trigger a 10% penalty that is payable if a distribution is taken from an ERISA qualified plan before the participant reaches age fifty-nine. The plan’s model may very well state that the alternate payee is going to be paid directly from the plan, and this may be fine with the alternate payee if she is willing to pay the 10% penalty. On the other hand, an alternate payee may not want to pay the penalty and may want to

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440 Carrad, supra note 11, at 106; Shulman, supra note 18, at § 11.06[N].

441 Dietrich, supra note 381, at §§ 17.01-17.03; Pratt & Reece, supra note 381, at 145-146; Schneider & Pinheiro, supra note 31, at § 3.12.
have her share of the benefits rolled over into an IRA or her own retirement plan. If she wants her share of the benefits rolled over into an IRA, the QDRO must require the plan administrator to transfer the money from the plan into the IRA. If she wants her share of the benefits rolled over into her own retirement plan, the QDRO must instruct the plan administrator to do so.\footnote{Dietrich, supra note 381, at §§ 17.01-17.03; Pratt & Reece, supra note 381, at 145-146; Schneider & Pinheiro, supra note 31, at § 3.12.}

The alternate should not take a payment directly from the plan and deposit the funds herself into an individual retirement account or her own retirement plan. Once the money is in her hands, the 10% penalty is triggered regardless of how quickly she deposits it into an IRA or her own retirement plan. The QDRO should be properly drafted so as to not trigger the 10% early withdrawal penalty.


a. Separate Interest Approach

Benefits payments under a defined benefit plan are going to be made under a separate interest approach or a shared interest approach.\footnote{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.01.} Under the separate interest approach, the alternate payee’s payments will be actuarially adjusted to her own life expectancy.\footnote{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.01.} For example: A divorced participant retired with a monthly pension of $2,000 and the court awarded his alternate payee former spouse one-half of his monthly benefits based on a separate interest approach. The
alternate payee is ten years younger than the participant. The alternate payee will not receive $1,000 per month. Instead, she is going to receive about $700 per month because she is going to be paid over a longer period of time because of her longer life expectancy. A QDRO directing the plan to pay the alternate payee one-half of the participant’s monthly benefit for the alternate payee’s lifetime would be rejected by the plan administrator as violating ERISA’s prohibition on requiring the plan to pay increased benefits based on actuarial equivalence.445

Another point to keep in mind is that even if the QDRO provides that the plan should use a separate interest approach, the language must be unambiguous. Do not merely state that the QDRO is a separate interest order. Instead, provide that the parties intend to use a separate interest approach and that the alternate payee’s benefits should be actuarially adjusted to her own life expectancy.446 Also, add a provision stating that the participant’s death shall not result in the termination of the alternate payee’s benefits.447

Under the separate interest approach, the alternate payee can start receiving benefits before the participant retires, provided the commencement date is on or after he reaches the earliest retirement age.448 If the alternate payee cannot wait or

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445 A plan cannot be required to provide increased benefits to an alternate payee determined on the basis of actuarial value. 29 U.S.C. § 1056(d)(3)(D)(ii).

446 Shulman, supra note 18, at § 6.02.

447 Id.

448 The earliest retirement age is the earlier of (A) the date on which the participant is first entitled to receive a distribution from the plan, or (B) the later of (i) the date the participant reaches fifty years of age or (ii) the earliest date when the participant could start receiving plan benefits if he ceased being employed by the plan sponsor. 29 U.S.C. § 1056(d)(3)(E)(ii). In order to make sense of
does not want to wait to start receiving benefits, the separate interest approach allows her to start receiving benefits at her discretion, but she should be advised that if she starts receiving benefits before the participant reaches the earliest retirement age she will lose her entitlement to a proportionate share of his early retirement subsidy.\textsuperscript{449} The longer she waits to commence receiving benefits, the larger those benefits will be. The separate interest approach is also advantageous to the participant. If he is single when he retires, he can elect to receive benefits in the form of a single life annuity or if he is remarried, he can provide survivorship coverage to his new spouse by choosing a qualified joint survivor annuity based on his and her life.\textsuperscript{450}

