RETIREMENT PLANS:
WHAT TO DO WHEN NO QDRO IS HONORED

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Advanced Family Law Course 2000
August 21 – 24, 2000
San Antonio, Texas

CHAPTER 65

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Note: Appendices H – R are copied from "Qualified Domestic Relations Order, Forms & Worksheets", Second Ed., 1998, by Mark W. Dundee, LL.M., Esq.

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I. INTRODUCTION

The focus of this paper is to alert the practitioner to the common problems that can cause a QDRO to be rejected, and highlight the hazards and alternatives when dealing with a non-ERISA plan that does not accept a QDRO and will not divide the plan benefits, regardless of a court order.

In any case involving marital property, alimony, or child support, your antennae should go up about the possibility of a QDRO (qualified domestic relations order). The time to understand the type and terms of the plan and to start on a QDRO is at the beginning of the case, the moment you have a mere suspicion one may be necessary, whether you represent the employee or non-employee. Secretaries, legal assistants, and the attorney should each do a part as the case progresses to make negotiation, drafting and finalizing a QDRO painless. We have provided you with an office procedure for QDROs, to heighten your awareness of the issues surrounding QDROs, and, to aid you in drafting QDROs. Checklists for every facet of a QDRO have been provided, as well as an office procedure you can implement immediately. Greater detail as to definitions and terms involved in a QDRO and QDRO preparation can be found in Charla Bradshaw Conner's paper entitled "*Retirement Overview and a Walk Through the QDRO*", 1998 Advanced Family Law Course.

It is vital to understand the difference in the types of retirement plans and the issues lurking therein before you attempt to advise your client, negotiate a settlement or try the case. Many attorneys wait until it is time to draft a QDRO before the attorney really attempts to understand the plan, which can create major problems affecting the client <u>and</u> the attorney's malpractice premiums. Whether the attorney drafts the QDRO or contracts that task out, a certain basic understanding of the plan must be obtained.

II. WHAT IS A QDRO?

The term "qualified domestic relations order" refers to a judgment, decree, or order that creates or recognizes the existence of an alternate payee's right to receive all or a portion of a plan participant's benefits, in a defined benefit plan or a defined contribution plan, payable under an ERISA-qualified employee benefit plan (Employee Retirement Income Security Act of 1974)--that is, a privately sponsored plan. ERISA §206(d)(3)(B) and I.R.C. §414(p)(1). Governmental (State, Federal and military), church, and foreign retirement plans are not subject to ERISA. Further, a company may have a privately sponsored plan that is not "qualified" and not subject to ERISA. A QDRO, at a minimum, must meet a set of specified criteria summarized in §414(p) of the Internal Revenue Code ("IRC"). That criteria is fairly simple and straightforward. Unfortunately, most of the plans and their lawyers have greatly added to the requirements of a QDRO and have made the preparation of a QDRO so technically difficult, inconsistent and downright stupid as to defy logic.

QDROs are particularly common in the area of divorce and are used as a means to "breakthrough" the anti-alienation provisions required in all plans subject to ERISA, which prohibit a plan from distributing a participant's benefits to anyone other than the participant. Further, a QDRO is basically a state-issued domestic relations order that 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. ERISA §206(d)(3)(B)(ii) and I.R.C. §414(p)(1). With a properly worded QDRO, a former spouse (also known as the alternate payee) of an employee (also known as the participant) can be eligible to receive all or a portion of such participant's accrued benefits in a defined benefit plan, or total account balance in a defined contribution plan, to satisfy child support, alimony, or marital property rights. Gary A. Shulman, <u>Qualified Domestic Relations Order Handbook</u> 8 (1993) [hereinafter Shulman].

Although government and church plans are exempt from ERISA, almost all have provisions or statutory language that allows the plan to accept an order dividing the benefits. The Texas state plans usually continue the use of the term QDRO; however, the Federal plans do not, and will reject any order that is even titled as a QDRO. Be aware, however, that there are a few state and local defined contribution plans that absolutely cannot be divided by court order.

A. Property Division

The most common use of a QDRO is for the division of property in a divorce in the form of various types of retirement plans, which are either defined benefit plans or defined contribution plans (defined herein below).

B. Child Support and Spousal Support

A QDRO can order payments be made to an alternate payee (usually the former spouse of the participant) for child support. Think "QDRO" whenever you have an initial child support order, enforcement of child support, or retroactive child support, and an obligor who is receiving retirement benefits, especially military benefits.

When the QDRO is used for the payment of child support, the distribution may be included in the gross income of the participant or the alternate payee, in the year in which the distribution is made. You should check with the plan and verify to whom the 1099-R will be sent (the participant or the alternate payee). If you run into trouble, ask who would be treated as the distributee if the child were named as the alternate payee in the QDRO. However, remember that if the child is the alternate payee, the QPSA discussed below could not be used because it is only available for former spouses. It is important to consider the consequences on the payment of the support if the Participant dies. See Section IV., H. below for a full discussion of these annuities.

In regard to spousal support (a/k/a maintenance or alimony), a QDRO can order payments be made to an alternate payee. In this case, the distribution is included in the gross income of the alternate payee in the year the distribution is made.

In either case, because the distribution is made pursuant to a QDRO, the payment is not subject to the 10 percent premature distribution tax. I.R.C. §72(t)(2)(C). Victor B. Meyen, Esq., Qualified Domestic Relations Order Answer Book, Second Edition 12-4 (1998) [hereinafter Meyen]. In addition, in either case, you should assess whether the plan already has a QDRO in place.

Using a QDRO for a defined benefit plan to satisfy monthly child support or monthly spousal support may not be a good idea, unless the participant is in pay status, due to having to wait until the participant reaches retirement age or takes early retirement to begin to receive benefits.

Using a QDRO for a defined contribution plan can be an excellent vehicle to satisfy a lump-sum retroactive child support judgment or child support arrearage judgment. Most defined contribution plans allow a lump sum cash payment. The plan may or may not allow for periodic monthly payments. You should ascertain this information first.

In considering using a QDRO for child support or spousal support, the threshold question should be to ascertain when payment to the alternate payee could be made according to the plan's rules. The QDRO CANNOT change the form of benefit payable by a qualified plan. I.R.C. §414(p)(3)(A); ERISA §206(d)(3)(D)(i). It is important to be certain that the payment(s) ordered not violate the terms of the plan, and that the form of the payments you desire are a payment option available under the plan.

