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To Have and To Hold, and Now a QDRO?

White dress, bouquets, and the sound of Pachelbel's Canon; everybody loves a wedding. As the guests await the magical two words "I Do," one would be considered quite the pessimist for contemplating the specific steps required for the distribution of assets if the marriage subsequently fails. If such pessimists are present however, it is likely that not a single one would be considering what might happen to the future pension benefits of one or both of the spouses in the event of divorce and the subsequent death of one or both spouses. As those two magical words are spoken, entitlements to the other spouse's income from that moment forward commence. In a state following the community property system, all property obtained during the marriage is treated as community property and is divided equally upon divorce.[1] Under the common law property system, the state will divide marital property equitably between spouses at divorce, but the definition of marital property differs by state.[2] What is true under either system though, is that typically one of the largest assets held by a couple is a retirement fund belonging to one or both of the spouses. The term marital property will be used in this paper to refer to both community property entitlements as well as common law property entitlements, as the distinction between the two terms is not relevant to its subject matter. Upon the dissolution of marriage, every state must decide how to divide a married couple's property to ensure that each spouse receives his or her proper share.[3] With the divorce rate remaining at around 50%, coupled with the potential for the federal government having to recognize same sex marriages, the issue of the division of pensions in divorce is not going to vanish. In fact, the exact opposite might happen.

Retirement accounts are vitally important to the U.S. economy. Prior to 1974, the federal government did not regulate these accounts. Congress responded to the rapid growth of retirement accounts, and the abuses thereof absent any regulation, by enacting legislation. This legislation is known as the Employee Retirement Income Security Act ("ERISA").

The Birth of ERISA

In 1974, Congress passed ERISA with the goal of protecting an employee's right to his or her pension.[4] In fact, some historians believe that the shutdown of a Studebaker plant in 1963, leading to over 2,900 workers losing all of their pension rights, provided the impetus for Congressional action. Symbolically, President Ford signed ERISA into law on Labor Day in 1974.[5] Before ERISA, retirement benefits were usually only paid to an employee who kept their job until retirement age.

The regulation of retirement income under ERISA represents a careful congressional balancing act to serve two aims: (i) to ensure the security of retirement income for individual plan participants by protecting against plan abuses, and (ii) to promote pension plan coverage by protecting against abuses of individual plan participants.[6] Congress implemented a fundamental tool in achieving the protection against abuses through the use of a "single, uniform federal scheme" across state lines to govern pension plans.[7] This uniform federal scheme, however, has the effect of impeding state court discretion, as federal courts have exclusive jurisdiction under ERISA to settle pension benefit disputes.[8]

ERISA is organized into four titles. Title I deals with the reporting requirements for pension plan administrators.[9] The pension plan administrator can be a designated person under the governing document of the plan, a plan sponsor, an employer, or anyone the Secretary of Labor deems as the administrator if the Secretary cannot find a named administrator or sponsor.[10] The plan administrator is required to provide an annual report including a financial statement, the number of employees in the plan, the names and addresses of the fiduciary, and an actuarial statement.[11] The plan administrator is also required to provide a plan description to all participants and beneficiaries of the plan, and update the plan description every five years. A written statement of what benefits have accrued, or will become non-forfeitable, for each participant receiving benefits of the plan is furnished upon request.[12]

Title II of ERISA addresses the changes made to the Internal Revenue Code.[13] Originally, the authority to issue regulations for the funding and vesting of ERISA plans was given to the Department of Labor, but in 1978 it was transferred to the Internal Revenue Service.[14] The Department of Labor enforces Title III of ERISA, dealing with jurisdiction and administration. Title IV deals with plan termination, establishes the Pension Benefit Guaranty Corporation ("PBGC"), and sets out the types of benefits guaranteed by the PBGC.[15]

Anti-assignability is the vehicle through which ERISA is able to protect the pension funds of employees. The result of this is that pensions became excluded from the reach of possible creditor claims.[16] ERISA's anti-assignability requirement, however, posed some problems. In particular, divorce courts struggled with it when dividing retirement pensions between ex-spouses because an ex-spouse is considered a creditor.[17] Throughout the 1970s and early 1980s the anti-assignability clause directly conflicted with evolving state law that recognized pension rights as marital property subject to division as part of a divorce.[18] This conflict is referred to in this paper as the ERISA divorce dilemma.

Congressional Response to the ERISA Divorce Dilemma

In 1985, Congress responded to the ERISA divorce dilemma by enacting the Retirement Equity Act (REA). The purpose of the REA was to provide a solution for the distribution of pension benefits as marital property upon divorce.[19] Division of marital property was previously governed by state law.[20] The REA sought to provide a mechanism for a former spouse to receive a portion of a pension plan participant's benefits during divorce.[21] This process requires a former spouse to take two steps in order to receive these benefits. The first step is that the former non-participant spouse must receive a portion of the pension pursuant to a state court domestic relations order (DRO).[22] Typically, this would be accomplished through the issuance of a divorce decree.[23] To be eligible for the second step of this process, the DRO must adhere to a series of strict requirements. First, the DRO must deal with the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent.[24] Second, it is required that the DRO clearly specify the following information:

1. "the name and last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order;"
2. "the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined;"
3. "the number of payments or period to which such order applies, and;"
4. "each plan to which the order applies."