A separate interest QDRO still must include a provision for a QPSA\textsuperscript{451} to guarantee the alternate payee that she will receive her share of the participant’s benefits if he dies before retirement or before he starts receiving benefits.\textsuperscript{452} With a properly drafted separate interest QDRO, the alternate payee will receive a lifetime stream of income once the payments start. But her attorney will need to make sure those payments get started even if the participant dies before she does, and a

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{449} Shulman, supra note 18, at § 6.02[A].
\item \textsuperscript{450} Id.
\item \textsuperscript{451} 29 U.S.C. § 1055(e).
\item \textsuperscript{452} Dietrich, supra note 381, at § 10.04: Pratt & Reece, supra note 381, at 436-442; Schneider & Pinheiro, supra note 31, at § 3.11[B][4].
\end{itemize}
\end{footnotesize}
provision granting her a QPSA will do just that.\footnote{Shulman, supra note 18, at § 6.02[B].} If the QDRO is silent in the issue of pre-retirement annuity protection, the alternate payee can lose all her benefits if the participant predeceases her.\footnote{Id.}

A properly drafted separate interest QDRO should not include a provision granting the alternate payee a qualified joint and survivor annuity with the participant because she is already guaranteed a lifetime stream of income once the payments start.\footnote{Id.} Granting her that lifetime guarantee and a qualified joint survivor would deprive the participant of his right to elect to do whatever he wants with his separate share, such as single life annuity on a non-actuarially reduced basis or a qualified joint survivor annuity with his current spouse.\footnote{Id.}

b. Shared Interest Approach.

The second way to divide pension payments under a defined benefit plan is the shared interest approach. Under this approach, the alternate payee’s share of the participant’s benefits are not actuarially adjusted to her life, rather, she shares in the participant’s benefits when he starts receiving them.\footnote{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.} This means the alternate payee cannot start receiving benefits until the participant retires, and

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\begin{itemize}
\item \footnotetext[453]{Shulman, supra note 18, at § 6.02[B].}
\item \footnotetext[454]{Id.}
\item \footnotetext[455]{Id.}
\item \footnotetext[456]{Id.}
\item \footnotetext[457]{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.}
\end{itemize}
even then, the payments cease when the participant dies.\footnote{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.} The only way to keep the payments going after the death of the participant is to include pre-retirement and post-retirement survivorship clauses.\footnote{Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.} For example: A participant is entitled to a $2,000 monthly benefit and the court divides it evenly between him and the alternate payee, who is fifteen years younger. The alternate payee will receive $1,000 per month with no actuarial reduction because the benefits are tied to the participant’s life rather than her own. If a separate interest QDRO is used instead, she will receive $600 per month, but she will receive it for her lifetime. If she wants to receive the $1,000 monthly benefit for the remainder of her life, the participant has to outlive her.\footnote{Shulman, supra note 18, at § 6.03.}

An alternate payee in this situation should protect herself by having the QDRO provide for a QPSA and a QJSA.\footnote{Shulman, supra note 18, at § 6.03[B].} Using the preceding example, if the QDRO contains QPSA and QJSA clauses, the pension plan would actuarially adjust the monthly pension from $2,000 per month to $1,800. The participant and the alternate payee would receive $900 per month while they are both living. If the participant predeceases the alternate payee, the alternate payee will still receive $900 for her lifetime based on the QJSA provision in the QDRO. Likewise, if the participant dies before he starts receiving benefits from his pension, a properly
drafted QPSA clause will provide the alternate payee with a lifetime stream of actuarially adjusted pension payments. If a shared interest QDRO does not include pre-retirement and post-retirement survivor protection for the alternate payee, her payments will cease when the participant dies. If she wants a lifetime stream of payments under the shared interest approach, the QDRO must include pre-retirement and post-retirement survivor annuity protection. If the participant is retired and receiving pension payments at the time of divorce, a separate interest approach is the only option available because it is too late for the plan to actuarially adjust the alternate payee’s benefits to her own life expectancy.