III. WHAT LAW APPLIES

A. Privately Sponsored Plan

If the plan is a qualified, privately sponsored plan, then ERISA § 206(d)(3) and IRC § 414(p) apply and the QDRO must meet all criteria under ERISA and the IRC to be a "qualified" domestic relations order. Before an order is "qualified" as a QDRO, it is first a "domestic relations order". The differences between the ERISA QDRO rules and the IRC QDRO rules lie in the types of plans to which they apply and the legal consequences to the plan of failure to comply.

B. State or Church Plan

If the plan is a state governmental plan, then the rules under that plan apply. A state plan means a plan established and maintained for its employees by the government of any state or political subdivision thereof, or by any agency or instrumentality of any of the foregoing

A church plan generally means a plan established and maintained for its employees by a church or by a convention or association of churches that is exempt from tax under IRC §501. Id. at 58. Church plans are authorized under IRC Section 403(b). It appears that §403(b) plans fall under IRC §414(p) QDRO rules.

BEWARE that if the state governmental or church plan has an anti-alienation clause, precluding the plan from paying an alternate payee directly, there is no statutory authority for a dividing order, and the plan is not subject to any legal process, a "QDRO" will not work. Whether or not a plan is able to pay your alternate payee client directly is THE primary consideration when representing an alternate payee. It could be malpractice if your alternate payee client is awarded benefits that are impossible to obtain.

C. Federal and Military Plan

If the plan is a federal governmental plan or military plan, then the statutory rules and laws that established the plan apply. A federal plan means a plan established and maintained for its employees by the government of the United States. Federal plans include the Civil Service Retirement System, Federal Employees Retirement System, and Thrift Savings Plan. Each has its own federal, statutory establishment, and some unique terms and features. A federal plan also includes any plan to which the Railroad Retirement Act of 1935 or 1937 applies and that is financed by contributions required under that Act and any plan of an international organization that is exempt from taxation by reason of the International Organizations Immunities Act (I.R.C. §414(d)). Shulman, at 58.

A military plan means a plan established and maintained for its members by a branch of the armed services of the United States, whether active or reserves. Again, military plans are controlled by federal, statutory authority, with unique terms and features.

IV. DEFINITIONS AND QDRO ISSUES

A. Alternate Payee

An "alternate payee" is any 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 the plan with respect to such participant. 29 U.S.C.A. §1056(d)(3)(J).

B. Participant

A "participant" is an employee or former employee who is or may become eligible to receive a benefit of any type from an employee benefit plan (welfare benefit plan or pension benefit plan) or whose beneficiaries may be eligible to receive such a benefit. 29 U.S.C.A. §1002(7).

C. Defined Benefit Plan ("DBP")

A defined benefit plan is qualified under ERISA and the IRC and provides a specific pre-determinable amount of benefits to a participant at that individual's projected date of retirement, usually age 65, which will continue for the employee's lifetime. Normally, the benefits are based on a formula that incorporates the participant's projected years of service and final average compensation. Defined benefit plans are required to be funded on an ongoing basis in accordance with actuarial principles enumerated in ERISA and the IRC. Internal Revenue Form 5500 can inform you of whether or not a plan's funding levels have been met. A participant's benefits under a defined benefit plan are referred to as accrued benefits. Shulman, at 12. A statement of the value of a participant's accrued benefit in a defined benefit plan is merely a projection as of the present time of the participant's monthly pension benefit at normal retirement age. The accrued benefit is calculated on the basis of the participant's present age, years of accredited service, and salary. Most defined benefit plans provide for early retirement prior to normal retirement age, with reduced payments established in tables or schedules establishing discounts for different ages at early retirement. David R. McClure, <u>Is That All There Is? Characterizing and Dividing Defined Contribution Plans</u>, State Bar of Texas 18th Marriage Dissolution Institute (1994) [hereinafter McClure].

Many non-ERISA, state and federal plans have attributes of a defined benefit plan in that the benefit is a monthly annuity payment calculated on a formula, but to the casual observer may appear to be a defined contribution plan in that the employee’s contributions are tracked and an annual statement is generated stating the amount of this “account”. Examples of these plans are the Civil Service Retirement System, Federal Employees Retirement System, Teacher Retirement System of Texas and the Texas Municipal Retirement System, **Caution:** The statement of the employee’s contribution to these plans has no direct relationship to the amount of the monthly benefit payable or the actual present value of the plan. Further, these plans do not provide for lump-sum distributions, or honor awards that state a lump-sum division.

D. Defined Contribution Plan ("DCP")

A plan qualified under ERISA and the IRC that provides for contributions directly to individual accounts established and maintained for each plan participant is a defined contribution plan. The contributions may consist of either employee or employer contributions, or both. The participant is generally entitled to receive the account balance (together with any interest accrued thereon as well as investment gains and/or losses) when the employee retires or otherwise terminates employment with the company. Usually the benefit will be in the form of a single-life annuity or lump-sum payment. There are several types of defined contribution plans, including profit sharing plans, thrift plans, section 401(k) plans, retirement savings plans, stock bonus plans, money purchase pension plans, target benefit plans, and employee stock ownership plans (ESOP's). Shulman, at 12.

There are also state, federal, and church plans that are not subject to ERISA but have the attributes of a defined contribution plan, such as the federal Thrift Savings Plan.

E. Accrued Benefit (DBP) and Account Balance (DCP) Issues

The accrued benefit is the specific dollar amount of the participant's benefit credited or allocated to the participant at any given point in time, determined in accordance with the terms of the defined benefit plan. In a defined benefit plan, the accrued benefit will be expressed as a life annuity payable to the participant at normal retirement age. ERISA contains set requirements for minimum benefit accruals, which basically provide that the benefit must be accrued over the time of the participant's employment at a set rate, rather than waiting until retirement. For example, a defined benefit plan might require the participant's accrued benefit in the plan at any point in time to be calculated by multiplying the projected benefit at normal retirement age times a fraction, the numerator of which is the number of years of plan participation by the participant, and the denominator of which is the number of years of plan participation the participant would have had if he had remained employed through normal retirement age. McClure, at K-4.