In addition, it is critical that the DRO:

5. "does not require a plan to provide any type of form of benefit, or any option, not otherwise provided under the plan;"
6. "does not require the plan to provide increased benefits (determined on the basis of actuarial value); and"

7. "does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order."[25]

Once all of the aforementioned requirements of the first step are met, the second step in the process is that the non-participant former spouse must transform the DRO into a Qualified Domestic Relations Order (QDRO) pronounced ("kwa-dro").[26] The plan administrator is tasked with the responsibility of determining if a DRO is transformed into the qualified status.[27] The REA requires that a DRO meet those very stringent requirements before the pension plan can deem it "qualified."[28] The purpose of the stringent requirements is to protect the plan participant and ensure the financial integrity of the pension plan.[29] Because this process requires adherence to multiple strict requirements, the process of obtaining a QDRO is typically time-consuming and can be complex for those unfamiliar with the variety of pension plans available.[30]

Part I of this paper provides key terms and concepts that a practitioner should understand when working with QDROs. Part II of this paper explores the former circuit split over the timing requirement (and ERISA's lack thereof) for QDROs, resulting in Congress' ultimate resolution of the issue. Part III of this paper explores the aftermath of Congress' resolution of the timing issue for QDROs under ERISA and exposes the unanswered timing issue that remains.

I. Key Terms and Concepts for Practitioners Working with QDROs

There are several key terms and concepts that a practitioner should understand when working with a QDRO, all of which are defined in ERISA. These key terms and concepts include participant, alternate payee, defined contribution plan, defined benefit plan, earliest retirement age, normal retirement age and plan administrator. The participant is "any employee or former employee of an employer, or any 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], or whose beneficiaries may be eligible to receive any such benefit."[31] The alternate payee is "any spouse, former spouse, child or other dependent of a participant who is recognized by a [DRO] as having a right to receive all, or a portion of, the benefits payable under a plan" to the participant.[32]

Understanding the differences between the types of plans available is a crucial concept for practitioners to grasp when dealing with a QDRO. There are two main types of qualified plans available under ERISA: a defined contribution plan and a defined benefit plan. A defined contribution plan is a pension plan that creates an individual account for each participant and provides benefits based on the amount contributed to that participant's account, together with any income, dividends, interest, capital gains, and any forfeitures from the accounts of other participants allocated to that account.[33] Basically, a defined contribution plan is a retirement plan in which an individual account is established for each participant into which the participant can deposit pre-tax dollars.[34] The participant decides how much money to deposit into the account, and the employer may choose to match a portion of the amount deposited by the participant. Calculating the value of a defined contribution plan is easy, as it is the value of the account on a given day.[35] Additionally, the participant can withdraw funds or borrow against the account subject to certain restrictions and tax consequences.[36] A 401(k) is the most common example of a defined contribution plan.

ERISA defines a defined benefit plan as any pension plan that is not a defined contribution plan.[37] Clearly, this definition is not very helpful. Basically, a defined benefit plan is a traditional pension plan, in which the participant receives a guaranteed monthly income upon retirement. The amount of the monthly payment is normally determined by a formula based on the participant's salary (usually the salary in the last year of employment or the last several years of employment), the length of the participant's employment, and the participant's age.[38] The value of a defined benefit plan is more difficult to determine, as it is based on actuarial methods. The formula used to determine the monthly payment varies depending on the plan's terms.[39] Defined benefit plans are usually provided by the government and large companies, which are more able to afford to carry the risk that these types of plans present. Currently, defined contribution plans are more popular than defined benefit plans.

Another key term defined in ERISA is the plan administrator – the person or entity who holds the seemingly magical power to transform the DRO into a QDRO. The plan administrator is defined as the person or entity designated by the governing plan document, and if no such person is designated, the plan sponsor (the employer).[40] Locating the plan administrator can be difficult at times, but once identified, they are of the utmost importance when dealing with a QDRO. The annual filings made with the Department of Labor (called Form 5500) are made publicly available and are a good resource for locating the plan administrator.

Retirement age comes into play with QDROs when dealing with the timing issue of when a DRO transforms into a QDRO. In particular, these retirement ages are significant because they can affect the participant's and alternate payee's ultimate receipt of benefits (or the unfortunate lack thereof).

The earliest possible retirement age is defined as the earlier of:

(i) The date on which the participant is first entitled to receive a distribution from the plan, or

(ii) The later of the date a participant attains age 50, or the earliest date on which the participant could begin receiving plan benefits if the participant separated from service.[41]

The normal retirement age is defined as the earlier of:

(i) The date the participant attains the normal retirement age specified in the plan, or

(ii) The later of the date a participant attains age 65, or the fifth anniversary of the time the participant began to participate in the plan.[42]

In addition to retirement ages having an effect on the receipt of benefits, another important issue is the effect of the death of either the participant or alternate payee before or after the QDRO is accepted. As explained below, this timing factor used to have grave effects on the allocation of the funds in the pension account, and the arguments on either side of this issue still remain very much alive.

When dealing with the division of plan assets, the division of defined contribution plans is a much easier task than the division of defined benefit plans. The cleanest way to divide a defined contribution plan is to set up a separate, independent account for the alternate payee.[43] This can be completed after a timely QDRO is accepted prior to the death or retirement of the plan participant. This method of allocation is beneficial because gives the alternate payee the ability to control the investments as well as protects the alternate payee from withdrawals made by the participant.[44] Because the QDRO was transformed and accepted, the alternate payee (and the participant) each have the ability to name a beneficiary of his or her choice, subject to plan restrictions (ERISA requires that Participant's name their spouse as the beneficiary unless a waiver is signed).[45] This is preferred because the proper beneficiaries will take in the event of the death of the participant or alternate payee.