The model orders of many plans are written using the shared interest approach, which vests the participant with control over the timing and receipt of benefits for himself and the alternate payee. Plans do not do this to disadvantage the alternate payee, but because the shared interest approach is easier, less costly, and requires fewer actuarial calculations. This is yet another example of how blithely using the model order can be quite costly to the alternate payee.

8. Assigning Vested Benefits Rather than Accrued Benefits.

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462 Id.

463 Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.

464 Dietrich, supra note 381, at §§ 10.01-10.04; Pratt & Reece, supra note 381, at 132-133; Schneider & Pinheiro, supra note 31, at § 3.11[B]; Shulman, supra note 18, at § 6.03.

465 Carrad, supra note 11, at 107-109.

466 Id.
The language of most model QDROs divide the participant’s vested benefit rather than his accrued benefit. The vested benefit number is smaller than the accrued benefit number. Benefits that have accrued but have yet to vest can be marital or community property, thus it is essential to divide the accrued number rather than the vested number.

9. Investment Gains and Losses in Defined Contribution Plans

A plan’s model order typically states that an alternate payee’s share of the participant’s account will be adjusted for gains, losses, dividends, and interest from the date of division under the QDRO until the date of distribution to the alternate payee. An alternate payee may not want to assume the risk that her share of the participant’s account will decrease in value, therefore, she may want to eliminate the language adjusting her account for gains, losses, dividends, and interest. Of course this means she will not get the benefit of increases either. If she wants to take a chance that the account will make market gains, she also has to bear the risk that it will suffer market losses.

10. Division of Year End Contributions.

A considerable number of employers make contributions to their employees’ retirement accounts once per year. If the participant and alternate payee divorce

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467 Id. at 109.

468 Id.

469 Id.

470 Id. at 109, 110.

471 Carrad, supra note 11, at 110-111.
in the middle of the plan year, an adjustment will need to be made to properly divide this end of year employer contribution. For example: Acme’s pension plan’s year ends on September 30. On that day, the company contributed $12,000 to Husband’s account. This contribution is based on Husband’s employment over the preceding year. Husband and Wife divorce on May 31, eight months into the plan year. Because Wife was married to Husband for 8/12 (66.67%) of the period in which he earned the right to a year-end contribution, she should receive 66.67% of the $12,000 or $8,000.

The employer’s model QDRO will not include adjustments for year-end contributions. The only way the alternate payee will get her share of this marital asset is to include a provision in the QDRO that says she gets a specific portion of employer contributions made to the participant’s account for any time that is attributable to the participant’s employment, whether those contributions are made before or after the cutoff date for property division under state law.

11. Allocation of Forfeitures.

ERISA allows an employer to delay the vesting of contributions made by the employer to an employee’s retirement plan for up to seven years. The purpose of

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472 Id.
473 Id.
474 Id.
this delay is to encourage employee loyalty.\textsuperscript{476} Once the employee becomes vested in a benefit, it is non-forfeitable.\textsuperscript{477} Conversely, as long as the benefit is accrued, but not vested, it can be lost if the employee quits or gets fired.\textsuperscript{478} ERISA allows two vesting schedules, one for defined benefit plans\textsuperscript{479} and one for defined contribution plans.\textsuperscript{480} These schedules show the minimum percentage of vesting allowed by ERISA; some plans offer faster vesting.\textsuperscript{481} Also, the vesting schedules only apply to the employer’s contributions; the employee is always 100\% vested in his own contributions to his retirement plan.\textsuperscript{482} Likewise, if an employee dies or the plan is terminated, the employee becomes 100\% vested in his and the employer’s contributions.\textsuperscript{483}