When dividing a defined benefit plan, you must first determine whether or not the participant is receiving benefits (also known as being in "pay status"). If a participant is in pay status, the QDRO needs to be adjusted accordingly. It is important to include a provision in the decree to order the participant to pay the alternate payee a set dollar amount per month until the QDRO is qualified and the plan begins to pay the alternate payee directly. Most importantly, if you represent the alternate payee, you need to advise that client about the survivorship benefits the participant has chosen, how those options will affect the alternate payee, and ascertain whether or not those options can be changed. For example, if the participant is receiving benefits with no qualified joint and survivor annuity, then upon the participant's death, payments to the alternate payee will stop, unless the participant elected some other optional form of benefit payment, such as a ten-year certain, wherein payments last the longer of the participant's life or ten years.

Benefits are always 100% accrued in a defined contribution plan, so that the participant's account balance is the value of the benefit. The amount in the account consists of contributions made, earnings on those contributions, less any deductions for forfeiture, and plan expenses. McClure, at K-5. A participant's account in a defined contribution plan may be made up of several sub accounts, such as the pretax account, after-tax account, stock account, and matching employer contribution account. It is vital you locate all accounts through discovery and that the QDRO award the alternate payee the appropriate percentage of each account or a specific dollar amount taken prorata from each account. If the alternate payee is to receive fifty percent (50%) of the community property portion of a defined contribution plan, the usual approach would be to have the QDRO allocate the alternate payee's fifty percent (50%) from each of the participant's sub accounts, on a pro rata basis. On the other hand, if, for example, you wanted to gain an advantage for your alternate payee client, an attempt could be made to draft the QDRO in a manner that allocated the alternate payee's portion of the retirement plan from the after-tax sub account rather than the pretax sub account.

In the event the defined contribution plan consists of common stock, in all probability, the earlier acquired common stock will have a lower cost basis than the most recently acquired stock. The fair approach would be to allocate the alternate payee's portion of the defined contribution plan on a pro-rata basis from the stock that has a low-cost basis and a high-cost basis. If an attorney wanted to gain an advantage for their client, whether they represented the alternate payee or the participant, the attorney would attempt to receive the stock that has the higher cost basis.

Further, if the defined contribution plan is made up of stock and cash, it is vital you address in the decree and in the QDRO what percentage of the alternate payee's benefits are to come from cash and from stock. If no percentage is specified, most plans will calculate the alternate payee's benefits on a pro rata basis. If the latter, consider the issues that can arise if the alternate payee is receiving a specified dollar amount from a defined contribution plan made up of stock and cash. The alternate payee would assume the risk of the stock decreasing in value between the time the divorce is rendered and the time the alternate payee's funds are segregated, and between the time of segregation and the time of final distribution to the alternate payee.

Pay careful attention to the ramifications of an alternate payee client receiving a specified dollar amount versus a percentage. The alternate payee receiving a specified dollar amount must understand that his or her specified dollar amount will be segregated from the participant's plan, and then the alternate payee's account will be adjusted after segregation for gains and losses. Each plan will vary on what they will do with gains and losses from the assignment date to the date of segregation. Thus, the final distribution to the alternate payee may not be the specified dollar amount in the decree, due to increases or decreases in, for example, mutual funds or company stock.

It is essential to understand the "events" that occur when dividing a defined contribution plan and how those events affect an alternate payee's benefit calculations. The **first event** is the assignment date that is the date the alternate payee's benefits are to be divided. The assignment date is usually the date of divorce (or a date on which the parties have agreed).

The **second event** is the date of segregation. This is the date the plan will carve out the alternate payee's portion of the plan and place it in a separate account on behalf of the alternate payee. It is highly recommended to have the QDRO signed at the time of divorce because most plans will not segregate the alternate payee's portion of the benefits until the QDRO has qualified. The goal is to have the assignment date and the segregation date as close as possible because during the period of time between the assignment date and the segregation date, the alternate payee could lose the gains on the alternate payee's portion, unless the decree specifically states the alternate payee is to receive those gains during that period of time! Under ERISA, the plan is not responsible for paying gains to the alternate payee until segregation occurs. It is not necessary for the QDRO to state that the alternate payee will receive the gains on the alternate payee's portion after segregation, but it is certainly safer to add this language to the QDRO and decree to insure yourself against a plan administrator with a different view. In addition, if the participant is in pay status, and the QDRO is not done at the time of divorce, the plan will be paying the alternate payee's share of the monthly benefit to the participant (because the plan cannot pay the alternate payee until it has a qualified domestic relations order). To avoid this money getting into the participant's hands and staying there, put a provision in your decree that the participant must pay the alternate payee's monthly benefit directly, until the plan begins to pay the alternate payee.

The **third event** is the date of distribution. This is the date the alternate payee's funds are actually paid to the alternate payee. It is your responsibility to make sure the alternate payee client understands the tax consequences of receiving the funds directly versus rolling the funds over into another retirement account (e.g., direct rollover IRA). Instruct the alternate payee client to seek tax advice. In addition, you should make sure the alternate payee client understands when he/she can receive his/her distribution. I have seen defined contribution plans that will not allow an alternate payee to receive their distribution until the participant receives his or her distribution. Think how disgruntled the alternate payee client will be to learn after the divorce that he or she cannot receive his or her portion of the participant's defined contribution plan until the participant reaches normal retirement age or terminates employment!

In addition, when drafting a defined contribution plan QDRO, the alternate payee's attorney should make sure that the alternate payee's rights and privileges with respect to directing investments, voting rights, election privileges, and the like, are addressed in the QDRO. If the alternate payee is not allowed to do these things, then state in the QDRO that the plan fiduciary will do them on the alternate payee's behalf.

F. Vested Benefits

Most plans have a vesting requirement. If the participant is not vested in the benefit, the participant's benefit may be overstated in determining its present value because the participant may terminate employment prior to becoming entitled to the retirement benefit. Vested benefits are those benefits to which the participant has acquired an unconditional ownership interest, which is not forfeitable. ERISA contains a number of vesting schedules to determine the minimum rate at which a participant must become vested. Each retirement plan must have a "vesting schedule" which vests benefits in its participants at least as rapidly as under the minimum schedule provided by ERISA. 36 U.S.C. §411(a), 29 U.S.C. §1053. Each participant in the plan, depending on the number of years of employment, will have a vesting percentage ranging from zero to 100%. Therefore, the vested portion of a participant's accrued benefit or account balance is the benefit to which the participant would be entitled if the participant terminated employment at a given date.