Defined benefit plans do not offer such a clean division of benefits. Survivorship problems most commonly arise under annuities distributed through a QDRO. Before getting into survivorship problems though, an understanding of the concept of annuity contracts is essential. An annuity is a contract to pay a sum of money periodically, starting on a fixed date and continuing either for a fixed period of time or until the death of one person or for the duration of the lives of two people.[46] A single life annuity is an annuity that is payable for the life of one person, and a joint and survivor annuity is an annuity payable during the joint lives of two people, until the second of them dies.[47] A pre-retirement survivor annuity is an annuity payable to a beneficiary if the participant dies before retiring.[48]

ERISA recognizes a Qualified Joint and Survivor Annuity ("QJSA") and a Qualified Pre-Retirement Survivor Annuity ("QPSA"). A QJSA annuity is: (1) for the life of the participant with a survivor annuity for the life of the spouse which is not less than 50 percent of (an is not greater than 100 percent of) the amount of the annuity which is payable during the joint lives of the participant and spouse, and (2) which is the actuarial equivalent of a single life annuity for the life of the participant.[49] That is, a QJSA requires that parties be spouses or that one of them be a former spouse, designated by a QDRO.

A QPSA means "a survivorship annuity for the life of the surviving spouse," if a set of strict requirements are met.[50] The key is that a QPSA, like a QJSA, requires that the parties be spouses or that one of them be a former spouse, designated by a QDRO. The benefits available through the election of a QJSA or QPSA are only available to a former spouse if specifically and separately mentioned within the QDRO.[51] Additionally, the election of a QJSA or QPSA, along with the former spouse being mentioned in the QDRO, may result in those rights not being available to a subsequent spouse of the participant.[52] These types of annuities posed, and may still pose, problems for plan administrators and courts when dealing with QDROs, as evidenced through the former circuit split explained below.

II. The Former Circuit Split Over When a DRO Must be Submitted

The timing of the submission a DRO, in particular with respect to defined benefit plans, had been an issue of contention among the circuits until 2006. Specifically, problems arose when a participant died prior to the DRO being submitted to the plan or being transformed into a qualified status. The Courts of Appeals were divided on the issue of whether ERISA contained an inferred deadline for the issuance of QDROs. ERISA itself did not explicitly mandate such a deadline, but several circuits inferred the deadline as being when the participant retired or upon the death of the participant. Congress answered this question and amended ERISA through the Pension Protection Act of 2006 (“PPA”) with further amendments made in 2010. Congress took the position of the Tenth and Ninth Circuits that no such deadline exists with respect to the death of a participant. What was left unanswered is the impact of retirement on any type of deadline for issuing a QDRO. The following summaries of the former circuit split expose the differing viewpoints and provide viable arguments for the issue of whether a deadline is inferred upon the retirement of the participant, an issue left unresolved by the PPA and explored in Part III of this paper.

a. The Tenth Circuit’s No Deadline Position

The Tenth Circuit took the position that ERISA recognizes that a state court divorce judgment awarding a portion of a Participant’s pension benefits creates a right in those benefits - regardless of when the QDRO is obtained. The result of this is that the pension plan must pay benefits to an alternate payee even though the QDRO was obtained after the participant's death. This issue of the validity of post-death QDROs came before the Tenth Circuit in the *Patton v. Denver Post* case.[53]

In *Patton*, a former spouse received part of her husband's pension benefits through a divorce settlement.[54] After the death of her ex-husband, she learned that he had an undisclosed plan in which he had been a participant.[55] The former spouse petitioned the state court to divide the undisclosed plan's benefits in the same manner in which the first plan was divided.[56] The state court awarded her a DRO in the undisclosed plan's benefits and made it retroactive to before her ex-husband's death.[57] When Patton submitted the DRO to the pension plan, however, the plan administrator refused to recognize her as a beneficiary.[58] According to the plan administrator, because the pension had lapsed at the point of her ex-husband's death, her DRO could not be qualified.[59] Moreover, the plan administrator argued that transforming the DRO into a QDRO would increase pension plan liabilities, and therefore be in direct contravention of the requirements for the first step of the DRO.[60] Finally, the plan administrator expressed great concern that this practice would dismantle the actuarial system for these types of plans.[61]

The court in *Patton* found that the statutory framework of ERISA did not provide a cutoff date for QDROs. The court found nothing in ERISA to support the position that a beneficiary must file a QDRO prior to the participant's death.[62] Instead, the court concluded that the REA's drafters contemplated that plan administrators might make "decisions regarding benefits after the death of the participant."[63] Specifically, plan administrators must provide for the possibility that another person, an alternate payee, could make a claim for benefits after the plan had already begun making payments.[64] Because of the extensive and time-consuming process for obtaining a QDRO, the court found that the statute provides for a period of time during which the administrator must determine whether a DRO satisfies the strict requirements of a valid QDRO.[65] During this determination period, the plan must set aside funds to pay the former spouse under the DRO for missed payments if the DRO is deemed "eligible."[66] Through these provisions, the court found that ERISA accounts for the possibility of post-death QDROs.