Assume that Grady has $400 in a defined contribution plan after he completes his fourth year of service. If the plan uses the ERISA vesting schedule for defined contribution plans, Grady will be 60\% vested in the employer’s

\footnotesize{\textsuperscript{476} Carrad, supra note 11, at 60, 61.}

\footnotesize{\textsuperscript{477} Schneider & Pinheiro, supra note 31, at \S 3.08.}

\footnotesize{\textsuperscript{478} \textit{Id.}}

\footnotesize{\textsuperscript{479} 29 U.S.C. \textsection 1053(a)(2)(A)(i)-(iii). The vesting schedule is as follows: after three years of service the employee’s non-forfeitable percentage of the employer’s contributions is 20\%; after four years, 40\%; after five years, 60\%; after six years, 80\%; after seven years or more, 100\%. 29 U.S.C. \textsection 1053(a)(2)(A)(iii).}

\footnotesize{\textsuperscript{480} 29 U.S.C. \textsection 1053(a)(2)(B)(i)-(iii). The vesting schedule is as follows: after two years of service the employee’s non-forfeitable percentage of the employer’s contributions is 20\%; after three years, 40\%; after four years, 60\%; after five years, 80\%; after six years or more, 100\%. 29 U.S.C. \textsection 1053(a)(2)(B)(iii).}

\footnotesize{\textsuperscript{481} Carrad, supra note 11, at 60, 61.}

\footnotesize{\textsuperscript{482} 29 U.S.C. \textsection 1053(a)(1).}

\footnotesize{\textsuperscript{483} 29 U.S.C. \textsection 1053(a)(3)(A).}
contributions to his plan. If Grady terminates his employment or gets fired, he would be entitled to $240, which is 60% of the employer’s contributions. That leaves $160 remaining in his plan. Something has to be done with this money, but it does not revert to the employer.\textsuperscript{484} This is because the employer took a tax deduction for the full $400 contribution it made to Grady’s plan, and ERISA bars the employer from retaining this money.\textsuperscript{485} Instead, the $160 is divided among the other plan participants on a pro-rata basis, typically based on their salaries during the year.\textsuperscript{486}

For example, assume Grady’s plan has two other participants, Fred and Lamont. When Grady’s employment ends and $160 of his $400 is forfeited, Fred earns $25,000 annually and Lamont earns $75,000. On the date the forfeitures are allocated, Fred will receive 25% of the forfeited $160 ($40) and Lamont will receive 75% of the forfeited $160 ($120).\textsuperscript{487} Forfeitures are usually allocated once at the end of the plan’s fiscal year, taking into account events occurring during the preceding two years.\textsuperscript{488} This is because ERISA requires plans to wait at least twelve months to see if an employee who left returns, and if he does, his service will be considered uninterrupted and no forfeiture with respect to that employee will occur.\textsuperscript{489} After one year, if the employee does not return, the plan can allocate any forfeitures

\begin{footnotes}
\footnote{484} Schneider & Pinheiro, supra note 31, at § 3.08.
\footnote{485} Id.
\footnote{486} Id.
\footnote{487} Carrad, supra note 11, at 60, 61.
\footnote{488} Schneider & Pinheiro, supra note 31, at § 3.08.
\footnote{489} Id.
\end{footnotes}
resulting from his departure. The earliest this can occur is at the end of the next plan year following the one year anniversary of the employee’s departure, which can delay the allocation of forfeitures to the remaining participants in the plan for two to three years.

A properly drafted QDRO should treat the allocation of forfeitures the same way it should treat year-end contributions, i.e., if Husband and Wife divorce during the middle of the plan’s fiscal year, the forfeitures allocated to Husband’s account one or two years later should be divided into marital and non-marital portions. The QDRO should state that an alternate payee will receive one-half of all forfeitures allocated to the participant’s plan account attributable to his service during the time period ending on the date of divorce, whether the forfeitures are allocated to his plan before or after the cutoff date for the division of property under state law. This is yet another consideration that will not be addressed in a plan’s model QDRO.