A participant is always 100% vested in all employee contributions and the earnings thereon. In distinguishing vesting from accrual, it may be said that benefits accrue, while ownership interests vests. McClure, at K-5. Be careful that you do understand the funds in the plan that are vested, in that if your alternate payee client receives a portion of the plan that is not vested, the plan cannot pay the alternate payee the nonvested amounts until all conditions for vesting have taken place.

G. Matured Benefits

Matured benefits are benefits, which are presently due and payable. In other words, all that is necessary for the participant to receive payment under the terms of the plan is to request payment. McClure, at K-5.

H. Provisions Concerning Death of Participant: Survivor Annuity Provisions for Preretirement and Postretirement

With the growing awareness of QDROs, survivorship issues have emerged as a central concern. The alternate payee's greatest concern should be the untimely death of the participant. Without a valid, qualified, properly drafted QDRO in place, this property right granted to the alternate payee can evaporate upon the participant's death. Unless the alternate payee is granted survivorship protection in the QDRO, an incomplete right is being assigned.

Survivorship issues range from determining whether such coverage should be extended at all, to deciding which party should bear the associated costs. Survivorship coverage is essential to dividing this marital right. Preretirement survivorship coverage is the qualified preretirement survivor annuity ("QPSA") and postretirement coverage is the qualified joint and survivor annuity ("QJSA"). The survivorship issues are usually only an issue in a defined benefit plan, unless it is a defined contribution plan wherein annuities are available.

It is only reasonable that the alternate payee would want the assurance of a lifetime benefit. Not to grant a lifetime pension for both parties defeats the concepts of equitable distribution in which assets (and the right to those assets) are fairly divided. Defined benefits plans offer participants the right to elect a post-retirement survivorship option that will provide a lifetime income for the surviving spouse in the event of the participant's death. In order to provide this extended coverage over two lives, the participant's benefits are reduced at retirement. For example, rather than recognizing a lifetime benefit on his or her life only, of $1,000 per month, the participant may elect a 50% joint and survivor annuity (a/k/a a qualified joint and survivor annuity and a/k/a "QJSA"), whereupon the participant will receive $900 per month for the participant's lifetime, with the proviso that the participant's surviving spouse will continue to receive $450 per month for the remainder of the alternate payee's lifetime in the event of the participant's death. This reduction in the participant's benefit is necessary to maintain the "actuarial equivalency" of the participant's benefit.

A **former spouse** can be treated as a surviving spouse for purposes of a QJSA and a QPSA <u>but only if the QDRO specifically provides.</u> Attorneys for participants and alternate payees should read the plan document and/or summary plan description to understand the survivor benefits available under the plan. For further discussion of survivor annuities, please see David McClure's article, <u>Commonly Overlooked Retirement Assets--Survivor Benefits</u>, State Bar of Texas Advanced Family Law Course (1992).

Survivorship issues for postretirement can be broken down into three areas: (1) QJSA, the annuity that is paid over two lives; (2) No QJSA, with the participant's life as the measuring life, and (3) the separate approach, with the participant's and alternate payee's benefits being severed and paid over their respective lives. First, postretirement survivorship rights could be granted to the alternate payee by a QJSA. This would require the participant to elect the participant's benefits in the form of an actuarially reduced joint and survivor annuity, which would pay benefits over two lives (the participant's and the alternate payee's). Second would be to use the participant's life as the measuring life, and forego the QJSA, but the annuity would stop at the participant's death. Third, would be to use the separate approach, which carves the participant's pension into two distinct entitlements (one for the participant's life and one for the alternate payee's life), with the participant's and alternate payee's lives being the measuring lives over their respective share. Most importantly, you should ascertain what the benefit to the alternate payee would be under these three scenarios.

Under any of these three alternatives, **preretirement** survivorship protection must be granted to the alternate payee to protect the alternate payee's interests should the participant predecease the alternate payee before retirement. Under the QPSA, you should explain to your client that this is the benefit they would receive as the alternate payee and not what they have bargained for in the decree should the participant die before beginning to receive benefits and before the alternate payee begins to receive benefits.

Regarding costs associated with the QJSA and the severed approach, any reduction in benefits providing survivorship protection for an alternate payee should normally be shared equally. As a result, the alternate payee's share of the pension should be calculated after first setting out the costs of providing such survivorship protection (such costs being the actuarial reduction). As a means of securing a lifetime pension, it is obvious why the alternate payee would agree to shoulder a portion of these costs. The issue, of course, is to what extent the alternate payee should bear this cost. Typically, the argument is made that the alternate payee is receiving the benefit of the survivorship rights and should pay the entire costs. Because the pension was earned through the joint efforts of the parties (and is all or partially community property), that portion which is considered community property should be treated the same way as a pension would be if the parties were still married. As the Retirement Equity Act requires that an alternate payee consent in writing out of a survivorship right, so also should the family trial court recognize this co-ownership treatment of the community portion of the participant's benefits by apportioning the costs between the parties when drafting a QDRO. Under the QJSA approach and the severed approach, the participant and the alternate payee equally share the benefits and burdens. Each can realize greater benefits, by taking into account who is likely to die first, and choosing the appropriate approach. Many lawyers take the easy road and utilize the QJSA not realizing the possible detriment to the participant and/or alternate payee.

I. Provisions Concerning Death of Alternate Payee

Not understanding what happens to the alternate payee's share of the benefits when the alternate payee dies before the participant is one of the most overlooked issues in QDROs. You should address this language in your QDRO, notwithstanding the ultimate restrictions that may be imposed by the plan administrator, depending on the type of plan in question. Most model QDROs do not address the death of the alternate payee.

In a defined contribution plan QDRO, the alternate payee's share of the benefits is to be payable to the alternate payee's designated beneficiary or estate in the event of the alternate payee's death before receiving the alternate payee's full distribution. Upon acceptance of the QDRO the plan administrator will usually establish separate accounts for the alternate payee. At that point, the alternate payee's share is effectively nonforfeitable. The alternate payee should be able to designate a beneficiary with respect to the alternate payee's share of the benefits, just as the participant can elect beneficiaries for the participant's share. Alternatively, the QDRO could contain language that provides for a full reversion to the participant in the event of the alternate payee's death.