The court in *Patton* also concluded that post-death QDROs do not require a plan to pay increased benefits in contravention of the first step DRO requirements.[67] The court's view is that a state court's entry of a DRO establishes the alternate payee's right to benefits, whether or not it had been transformed into QDRO.[68] Because the DRO is the vehicle established to enforce this right, obtaining a QDRO after the plan participant's death would not make a former spouse's right to the benefits lapse.[69] According to the court, a post-death QDRO does not increase the "benefits to be paid" because the right does not lapse.[70]

The plan administrator in *Patton* set forth the policy argument that in order for its actuarial operation to be effective, plans needed to know the extent of a pension claim before payment.[71] The court in *Patton* rejected this policy justification against recognizing post-death QDROs. The *Patton* court stated that the pension plan's policy arguments "lack[ed] weight" because plan administrators are already on notice of the former spouse's potential right to pension benefits.[72] Accordingly, the court held that there were not sufficient policy concerns to compel the inference that ERISA requires a QDRO to be submitted prior to the death of the participant.[73]

The Tenth Circuit takes a pro-state's rights view that the state court is the preeminent decision-maker in domestic relations decisions. The court also emphasized that state courts, rather than plan administrators or federal ERISA law, are the appropriate forum for determining the proper division of pension benefits.[74] In fact, the court encouraged state courts to widely administer retroactive relief in this area of domestic relations.[75]

b. The Ninth Circuit's No Deadline Position

The Tenth Circuit was not alone in its view that post-death QDROs are permitted under ERISA. The cases of *In Re Gendreau* and *Trustees of the Directors Guild of America v. Tise* influenced the Tenth Circuit's *Patton* decision in holding that post-death QDROs are valid under ERISA.[76]

The *Gendreau* court held that a former spouse's interest in pension benefits granted by a DRO does not lapse on a specific date in the absence of a QDRO.[77] The facts of *Gendreau* involved an award by of half of Gendreau's former husband's pension to the ex-wife in their divorce decree.[78] Gendreau submitted the DRO to the pension plan, but the plan administrator rejected the DRO for failing to meet the criteria of a QDRO.[79] Before Gendreau could amend and resubmit the DRO, her ex-husband filed for bankruptcy.[80] Her ex-husband then claimed that Gendreau had lost her right to those benefits because she did not obtain a QDRO before he filed.[81]

The court interpreted the REA to mean that the former spouse's property interest in a former spouse's pension commence upon the filing of the divorce DRO and not at the point that a QDRO is obtained.[82] The court held that once the DRO awarded Gendreau an interest in the pension plan's proceeds, she had a right under state law to obtain a QDRO in order to enforce her interest in the pension plan.[83] The court further explained that the QDRO is merely the enforcement mechanism for the interest granted by the DRO and that the QDRO does not grant the interest.[84] This is an important distinction because it shifts the vesting right of a pension from obtaining a QDRO to the issuance of the DRO in the divorce settlement. As a result, the interest of a former spouse in an ex-spouse's pension does not lapse once a DRO is obtained, even if the spouse does not obtain a QDRO by a specific date.[85]

Similarly, the Ninth Circuit decision of *Directors Guild* held that a DRO creates the former spouse's interest in the pension due to the multiple steps involved in converting a DRO into a QDRO.[86] The court found that because ERISA requires the plan administrator to determine whether a DRO is a QDRO, the plan administrator is on notice that the former spouse is entitled to benefits under state law.[87] The court determined that the absence of a QDRO does not alter the interests of the former spouse, but only "prevent[s] her from enforcing that interest until the QDRO is obtained."[88]

In concluding that post-death (and post-bankruptcy) QDROS are valid under ERISA, the Ninth Circuit identified a provision in ERISA that specifically provided for situations in which a QDRO could be enforced after a participant's death.[89] The first ERISA provision the court noted allows a former spouse to obtain a QDRO after the pension plan has begun to pay out benefits.[90] ERISA demands that during the time a pension plan administrator is determining whether a DRO is a QDRO, the plan administrator set aside funds covering the first eighteen months that would be due to the former spouse if the DRO is ultimately found to be qualified.[91] The former spouse is entitled to disbursements retroactive to the date the benefits became payable if the DRO is deemed qualified.[92]

The Ninth Circuit also construed this eighteen month period as evidence of the express intention of Congress to allow a former spouse to amend a DRO that does not meet the QDRO requirements.[93] The court surmised that taken together, the provisions for segregating benefits and the determination period allow a former spouse to account for events like the death of the participant during the complex and time-consuming process of getting a DRO qualified.[94] The court determined that these provisions enable a former spouse to "perfect the DRO into a QDRO" after the participant's death by forcing the pension plan to account for the ex-spouse as a potential beneficiary.[95] Moreover, the court noted that the determination period was not a cutoff date for post-death QDROs because the statute specifies that if the plan accepts the DRO after the determination period, the former spouse can get payments only prospectively and not retroactively.[96] The statute contemplates that a DRO can be submitted after the determination period, and therefore the eighteen month period cannot be the cutoff date.

c. The Third Circuit's Pro-Deadline Position

Taking a directly opposite position, the Third Circuit held that post-death QDROs are invalid in the *Samaroo v. Samaroo* decision.[97] In *Samaroo*, the husband had a pension plan that included an annuity for his spouse.[98] When the marriage failed and divorce ensued, the divorce decree did not mention this pension and instead awarded his former wife a set dollar amount.[99] The ex-husband passed away before retirement and two years before benefit payments would automatically begin.[100] After his death, the ex-wife amended the divorce decree awarding the husband's annuity to her.[101]

The Third Circuit held that the amended divorce decree was an invalid QDRO.[102] The court's reasoning was that the rights to pension benefits must be determined as of the date the benefits become payable.[103] Because Samaroo died before he began receiving payments, his benefits were determined on the date of his death.[104] His ex-spouse did not have a QDRO on the date of his death, and therefore the benefit lapsed upon his death and reverted back to the plan.[105] The court held that neither Samaroo nor his ex-wife possessed any right to the pension benefits because Samaroo's ex-wife missed her chance to receive the benefit when her ex-husband passed away.[106] The reasoning the Third Circuit employed, the exact same arguments made by the plan administrators in the Ninth and Tenth Circuits, was that a post-death QDRO would increase the liabilities of the plan and would violate the REA's requirement that a QDRO cannot increase the benefits to be paid over what the plan expected to pay based upon its actuarial calculations.[107]