When computing the balance in a defined contribution plan a plan administrator has to divide, he has to be instructed in the QDRO on how to handle outstanding loans against the participant’s account balance. ERISA authorizes two exceptions to its spendthrift clause: a QDRO, and a revocable assignment of up to

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490 Id.
491 Id.
492 Carrad, supra note 11, at 62, 63.
10% of future benefits. Participants occasionally take out loans against their plans, and this must be considered when dividing a plan with an outstanding loan against it. From a lay person’s point of view, a loan is a liability. From the plan’s point of view, however, a loan is an asset. For example: A participant’s account has $80,000 in mutual funds and a $20,000 loan owed by the participant. If an alternate payee is awarded one-half of the account excluding the loan, she will get $40,000 (50% of $80,000). On the other hand, if she is awarded one-half of the account including the loan, she will get $50,000 (50% of $100,000). The loan is an account receivable to the plan, but an account payable to the participant. The participant is repaying himself when he repays the loan. A QDRO that does not add loan amounts to the amount to divide could significantly shortchange the alternate payee. It is the drafting lawyer’s responsibility to determine if there is a loan balance and then make sure the alternate payee receives her share of that account receivable.

13. The PBGC and Defined Benefit Plans

ERISA established the PBGC to provide the pension termination insurance that did not exist when the Studebaker plant closed on December 9, 1963 and terminated its defined benefit plan. The PBGC insures pension benefits of a corporation’s employees if the company sponsoring an underfunded defined benefit

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494 Carrad, supra note 11, at 131.
pension plan becomes insolvent. The PBGC becomes trustee of the plan and its assets, and is then responsible for investing those assets and paying benefits to the plan’s participants. In 2010, the PBGC paid nearly $5.6 billion for approximately 801,000 retirees in 4,200 failed plans.

The PBGC will not pay plan benefits above certain limits, and in almost all cases, PBGC payments will be lower than plan payments. In 2011, the maximum monthly payment the PBGC would make for a single life annuity at age 65 was $4,500. The maximum monthly payment for a joint and survivor annuity was

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497 Id.

498 Id. The PBGC, however, has its own fiscal problems. In the first half of fiscal year 2009, the agency posted a deficit of $33.5 billion, an increase of $22.5 billion over fiscal year 2008’s $11 billion deficit. PBGC Deficit Climbs to $33.5 Billion at Mid-Year, Snowbarger to Tell Senate Panel, http://www.pbgc.gov/news/press/releases/pr09-30.html (last visited May 27, 2011). According to the acting director of the agency at the time, “The increase in the PBGC’s deficit is driven primarily by a drop in interest rates and by plan terminations, not by investment losses. The PBGC has sufficient funds to meet its benefit obligations for many years because benefits are paid monthly over the lifetimes of beneficiaries, not as lump sums. Nevertheless, over the long term, the deficit must be addressed.” Id. The $22.5 billion deficit increase was due primarily to about $11 billion in completed and probable pension plan terminations; about $7 billion resulting from a decrease in the interest factor used to value liabilities; about $3 billion in investment losses; and about $2 billion in actuarial charges. Id. On April 30, 2009, the PBGC’s investment portfolio consisted of 30% equities, 68% bonds, and less than 2% alternatives, such as private equity and real estate. Id. All the agency’s alternative investments were inherited from failed pension plans. Id. According to PBGC estimates, auto sector pensions are underfunded by about $77 billion, of which $42 billion would be guaranteed in the event of plan termination. Id. The agency also faces increased exposure from weak companies across all sectors of the economy, including retail, financial services and health care. http://www.pbgc.gov/news/press/releases/pr09-30.html (last visited May 27, 2011). The agency receives no funds from general tax revenues; operations are financed largely by insurance premiums paid by companies that sponsor pension plans and by investment returns. Id.