In a defined benefit plan QDRO, the issues are more complex. Many QDROs attempt to provide ongoing benefits to the beneficiary or estate of the alternate payee in the event of the alternate payee's death. This is generally not permitted in a defined benefit plan, as plan administrators do not want to absorb the costs associated with providing survivorship protection to the survivor of a survivorship. There are no individual accounts set up for the participant and alternate payee, as in a defined contribution plan.

Benefits are payable in accordance with the optional forms of payments permitted under the terms of the plan, which are usually in the form of monthly annuities. An alternate payee generally cannot designate a beneficiary or the alternate payee's estate to receive a death benefit in the event of the alternate payee's death on a defined benefit plan. Benefits usually revert back to the participant or are forfeited to the plan should the alternate payee die before the alternate payee begins to receive benefits.

Some plans, though, do not permit this reversion under certain circumstances. For example, if the separate approach is used, after the alternate payee begins to receive benefits, there would be no reversion of the alternate payee's benefits to the participant because the alternate payee's benefits are paid for the alternate payee's lifetime and stop on the alternate payee's death, leaving nothing to revert since the benefit was actuarially adjusted and paid for the alternate payee's life. Some plan administrators are changing their reversion methodology depending on whether payments are actuarially adjusted for the alternate payee's lifetime. The critical point on reversion is whether the benefits have been actuarially adjusted for the alternate payee's lifetime. It is important to note that reversion to the participant of the alternate payee's benefits will not occur once the alternate payee begins to commence the alternate payee's benefits, if the separate approach has been used.

When representing the participant whose plan prohibits an alternate payee's benefits to revert to the participant and does not allow an alternate payee to designate beneficiaries, upon the alternate payee's death (prior to the alternate payee beginning to receive benefits), you may want to avoid language in the QDRO that would base the alternate payee's share of the benefit on the alternate payee's life expectancy. If this is the case, and the alternate payee dies one day after the QDRO, and before the alternate payee begins to receive benefits, the alternate payee's benefits are lost forever. Neither the participant nor alternate payee's beneficiaries will ever see a dime of the alternate payee's share. In this case, it may be better for the alternate payee to take the benefit in the form of a QJSA and let reversion occur upon the alternate payee predeceasing the participant. Note that with the QJSA, the alternate payee would have to wait until the participant commences benefits before the alternate payee could receive any benefits, and the participant would have to choose a joint and survivor annuity (and receive less benefits because he/she would have to be actuarially reduced to pay for the annuity).

J. Loans

Special attention should be paid to any outstanding loans against a defined contribution plan at the time of divorce to ensure that the QDRO properly and adequately addresses how the loan affects division of the benefit and the effect of a possible default of the loan. If awarding an alternate payee a percentage of a defined contribution plan, the QDRO should specifically state whether the percentage is applied, and the award calculated, before or after reduction of the account balance for the loan amount. Also, the QDRO should address what happens in the event of a default on the loan by whoever is to pay it. The only real security for an alternate payee in such a situation is a provision in the QDRO ensuring that the full amount payable to the alternate payee is kept intact by having the order address how and who will pay the loan, and providing provisions for the loan not being repaid. The plan will have provisions for the loan repayment (often in the form of payroll deductions), but not for paying the loan in the QDRO.

K. Discuss Annuity Options With Clients

Most defined benefit plans allow an alternate payee to choose the benefit type, or manner in which it is paid, at the time the benefits begin. Some plans require that such election be made in the QDRO. Generally, the alternate payee can choose to receive his/her share of the monthly benefits a) for the participant's lifetime, b) for the alternate payee's lifetime or c) for a term certain, such as 120 monthly payments, regardless of anyone's death. The election made can change the amount of the benefit received, so let the client make the choice after consultation with a financial planner or tax advisor. Not all plans have all these options; some have additional options, and most allow no option at all if the participant has already retired when the QDRO is submitted. This is a very complicated area and varies greatly from plan to plan. Make certain the client is aware that options may exist and the selection of an option may have a significant impact upon the benefit received.

L. Alternate Payee's Attorney Should Always Request a Hold

Whenever an attorney in a divorce case becomes aware that a retirement plan is involved and that a QDRO could be needed, the attorney should always give the appropriate plan administrator formal notice that a divorce is pending and request that a "hold" be placed upon the participant's benefit or account. A sample "hold" letter is attached as Exhibit J to this paper. While such a requested "hold" does not guarantee that no benefits will be paid until the divorce is concluded and the appropriate QDROs issued, most plans will be cautious and not pay benefits or allow access to, or loans against, the account.

V. OFFICE PROCEDURE AND CHECKLISTS FOR QDROS

A. Overview of the Checklists

The most useful parts of this paper for your office are Appendices A though E. There are four checklists provided in Appendices A, B, C, and D. These checklists have been updated from my prior papers.

The first checklist (Appendix A), "QDRO Fact Sheet for Legal Assistants and Clients," should be filled out by the legal assistant for each plan in which the husband <u>and</u> wife participate. Information to be gathered in this checklist is administrative in nature, but vital to the drafter of a QDRO.

The second checklist (Appendix B), "QDRO Identification During Discovery Stage," is for you to use when gathering information from your client and the opposing party.

The third checklist (Appendix C), "QDRO Fact Sheet for the Plan," is a comprehensive checklist to be sent to the plan. The questions asked are vital to the negotiation of a retirement plan <u>and</u> in drafting the QDRO. For example, an attorney should know that if a participant is in pay status, and their current spouse has waived the qualified joint and survivor annuity, (yielding the largest monthly annuity possible), then the alternate payee's share of the monthly annuity STOPS when the participant dies. An attorney unfamiliar with qualified joint and survivor annuities would miss this issue. An alternate payee client should be warned about the benefit stopping on the death of the participant when negotiating a settlement. Another example is an attorney who thinks that a statement in a QDRO naming their alternate payee client as the "surviving spouse" of the participant is enough to award their client a qualified joint and survivor annuity and a qualified preretirement survivor annuity. This is simply WRONG. Both of these annuities should be set out specifically in the QDRO. A complete evaluation of the qualified joint and survivor annuity should be undertaken by every alternate payee's and every participant's attorney.