In holding that Samaroo's ex-spouse was not entitled to his pension benefits, the court declared that determining benefits as of the date of the participant's death was "consistent with actuarial necessity" and furthered ERISA's policy of a uniform scheme to protect pension plans from high transaction costs.[108] The court noted that the "successful operation of a defined benefit plan requires that . . . liabilities be ascertainable as of particular dates."[109] The Third Circuit noted that without the certainty of actuarial calculations, unknown future demands put the pension system in danger and contravene the entire purpose behind ERISA.[110] Furthermore, the court feared that acknowledging post-death QDROs would render the system vulnerable to abuses where the ex-spouse would take advantage of the participant's absence in order to gain an increased, and unentitled, share of the benefits.[111]

The dissent in *Samaroo* rejected the principles relied upon by the majority and claimed that disallowing a post-death QDRO would jeopardize the states' ability to administer domestic relations law.[112] The dissent attacked the majority's statutory interpretation and policy interpretations, and these arguments served as the foundation for the majority in the *Patton* decision.

d. The Fourth Circuit's Pro-Deadline Position

The Tenth Circuit's decision in *Samaroo* draws upon principles and policy arguments found in the Fourth Circuit decision of *Hopkins v. AT&T Global Information Solutions Co*.[113] In *Hopkins*, the Fourth Circuit read ERISA to provide that an interest in a pension is determined as of a specific date.[114]

In *Hopkins*, the state court awarded a former spouse a DRO to attach to a pension annuity to make up for her ex-husband's missed alimony payments.[115] After the divorce, the ex-husband remarried, retired, and began to receive pension benefits.[116] The Fourth Circuit held that the pension benefits are determined as of the date of the participant's retirement, and as such, the former spouse lost any right to the pension benefit because it vested in the plan participant's current spouse.[117] The court further concluded that the former spouse's interest in the benefits would disappear without a QDRO by relying on language in the REA stating that for a DRO to be qualified, it must create a benefit "payable with respect to the participant."[118] Under ERISA, the current spouse is a "beneficiary" and not a "participant," and according to the court once a benefit vests in a beneficiary, it is no longer payable "with respect to a participant" because the participant no longer has the right to receive it.[119] In sum, the court held that a DRO submitted after benefits vest in another spouse would create an interest payable "with respect to a beneficiary" which is outside the scope of the narrow QDRO exception to ERISA's anti-assignability clause.[120]

The *Hopkins* court determined the interest in a benefit on the date of retirement and reasoned that this view was consistent with the overall framework and policy of ERISA because a definitive vesting date assists in pension administration.[121] The *Hopkins* court also addressed the policy concerns with respect to actuarial calculations requiring firm dates for assessing liabilities, and noted that a QDRO submitted after the participant's retirement might change monthly benefit payments and jeopardize a pension plan's operation.[122]

In 2006, Congress provided an answer to this vexing timing question through the Pension Protection Act, specifically amending Section 206 (d)(3) of ERISA. Congress decided that a domestic relations order issued after the participant's death, divorce, or annuity starting date, or subsequent to an existing QDRO, will not fail to be treated as a QDRO solely because of the timing of the issuance.[123] For example, a subsequent QDRO that revises an earlier QDRO does not fail to be a QDRO solely because it was issued after the first QDRO.[124] Additionally, a DRO requiring a portion of a participant's annuity benefit payments to be paid to an alternate payee does not fail to be a QDRO solely because the domestic relations order was issued after the annuity starting date.[125]

III. What Does This Mean Going Forward with Respect to the Participant's Retirement and the Timing of a QDRO?

It is clear from the amendments to ERISA that the participant's death, divorce, and/or the commencement of an annuity do not impede a former spouse's ability to reach the participant's pension based on the timing of the submission of the QDRO. What Congress left unanswered is the effect of the participant's retirement and the timing a DRO submission has on the former spouse's ability to reach the participant's pension. Retirement is not specifically mentioned in the regulation, however, the regulation does state that " . . .a domestic relations order shall not fail to be treated as a qualified domestic relations order solely because of the time at which it is issued."[126]

On March 27, 2013, the Supreme Court of Minnesota had the opportunity to explore the reach of the regulations with respect to the timing of a QDRO and a participant's retirement (and subsequent death) in *Langston v. Wilson-McShane Corp*.[127] The Court's ultimate resolution was that surviving spouse benefits vested at the time of a plan participant's retirement, and therefore a portion of the surviving spouse's benefits could not be made payable to the participant's former spouse pursuant to a DRO served on the plan after the participant's retirement.[128] The arguments presented in the prior section of this paper resurfaced in this decision, and demonstrate that ambiguity still exists in the aftermath of the PPA's attempt to resolve the timing issue.

