

BRUCKER



MORRA

A Professional Corporation

on Benefits

Exclusively practicing employee benefits law ♦ ERISA ♦ and benefits taxation

Bifurcations and Family Code § 2337(d)(2)

Why the Attachment in Subsection (C) Fails the Former Spouse

Linda Russano Morra
September 23, 2010

When a party in a divorce case seeks bifurcation and early termination of marital status, and there are retirement benefits involved, Family Code §2337 provides several options to protect the other party *“from any adverse consequences if the bifurcation results in the loss of the other party’s rights with respect to any retirement, survivor, or deferred compensation benefits under any plan, fund or arrangement, or to any elections or options associated therewith, to the extent that the other party would have been entitled to those benefits or elections as the spouse or surviving spouse of the party.”* FC §2337(c)(5). One of the first questions to ask when analyzing which option to use is whether the plan is covered by ERISA.

ERISA governs employee pension benefit plans. How can you identify an employee pension benefit plan? Any plan maintained by an employer that provides retirement income to employees is an employee pension benefit plan under ERISA §3(3). However, for purposes of this definition, the sole owner of a business and his or her spouse are not considered employees. Thus, if they are the only employees, and the only participants in the plan, then the plan is not covered by ERISA.

If you determine that you are dealing with an ERISA plan, then ERISA will affect your choices under FC §2337(d)(2). Why? First, under ERISA §514(a), ERISA supersedes any and all state laws that relate to employee benefit plans covered by Title I of ERISA (“ERISA preemption”). The purpose of ERISA preemption is to ensure that plans and administrators are subject to one uniform body of law and

need have only one set of administrative procedures applicable in every state.

Second, under ERISA §206(d), the creation, recognition, or assignment of a right to any benefit payable with respect to a participant to any other person generally is a prohibited assignment or alienation of benefits (“Anti-Assignment”). There is an identical provision in the Internal Revenue Code, applicable to every tax-qualified retirement plan (whether covered by ERISA or not) which, if violated, jeopardizes the tax-qualified status of the plan.

There is relief, however. ERISA §206 (d)(3) provides that Anti-Assignment does not apply to qualified domestic relations orders (“QDROs”). Furthermore, ERISA §514(b)(7) states that the broad preemption provision in §514(a) does not apply to QDROs. QDROs are also an exception to Anti-Assignment under the Internal Revenue Code.

Back to FC §2337(d)(2), where the choices are as follows:

“(A) An order pursuant to Section 2610 disposing of each party’s interest in retirement plan benefits, including survivor and death benefits.

“(B) An interim order preserving the nonemployee party’s right to retirement plan benefits, including survivor and death benefits, pending entry of judgment on all remaining issues.

“(C) An attachment to the judgment granting a dissolution of the status of the marriage, as follows:

Attorneys

- Alex M. Brucker
- Linda Russano Morra
- Michael L. Cotter
- Meredith J. Sesser
- Cathryn B. Sportsman
- Jeremy M. Pelphrey

T: (310) 475-7540

F: (310) 470-4806

W: www.pensionlawyers.com

“Each party (insert names and addresses) is provisionally awarded without prejudice and subject to adjustment by a subsequent domestic relations order, a separate interest equal to one-half of all benefits accrued or to be accrued under the plan (name each plan individually) as a result of employment of the other party during the marriage or domestic partnership and prior to the date of separation. In addition, pending further notice, the plan shall, as allowed by law, or in the case of a governmental plan, as allowed by the terms of the plan, continue to treat the parties as married or domestic partners for purposes of any survivor rights or benefits available under the plan to the extent necessary to provide for payment of an amount equal to that separate interest or for all of the survivor benefit if at the time of the death of the participant, there is no other eligible recipient of the survivor benefit.”

The type of order described in (A) above would be a QDRO, assuming it is drafted to comply with the QDRO requirements. The type of order described in (B) above would be an interim QDRO, again assuming it is drafted properly. Either of these orders would comply with FC §2337(d)(2) and should be enforceable against the plan. The QDRO would actually divide the benefit, which may or may not be desirable in a bifurcation. If dividing the benefit is premature, then the interim QDRO is the better choice. In essence, an interim QDRO is a QDRO that orders the plan to treat the former spouse as the surviving spouse in the event of the participant's death, but does not divide the benefit. These are the main points; there are many nuances that are beyond the scope of this article.

So why doesn't the attachment described in (C) above protect the former spouse in a bifurcation? First, the provisional award of a separate interest does not satisfy the statutory requirements to qualify as a QDRO. For instance, it attempts to award benefits, but does not contain enough information for the plan to determine how much the former spouse is entitled to receive. It does not state the period to which it applies, and when the former spouse can receive the awarded benefits. Since the attachment is not a

QDRO, paying benefits based on the attachment, or even segregating benefits within the plan for the former spouse, would violate Anti-Assignment. The attachment would be preempted by ERISA and not enforceable against the plan.

Second, the attachment orders the plan to treat the former spouse as a surviving spouse as allowed by law. Under ERISA, a former spouse can be treated as a surviving spouse only as provided in a QDRO. Since the attachment does not qualify as a QDRO, it does not preserve the former spouse's status as a spouse for purposes of survivor benefits.

If the attachment is used in a bifurcation involving an ERISA plan, and if the participant dies prior to entry of a QDRO, the plan should reject the attachment and pay benefits to the actual surviving spouse, if any, or to the participant's beneficiaries.

Can this situation be corrected retroactively? Maybe. Under a Final Rule published on June 10, 2010, the U.S. Department of Labor clarified that a DRO otherwise meeting the requirements of a QDRO does not fail to be treated as a QDRO solely because it is issued after, or revises another, DRO or QDRO, or because of the time at which it is issued. While retroactive QDROs are now sanctioned under ERISA in many circumstances, there are limits on what can be accomplished retroactively.

According to recent case law, a QDRO cannot assign to a former spouse the survivor rights that vested in a subsequent spouse as of the participant's retirement date. It is this author's opinion that this principle also applies to pre-retirement surviving spouse benefits. Thus, if the participant remarries and dies after the bifurcation but before a QDRO is entered, the new spouse will be entitled to survivor benefits from the plan and a later QDRO cannot divest the new spouse of those benefits.

In conclusion, as much as the attachment to the judgment described in FC §2337(d)(2)(C) is a simple and efficient way to handle a retirement plan, it has its limitations. For this reason, the attachment is not the best option for an ERISA plan.

DISCLAIMER

The information contained herein is provided by Brucker & Morra, APC as general information to clients and friends. It should not be construed as, and does not constitute, legal advice on any specific matter, nor does this message create an attorney-client relationship. These materials may be considered ATTORNEY ADVERTISING in some states.