Further, we find the majority of attorneys feel that a QDRO is a document that benefits the alternate payee and is not as important to a participant. Hold that thought, because we will dispel it. If you represent a participant and the QDRO names the alternate payee as the participant's "surviving spouse", then your participant client may be forced to choose a qualified joint and survivor annuity at the time of retirement, thereby reducing the participant's benefit (sometimes by one-half), and allowing the alternate payee to receive the participant's benefit after the participant dies, for the alternate payee's life. This forces the participant to take a reduced benefit at retirement. If the plan allows, you would not be representing your participant client to the utmost if you did not look into the separate approach, which allows the participant to avoid taking a reduced benefit at retirement (because there is no qualified joint and survivor annuity in place), or by using the participant's life as the measuring life and not utilizing the QJSA.

By using the checklist in Appendix C, you can also get the retirement information certified as a business record. We have even had plan administrators include the fact sheet as part of the business record! It has been most valuable at trial to have every question about the plan answered in one business record. We have found very few plan administrators to be uncooperative, especially when we point out that it will save numerous calls to them and inquire into a convenient time to depose them.

The fourth checklist (Appendix D), "QDRO Drafting and Submitting Checklist for Privately Sponsored Defined Benefit Plans and Defined Contribution Plans," is a comprehensive checklist to be used during drafting, and to be used as a final checklist before submitting the QDRO to the court and the plan administrator. We would suggest reading this checklist before you prepare any QDRO because it will alert you to the numerous issues within any QDRO. Often, a sample QDRO will be provided by the plan administrator, but there are times when no sample is available and you must generate your own. This checklist is intended to assist you in detect any discrepancies or voids in the model QDROs. Most model QDROs do not protect alternate payees, so exercise caution when using them. One of the most common myths about QDROs is that the plan will only accept a QDRO in the form of their model. This is simply not true. There are many items that benefit an alternate payee and/or participant, which can be included in a QDRO and still allow the QDRO to qualify.

Early in the case, it is very important to complete the checklists and obtain an authorization for release of information from the participant. These checklists are invaluable for aiding in the determination of the value of the plan, when benefits can commence, and the survivorship provisions upon the death of the alternate payee or the participant, which are vital to the settlement process or trial preparation.

B. Legal Assistant and Client at Beginning of Case

All initial client interview forms should inquire about any retirement plan(s) in which each spouse might have an interest. You should request each plan be listed separately on your client intake sheet. In addition, if you become aware your client or your client's spouse are involved in any retirement plan, you should immediately have the legal assistant fill out the form located in Appendix A, entitled "QDRO Fact Sheet for Legal Assistants and Clients," request the documents recommended in the form, and have the participant fill out an authorization for release of information. The legal assistant should then send the "QDRO Fact Sheet for the Plan," located in Appendix C (sending one for each plan in which the participant participates), to the plan.

C. Attorney at Beginning of Case

If you represent a prospective alternate payee, it is important at the beginning of the case to send notice to the plan administrator that the retirement plan is subject to division in a pending divorce. I usually do this by sending a copy of the temporary orders and/or injunction to the plan. You could be faced with malpractice if this notice is not given, especially if there are no temporary orders or injunctions. These actions will place an administrative hold on the plan. Most retirement plans have loan provisions and a participant can usually take out a loan against their plan without spousal consent. If notice is given to the plan, the plan will usually allow no distributions or loans to be made until the divorce is settled. If you are contemplating using a QDRO for child support, you should also send notice to the plan so the money is protected during contempt proceedings.

The most common scenario is for the plan administrator to learn there has been a divorce <u>after</u> the QDRO is served on the plan administrator. If notice has not been given to the plan administrator to freeze the funds, the participant could have borrowed money from the plan, or gone into pay status, causing the alternate payee's share of the plan to either be depleted, encumbered, or significantly reduced. Therefore, it is important if you represent an alternate payee to make sure you put the plan administrator on notice to protect the alternate payee's interest in the plan and protect yourself from malpractice.

D. Attorney During Discovery Stage

Appendix B, entitled "QDRO Identification During Discovery Stage," contains a checklist for QDRO identification through interrogatories and requests for production. <u>See also</u>, Jack W. Marr, <u>Employment and Retirement Benefits in Family Law Litigation: An Overview Checklist and Update of Advanced Issues</u>, State Bar of Texas 20th Annual Advanced Family Law Course, Appendix D (1994) [hereinafter Marr]. This checklist should be used for discovery purposes if there is not cooperation from your opposition on getting retirement information. The checklist addresses what inquiries you should make to your client and what information to obtain from your client. In addition, it contains information to be gathered through interrogatories and a request for production.

E. Office Procedure

In Appendix E, an office procedure has been provided for QDROs. If you have not completed the fact finding in Appendix C, then you do not have enough information to negotiate the division of a retirement plan or to draft a QDRO. In addition, if you cannot complete the checklist located in Appendix D, then you have not addressed each issue that should be addressed in your QDRO. To protect yourself from malpractice, I would advise you have the checklists located in Appendices D and E in your file. These checklists could save you in the future from a malpractice claim. More than likely, you will not become aware of a QDRO problem until the participant enters pay status some years in the future.

If the checklists provided in Appendices A through D have been completed and/or utilized, then the drafter should have all the information needed to draft a QDRO while using the checklist provided in Appendix E for office procedures. The office procedure provided should allow you and your staff to have all the necessary information to negotiate and draft the QDRO. In addition, the procedure provided encourages you to keep a client's file open until the QDRO has finally qualified. This can take quite some time, depending on the plan.

F. Legal Assistant and Attorney During Drafting and Submitting Stage

Appendix D, entitled "QDRO Drafting and Submitting Checklist for Privately Sponsored Defined Benefit Plans and Defined Contribution Plans," contains a comprehensive checklist for DBP's and DCP's. This form is extremely valuable at all stages of the QDRO process. This checklist is intended to be broad. Some terminology, such as "QDRO" and "alternate payee," which are applicable to private plans under ERISA, are not part of the vocabulary when dealing with military retirement, Federal Employees Retirement System (FERS), Federal Thrift Savings Plan, Civil Service Retirement System, Railroad Retirement, or private non-qualified deferred compensation plans. However, the terms used in this checklist will often be synonymous with terms used with respect to the other retirement systems. The idea is that if you gather the information in this checklist, and study the requirements of the retirement system in question, you will probably find you have all the information you need and will have given consideration to the pertinent issues prior to drafting the QDRO.