The PBGC will not pay a participant more than he would have received from his plan. If the PBGC has to pay a participant less than he would have received from his plan and a QDRO lacks a provision specifying how an alternate payee is to share in PBGC payments, the alternate payee could receive nothing from the PBGC. A properly drafted QDRO should include a provision stating that in the event of a PBGC takeover of a defined benefit plan, the alternate payee’s portion of the PBGC payment shall be guaranteed to the same extent, and in the same ratio, as the participant’s.

It is nearly impossible to find a plan’s model QDRO with a provision addressing what to do in the event the PBGC takes over the plan. This is because when the PBGC takes over a plan, the plan’s administrator is replaced, so he has no continuing interest in what happens after that. The attorneys for the parties must provide for each party in the event a PBGC takeover occurs.

V. Verify that the QDRO is Approved by the Plan Administrator.

A nationally known, well regarded QDRO expert who formerly served as a plan administrator observed that, in his experience, between fifteen and twenty percent of the time when an order did not get qualified as a QDRO, the drafter simply gave up. It is the drafter’s responsibility, not the plan administrator’s, to...

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500 Id.
501 Carrad, supra note 11, at 131; Shulman, supra note 18, at § 4.09[P].
502 Carrad, supra note 11, at 102.
503 Id.
504 Id. at 9.
make the changes necessary to get the order qualified and effectuated.\textsuperscript{505} The failure to do so will result in the alternate payee permanently losing her rights to her share of the participant’s benefits.\textsuperscript{506} This constitutes professional misconduct and malpractice. Also, it is not enough to just send the plan administrator an order for a QDRO determination. The drafter has to be persistent and follow up with the plan administrator until the order is qualified. Sometimes, plans lose or mislay orders waiting to be qualified.\textsuperscript{507} If this happens and a QDRO never gets entered, the alternate payee’s rights will be lost, and it will be the lawyer’s fault – not the plan’s.\textsuperscript{508} Once the order is sent to the plan administrator, follow up in writing every fourteen days until the order is qualified. If it does not get qualified the first, second, or even the third time, work diligently to make the changes necessary to get it qualified. Once the order is qualified, obtain a written confirmation from the plan administrator verifying that fact, and send that writing to the client.\textsuperscript{509} Remember, the lawyer’s duty is not fulfilled until the QDRO gets accepted and put into effect.

The foregoing are not all of the areas of concern a domestic relations practitioner must consider in drafting or reviewing a QDRO. The subject is complex

\textsuperscript{505} Shulman, supra note 18, at § 16.02[I]

\textsuperscript{506} Carrad, supra note 11, at 9.

\textsuperscript{507} Id. at 154 (citing Fortmann v. Avon Prods., Inc., No. 97 C 5286, 1999 WL 160258, at *1-9 (N.D. Ill. Mar. 9, 1999)).

\textsuperscript{508} Id. at 154.

\textsuperscript{509} Carrad, supra note 11, at 154.
enough that one article could not possibly cover every conceivable pitfall or trap for the unwary. Those addressed here, however, are ones that arise quite often.

VI. Conclusion.

As long as people get married in America, people will get divorced. On August 23, 1984, the job of the domestic relations practitioner got more complex with the introduction of the QDRO. All domestic relations practitioners need to learn the ins and outs of QDROs; there is no other choice. The learning curve can be steep, but it is not insurmountable. Excellent, user-friendly resources are available,\textsuperscript{510} and it is my hope that this article becomes one of those resources. Happy QDRO drafting.

\textsuperscript{510} Carrad, supra note 11; Shulman, supra note 18; Snyder, supra note 12; The Division of Retirement Benefits Through Qualified Domestic Relations Orders, http://www.dol.gov/ebsa/publications/qdros.html (last visited May 11, 2011).