In *Langston*, the husband and wife were married for close to 29 years before divorcing.[129] At the time of the divorce, the husband was a participant in the Twin Cities Carpenters and Joiners Pension Fund.[130] In 1993, a judgment and decree dissolved the Langston's marriage and distributed the couple's marital property.[131] The decree provided the following: "(i) that the ex-wife shall be awarded a one-half share in the marital share of all future pension payments received by the husband; (ii) that it shall include one-half of all payments made to the husband pursuant to a plan that husband is currently participating in, even if the husband is not currently vested in said plan; and (iii) in the event the that husband's plan allows the husband to elect survivor benefits, the husband shall elect survivor benefits and name ex-spouse as the survivor beneficiary."[132]

In order to enforce this interest awarded to her in the 1993 judgment and decree, the ex-wife needed to serve a DRO on the plan for qualification as a QDRO under ERISA, but this did not happen until 2005.[133] Several years after his divorce and prior to his ex-wife serving the DRO on the plan, Mr. Langston remarried and retired in 2004.[134] At the time of his retirement, he made a benefit election, choosing a joint and 50 percent survivor benefit that made a survivor annuity payable to his new wife.[135] His former wife eventually sought a DRO, containing all of the terms of the 1993 divorce decree, and served it on the plan in 2005.[136] Nine days later the plan administrator responded that the DRO did not satisfy the requirements of a qualified domestic relations order under ERISA, stating that the benefits to the participant were already in pay status and that the death benefits were payable to his current spouse.[137]

Mr. Langston died in 2005, and his ex-wife continued to try and enforce her interest in his pension benefits as described in the DRO by bringing suit.[138] The district court ordered the plan to begin paying surviving spouse benefits to Langston's ex-wife and also awarded her over $55,000 in attorneys' fees.[139] The court of appeals reversed the district court and concluded that under ERISA, surviving spouse benefits vest in a participant's current spouse at the time of the participant's retirement.[140] The court of appeals reasoned that after the passage of REA, the regulations prevent a participant from selecting a different form of benefit or designating a beneficiary other than his or her own spouse unless it is with the spouse's written consent "witnessed by a plan representative or notary public."[141] The court cited to the *Hopkins* decision for the proposition that surviving spouse benefits vest in a participant's current spouse.[142] Finally, the court noted that "a vesting rule also promotes one of the principal goals underlying ERISA: 'ensuring that plans be uniform in their interpretation and simple in their application.'".[143]

The court in *Langston* also noted the *Carmona* decision out of the Ninth Circuit where the court concluded that "a state DRO may not create an enforceable interest in surviving spouse benefits to an alternate payee after a participant's retirement, because ordinarily at retirement the surviving spouse's interest irrevocably vests."[144] Yet before *Carmona*, the Ninth Circuit rejected a vesting rule in the context of death benefits that were designated as payable to a participant's non-spouse beneficiary in the *Tise* decision.[145] The *Carmona* court distinguished *Tise* on the grounds that *Tise* dealt with benefits other than qualified joint and survivor annuity benefits.[146] Therefore, timing may not be of such a dispositive nature for other types of benefits in the Ninth Circuit.

In her brief, Langston urges the court to follow the reasoning in *Tise* where the court explained: "Because a QDRO only renders enforceable an already-existing interest, there is no conceptual reason why a QDRO must be obtained before the plan participant's benefits become payable on account of his retirement or death. Several features of the statute's language and structure confirm that ERISA erects no such requirement."[147] Langston also explains in her brief that for all of the detail the QDRO requirements contain, ERISA nowhere specifies that it must be in hand before benefits become payable.[148] Additionally, Langston points out that the statute specifically provides for situations in which no valid QDRO issues until after benefits become payable.[149] Langston argues that once the pension plan is on notice that a domestic relations order has been issued that may be a QDRO, the plan may take a reasonable period to determine whether the order is a QDRO; and therefore an obligation is created for the pension plan.[150] As a result, while the plan makes its determination it must segregate the benefits that would be due to the alternate payee under the terms of the DRO during the first 18 months that the benefits would be payable if the DRO is ultimately deemed to be a QDRO.[151] According to Langston, it is then logical to assume that the benefit-segregation requirement presumes that benefits may already be payable during the period the plan is determining whether the DRO is a QDRO.[152]

Langston also argues that Congress expressly contemplated that further state court proceedings might ensue during the 18-month QDRO-determination period, through which the alternate payee could attempt to cure any defects in the original DRO and obtain an enforceable QDRO.[153] Langston points out that this position was adopted by the Eight Circuit and cites to the *Hogan v. Raytheon Co*. decision.[154] In *Hogan* it was held that state courts may enter QDROs after a participant had died or the right to benefits had been transferred or expired.[155] In addition, Langston notes that the Third, Eight, Ninth, and Tenth Circuits along with the State District

Court for the District of Vermont, the Supreme Court of Hawaii, and the United States District Court for the Eastern District of Michigan have all held similarly.[156] Based upon ERISA, interpretive regulations and the authority noted above, Langston argues that the QDRO was sufficiently timely, and therefore she was entitled to the benefits awarded to her in the 1993 divorce decree. The Supreme Court of Minnesota did not agree with her.

IV. Conclusion

Dealing with a QDRO can be a daunting task. First, the very stringent series of steps must be taken with respect to the DRO to even make it eligible to transform into a QDRO. Second, a solid understanding of ERISA's key terms and the type of plan involved is essential. Next, the timing the DRO is served on a plan can be hugely significant. Depending on whether the plan is a defined contribution or a defined benefit plan, rights to benefits may be cutoff in some jurisdictions if the DRO is served on the plan after a participant retires. While it is clear that death, divorce, or the commencement of an annuity contract cannot serve as a cutoff date, retirement may serve as a cutoff for benefits for a former spouse. Certainly in the *Langston* case, the ex-spouse's retirement cutoff the former spouse's right to benefits – even with a valid DRO. It's possible (and likely) that the 12 year time period it took Langston's former wife to serve the DRO on the plan negatively impacted her position. What took her so long? One can only wonder if her divorce attorney will soon be sued for malpractice. What's not clear though, is how a court would rule if rather than 12 years, the DRO was served on the plan 2 years later with the participant retiring before the DRO is served. When this case appears before a court, it is undoubted that the very same arguments presented in this paper will be used to argue both sides of the issue. It is tough to predict the outcome, as both sides have very strong arguments and represent competing interests ERISA aims to protect.