G. Preview by the Plan Administrator

Some plan administrators will preview QDROs and some will not. To save you and your client time and expense, it is important to take advantage of the preview process if the plan will preview, before the judge signs the Order. Preview information will be gathered by the legal assistant when he/she completes the "QDRO Fact Sheet for Legal Assistants and Clients." Although many plan personnel state that they will not pre-approve an order, they will review a draft and suggest changes, and/or make comments on how they interpret the order. Thus, it is important to ask if the plan administrator will "preview" a QDRO rather than asking if the plan administrator will "pre-approve" a QDRO. All ERISA plans are required to establish written procedures for review of domestic relations orders to see if they qualify to be a QDRO. Some plans have sample QDRO forms. Make sure any sample QDROs are the current sample forms. Even if the sample form does not satisfy your drafting goals, it will provide useful drafting guidelines and be a starting point. Remember that the model QDROs from the plan are not the only way the QDRO can be drafted. Review the plan's written procedures and any sample forms before you draft the QDRO. After drafting the QDRO, submit the draft to the plan administrator for review and preview, or pre-approval, if allowed.

H. Relationship with the Plan Administrator

Remember, it is not the court that decides whether your QDRO is qualified, but the plan administrator. A detail-oriented (read “anal retentive”) plan administrator or plan lawyer can tie up your QDRO for months (even if he/she is in a good mood). Therefore, treat the plan administrator in a polite, courteous, and respectful manner. The plan administrator and the plan trustee do not play favorites. Their goal is to operate the plan in accordance with the fiduciary principles set forth under ERISA and the IRC. If they receive a QDRO that satisfies all the requirements under ERISA and the IRC, they will provide benefits to the alternate payee. Also remember that it is not the job of the plan administrator to teach the attorney how to draft an acceptable QDRO. Further, even if you have QDRO language that worked for you before with a different company, it may not be acceptable to another employer.

I. Submitting the QDRO to the Court, then the Plan Administrator

The QDRO should be first previewed by the plan, then approved by the opposing lawyer, then signed by the judge. After the judge signs the QDRO, and the QDRO has been filed with the clerk, submit a certified copy of the QDRO, certified mail, to the Plan Administrator, or to whomever the plan requires it be sent.

Upon receipt of the domestic relations order, the plan administrator is required to promptly notify the participant and any alternate payee of receipt of the order and of the plan's procedures for determining whether or not the order constitutes a qualified domestic relations order. The plan administrator is required to determine, within a reasonable period after receipt of the order, whether or not the order is a qualified domestic relations order and to then notify the participant and alternate payee of the determination. The written procedures provided by the plan should provide you with a time frame of when to expect a determination of whether or not the domestic relations order qualifies as a QDRO.

Upon receipt of a domestic relations order or notice of a pending order, some plan administrators immediately segregate the alternate payee's funds and some will not segregate until the domestic relations order qualifies. The segregated amounts rule only requires a plan administrator to account separately for the amount that is immediately payable to an alternate payee during the period of time during which the plan administrator is determining if the domestic relations order is a QDRO. I.R.C. §414(p)(7)(A); ERISA §206(d)(3)(H)(i). If the domestic relations order does not require immediate payment, the segregated-amounts rule does not apply. This is why it is vital for you to try and have the QDRO signed at the time the decree of divorce is signed. If you wait and send the QDRO later, the alternate payee's funds could remain with the participant's funds, and this could create problems regarding any gains on the alternate payee's funds.

In addition, upon receipt of a domestic relations order or notice of pending order, the plan administrator should immediately determine whether the participant is in pay status, that is, whether the participant has already begun to receive pension benefits. If the answer is yes, the plan administrator must separately account for the amounts (referred to as "segregated amounts"), which would have been paid to the alternate payee during such period if the order had been determined to be a qualified domestic relations order. I.R.C. §414(p)(7)(A). The amount should be reduced from the participant's monthly pension check and separately accounted for pending the final determination of the qualified status of the order. The problem you want to avoid is that if the plan has not received notice of a pending order or a domestic relations order, the plan cannot be required to separately account for the alternate payee's funds. The result is that some of the alternate payee's funds could be paid to the participant with no chance to recapture them for the alternate payee. Thus, it cannot be stressed enough that the plan administrator should be notified immediately to make all necessary arrangements to insure that amounts called for under the order are not paid out to the plan participant.

If, within 18 months of the date the first payment from the Plan would be required to be made under the QDRO, the QDRO (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall direct payment of the amounts separately accounted for (including any interest earned thereon) to the person or persons entitled thereto. If within such 18-month period it is determined that the QDRO is not a qualified domestic relations order, or the issue as to whether such QDRO is a qualified domestic relations order is not resolved, then the plan administrator shall direct payment of the amounts separately accounted for (including any interest earned thereon) to the person or persons who would have been entitled to such amounts if there had been no QDRO. Any determination that a QDRO is a qualified domestic relations order, which is made after the close of the 18-month period, shall be applied prospectively only. Shulman, at 45.

J. Delinquent QDROs

Prior to September 1, 1995, there was no statutory authority for a judge to sign a QDRO after the Court's plenary jurisdiction had expired (30 days after the date the decree of divorce was signed absent an appeal). Unfortunately, it is not that uncommon for a situation to arise where the divorce decree contains language that divides a retirement plan in some manner by way of a QDRO, but a QDRO was not prepared and presented to the judge within thirty days of the date the judge signed the decree of divorce. Frequently, attorneys in this predicament submit a delinquent QDRO to the judge and the judge signs the QDRO despite the lack of plenary jurisdiction. The enforceability of a QDRO, or similar order, being signed after the court has lost plenary jurisdiction is in jeapordy.

Tex. Fam. Code §3.711 was enacted by the 74th Legislative Regular Session (1995), H.B. 603, effective September 1, 1995, and applies to an order, judgment or decree without regard to whether the order, judgment, or decree was rendered before, on, or after the act's effective date. Section 3.711 has been recodified in Title 1 to Sections 9.101 through 9.105. These sections state that when a court rendered a final decree of divorce that divided a retirement plan, but did not sign a QDRO, a party may petition the court to render a QDRO. Unless prohibited by federal law, an action seeking a QDRO or a similar order under this section applies to any previously divided retirement plan divisible under the laws of Texas or the United States, whether the plan is private, state or federal.