[1] Cheyanna L. Jaffke, Death, Taxes, and Now Divorce – The Dyad Expands to a Triad: ERISA's Social Policy Harms Women's Rights, 35 U.S.F. L. Rev. 225, 268-69 (2001) (describing the two main ways that a state will divide property in a divorce). See also David S. Rottenstein, The ALI Proposals and the Distribution of Stock Options and Restricted Stock on Divorce: The Risks of Theory Meet the Theory of Risk, 8 Wm. & Mary J. Women & L. 243, 245-46 (2002) (stating that the ALI concluded that most jurisdictions adopt the principle of equitable distribution of property at divorce, yet there were different methods of deciding which assets are subject to distribution).

[2] *Id*.

[3] Mark. S. Maddox & Margaret K. Cassidy, Division of Employee Benefits Upon Divorce: An Analysis of the Retirement Equity Act of 1984 and a Framework of Distribution of Benefits, 58 Ohio Bar 436, 436 (1985) (stating that in most divorces, "the pension rights or employee benefits of one or both spouses are the most significant marital assets owned by the couple. Accordingly, employee benefits are increasingly subject to division in state divorce proceedings.") See also Jessica Straub, Note, Erb v. Erb: A Step Toward Clarification in Public Pension Division, 33 U. Tol. L. Rev. 915, 916 (2002) (stating that pensions earned during marriage are usually marital property and are crucial in divorce because the pension is often the largest marital asset, along with the marital home).

[4] 29 U.S.C.S. § 1001 (a) (Lexis 2007) ("[I]t is desirable in the interests of employees and their beneficiaries . . . that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of [employee benefit plans].") See also T. Leigh Anenson & Dr. Karen Eilers Lahey, The Crisis in Corporate America: Private Pension Liability and Proposals for Reform, 9 U. Pa. J. Lab. & Emp. L. 495, 495 (2007) ("On September 2, 1974, Congress enacted the Employee Retirement Income Security Act (ERISA) to preserve and protect the pension plans of millions of American workers.").

[5] Jaffke, supra note 1 at 260.

[6] Donald T. Bogan, ERISA: The Savings Clause, § 502 Implied Preemption, Complete Preemption, and State Law Remedies, 42 Santa Clara L. Rev. 105, 116-17 (2001) (citing S. Rep. No. 93-127 (1993) at 11-13, reprinted at 1974 U.S.C.C.A.N. 4838) (Bogan states that: "as Congress approached the task of reforming the private pension industry, it faced a significant dilemma . . . Congress wanted to encourage employers to continue to offer such voluntary retirement programs, and simultaneously contemplated placing administrative and financial burdens on such plans in order to ensure that anticipated benefits would be available for covered workers upon retirement.")

[7] David L. Bacon, ERISA Preemption In a Nutshell app. 1, at § 1 (2002) ("Congress drafted ERISA as a remedial labor statute, with enforcement provisions . . . to carry forward public policy interests . . . [including] . . . Protect[ing] interstate employers and plans from inconsistent state and local regulation by providing for uniform federal law to govern employee benefit field . . .."); see also Fort Halifax Co. v. Coyne, 482 U.S. 1, 9 (1987).

[8] 29 U.S.C. § 1144(B)(2)(b).

[9] ERISA § 1.

[10] ERISA § 3(16).
[11] ERISA § 103(c).
[12] ERISA § 105(a).
[13] ERISA § 1001.
[14] 44 Fed. Reg. 1056 (Jan. 3, 1979).
[15] ERISA § 4022.
[16] *Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown*, 879 F.2d 275, 278 (7th Cir. 1990) ("ERISA provides that a pension plan must prohibit the alienation or assignment of benefits. These 'spendthrift' provisions are designed to prevent unwise alienation or assignment.") See also Margaret. R. Cooper, A Family Practitioner's Guide To Overcoming QDRO Phobia, 8 Del. L. Rev. 213, 214 (2006) ("[T]he purpose of ERISA is to protect pension benefits and protect employees by barring pension benefits from being used to satisfy judgments.").
[17] Cooper, supra note 6 at 214.
[18] *Id.*
[19] *Boggs v. Boggs*, 520 U.S. 833, 848 (1997) (stating that "[a]s a general matter, '[t]he whole subject of the domestic relations of a husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States'") (citing *In re Burrus*, 136 U.S. 586, 593-94 (1890)).
[20] *Id.*
[21] *In re Gendreau*, 122 F.3d 815, 819 (9th Cir. 1997) (noting "the purpose of the QDRO exception was to protect the financial security of divorcees.").
[22] 29 U.S.C. § 1056(d)(3)(B)(ii). A "domestic relations order" is "any judgment, decree, or order . . . which (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a [plan] participant and (II) is made pursuant to State domestic relations law."
[23] *Id.*
[24] *Id.*
[25] Retirement Equity Act of 1984 (REA), Pub. L. No. 98-397, 98 Stat. 1426.
[26] 29 U.S.C. § 1056(d)(3)(B)(i). Under ERISA, a QDRO is a DRO that "creates or recognizes the existence of an alternate payee's right to . . . receive all or a portion of the benefits payable with respect to a participant under a plan."
[27] 29 U.S.C. § 1056(d)(3)(B)(i)-(ii).
[28] 29 U.S.C. § 1056(d)(3)(C)-(D).
[29] *Id.*
[30] See *In re Gendreau*, 122 F.3d at 819 (noting that "everyone (including Congress) recognizes" that the process to obtain a QDRO is "time-consuming").
[31] 29 U.S.C. § 1002(7).
[32] *Id.* § 1056(d)(3)(K).
[33] *Id.* § 1002(34).
[34] David Clayton Carrad, The Complete QDRO Handbook 3, 13 (2000).
[35] *Id.*
[36] *Id.*
[37] 29 U.S.C. § 1002(35).

[38] *Id*.
[39] *Id*.

[40] 29 U.S.C. § 1002(16)(A).
[41] *Id*. § 1056(d)(3)(E)(ii).
[42] *Id*. § 1002(24).
[43] David Clayton Carrad, The Complete QDRO Handbook 3, 61 (2000).
[44] *Id*.
[45] *Id*.
[46] *Id*..
[47] *Id*.
[48] *Id*. at 63.
[49] 29 U.S.C. § 1055(d).
[50] *Id*.
[51] Carrad at 61.
[52] *Id*.
[53] *Patton v. Denver Post*, 326 F.3d 1148, (10th Cir. 2003).
[54] *See Patton v. Denver Post Corp*., 179 F. Supp. 2d 1232, 1234 (D. Colo. 2002).
[55] *Id*. at 1233-34.
[56] *Id*. at 1234.
[57] *Id*.
[58] *Patton*, 326 F.3d at 1150.
[59] *Id*.
[60] *Id*.
[61] *Id*.
[62] *Id*. at 1151.
[63] *Id*.
[64] *Id*. at 1152.
[65] 29 U.S.C. § 1056(d)(3)(J)-(K).
[66] *Patton*, 326 F.3d at 1151.
[67] *Id*. at 1153.
[68] *See In re Gendrea*, 122 F.3d 815, 819 (9th Cir. 1997).
[69] *Patton*, 326 F.3d at 1153.
[70] *Id*. at 1152.
[71] *Id*. at 1151.
[72] *Id*.
[73] *Id*. at 1153.
[74] *Id*.
[75] *Id*.
[76] *In re Gendreau*, 122 F.3d 815, 818-19 (9th Cir. 1997); Dirs. Guild, 245 F.ed at 421 (cir)
[77] *In re Gendreau*, 122 F.3d at 818.
[78] *Id*. at 817.
[79] *Id*.
[80] *Id*.
[81] *Id*.

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[82] *Id*. at 818.
[83] *Id*.
[84] *Id*.
[85] *Id*. at 819.
[86] *Trs. Of the Dirs. Guild of Am*., 234 F.3d 415, 421 (9th Cir. 2000).
[87] *Id*. at 420-21.
[88] *Id*. at 421.
[89] *Id*.
[90] *Id*.
[91] *Id*.; 29 U.S.C.§ 1056(d)(3)(H)(i).
[92] *Id*.
[93] *Id*. at 422.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] Samaroo v. Samaroo, 193 F.3d 185 (3rd Cir. 1999).
[98] *Id*. at 187.
[99] *Id*.
[100] *Id*. at 185.
[101] *Id*. at 188.
[102] *Id*. at 186.
[103] *Id*. at 190.
[104] *Id*. at 188.
[105] *Id*.
[106] *Id*.
[107] *Id*. at 190.
[108] *Id*.
[109] *Id*.
[110] *Id*.
[111] *Id*. at 191.
[112] *Id*. at 192.
[113] *Hopkins v. AT&T Global Solutions Co*., 105 F.3d 153 (4th Cir. 1997).
[114] *Id*.
[115] *Id*. at 154.
[116] *Id*. at 156.
[117] *Id*. at 156-57.
[118] *Id*. at 157.
[119] *Id*.
[120] *Id*.
[121] *Id*.
[122] *Id*.
[123] 29 C.F.R. 2530.206.
[124] *Id*.
[125] *Id*.

[126] 29 C.F.R. § 2530.206,(c)(1).
[127] *Langston v. Wilson McShane Corp*., 2013 WL 1222848 (Minn. Mar. 27, 2013).

[128] *Id*. at *6.
[129] *Id*. at *1.
[130] *Id*.
[131] *Id*.
[132] *Id*. at *1-2.
[133] *Id*. at *2.
[134] *Id*.
[135] *Id*.
[136] *Id*.
[137] *Id*.
[138] *Id*. at *3.
[139] *Id*.
[140] *Id*.
[141] *Id*. at *4.
[142] *Id*.
[143] *Id*. at *5.
[144] *Carmona v. Carmona*, 603 F.3d 1041, 1060, (9th Cir. 2010).
[145] *Carmona*, 603 F.3d at 1056.
[146] *Id*. at 1057.
[147] *Langston*, Appellant's Reply Brief, No. A07-2034, 2009 WL 4917135 at *5-6 (Minn. June 8, 2009).
[148] *Id*. at *6.
[149] *Id*.
[150] 29 U.S.C. § 1056(d)(3)(G)(II).
[151] 29 U.S.C. § 1056(d)(3)(H)(v).
[152] Langston Brief at *7.
[153] *Id*.
[154] *Id*.
[155] *Hogan v. Raytheon Co*., 302 F.3d 854, 857 (8th Cir. 2002).
[156] Langston Brief at *8.