In addition, §9.101(a) provides that the Court that rendered the final divorce order has continuing, exclusive jurisdiction over the parties and property for the purposes of rendering a QDRO or similar order as if the court were required to presently divide the plan or benefit in a manner substantially similar to the original division. A petition filed under §9.102 is governed by the Texas Rules of Civil Procedure that apply to the filing of an original lawsuit. Each party whose rights may be affected by the petition is entitled to receive notice by citation and shall be commanded to appear by filing a written answer. Following service of citation, the proceeding shall be conducted in the same manner as civil cases generally. THEREFORE, IF YOU DO NOT HAVE A QDRO SIGNED BY THE COURT AT THE TIME OF THE DECREE, YOU COULD FIND YOURSELF HAVING TO START A NEW LAWSUIT TO GET A QDRO FOR YOUR ALTERNATE PAYEE CLIENT. However, some counties, such as Tarrant County, do not require the filing of a new lawsuit, motion or the paying of an additional filing fee if a QDRO is presented to the Court, even years after the conclusion of the divorce. Check your locality. Importantly, §9.105 states that the Court shall liberally construe Subchapter B of Title 1 to effectuate payment of retirement benefits that were divided by previous decree that failed to contain a qualified domestic relations order or similar order or that contain an order that failed to meet the requirements of a qualified domestic relations order or similar order.

K. Domestic Relations Order not approved by Plan Administrator as "Qualified", therefore not a QDRO

After a court has signed a QDRO and a certified copy sent to the Plan Administrator, the plan administrator can determine that the domestic relations order does not meet the criteria to be a "qualified" domestic relations order. A domestic relations order that is not found to be "qualified" is subject to the preemption and anti-alienation provisions of ERISA and will not pass title to an interest in the retirement benefit to the alternate payee. Even if you receive a letter from the plan stating the QDRO qualifies, be sure to review extensively how the plan has interpreted the QDRO, in that the interpretation may not be as you intended.

If you receive a nonqualification letter, you must pursue one of the following three alternative courses of action.

1. <u>Carefully Review the Rejection Letter</u>

The plan representative will send you written notification if your order is rejected (not “qualified”). The rejection letter will provide you with the reasons for rejection, but some letters provide more usable information than others. Many plans will actually identify the order provision that is in issue, and suggest specific changes in the language. Others identify the problem provisions only. Still others provide only cryptic references to obscure, generalized provisions in ERISA that no one but the author of the letter comprehends. Always carefully review the letter several times, since it will usually provide the means of correcting your order.

2. <u>Contact Author of Rejection Letter</u>

In the event you cannot decipher the meaning of the rejection letter, or believe the author may have overlooked or misinterpreted a provision, place a phone call to the author of the letter. Many times form letters are generated, and a one-on-one conversation will shed considerable light on the problems in the order. Many times specific wording, or a more precise understanding of the plan provisions, can be obtained from a phone call. Your conversation should always be professional and polite. You may be talking with a non-lawyer, but it is not uncommon for that layperson to actually have more working knowledge of QDROs than you will ever have. If you don’t understand something, say so, don’t try to bluff your way through. Although most plan personnel will not spend much time in educating counsel on the basics of a QDRO, frankness will usually be rewarded.

L. What Every Decree Should Include

The decree is the actual document that awards property. The QDRO only effectuates what the decree says. The two must be consistent. Very few decrees we review have enough detail to allow preparation of a QDRO without asking questions, or making choices that should have been made prior to the divorce. The decree doesn't have tocontain all the technical language of a QDRO, however, simply awarding wife 50% of all husband's retirement benefits doesn't get the job done. Strategically, if the opposing counsel or party doesn't really understand the plan or QDROs, it is possible to be purposefully vague in the decree and then slash and burn in the drafting of the QDRO. What they don't know won't hurt them, but the ethics of that approach doesn't sit well with us, and may not with the grievance committee.

Every decree that divides a plan should include the following:

All Plan Types

1) Exact plan name or names. Although there are circumstances when an additional general provision would be appropriate if a question arises as to unknown plans.

2) Clear, concise division of the benefit, whether by percentage or dollar amount.

3) Date on which division occurs, such as date of divorce or other specific date. You may be required by the plan to use the end of a month or end of a quarter date. You should ascertain this at the time of division.

4) If a CSRS or FERS Plan, whether the division is for the "gross", "net" or "self-only" benefit and the extent, if any of a surviving spouse benefit. Most non-ERISA, government plans have unique terms or language that should be included in the Decree.

5) If a military plan, does the division include cost of living increases (COLA) and Survivor Benefit Plan (SBP). If SBP is included, to what extent.

Include for Defined Benefit Plans

1) If plan allows lump-sum distribution (rare), state that as the option chosen.

2) Whether alternate payee is a "surviving spouse" and entitled to any pre-retirement or post-retirement death benefit, and the extent of the benefit.

Include for Defined Contribution Plans

1) Does award include earnings or losses from date of division to date of distribution?

2) What happens if alternate payee dies before distribution, and if a beneficiary can be named, who is it?

3) If the plan allows a lump-sum cash-out (most do), state whether or not the alternate payee is cashing out, rolling over or leaving in the plan (if allowed).

4) Is the award before or after reduction of the account balance for any outstanding loans?

M. Real World Examples of What Can Go Wrong

Without adequate and accurate information on a specific plan, bad things can happen. Whenever one deals with a very technical and complex area such as QDROs, mistakes can occur, however the practitioner should strive to avoid the easy mistakes. The following are summaries of problems we have personally observed that could have been avoided with a little effort.

a) The plan was a defined benefit plan, but the decree awarded the alternate payee/spouse a large lump-sum, which couldn't be paid. When no agreement could be reached on how to resolve the issue, it went to Court. Since the division was agreed, and the Court had lost its plenary power to modify, the Judge felt that substantial changes were not allowed. The Court made the award into a money judgment, which the alternate payee will never collect. (Except maybe from her lawyer)

b) The Decree awarded the alternate payee/spouse a large sum from the 401k plan, but did not designate her a "surviving spouse" or say what would occur if she died prior to receiving her money. She was killed in an accident two months after the divorce. The plan ruled that her award reverted to the participant, instead of going to her beneficiaries, since none were designated and the decree was silent.

c) The participant retired early, accepting a one-time supplemental package that encouraged early retirement. The supplemental plan was separate from the regular retirement plan, and the decree only named the regular plan, but also has a general provision awarding the participant any other retirement benefits. Alternate Payee did not share in the substantial lump-sum supplemental benefit.

d) The alternate payee fought for, and got, the Survivor Benefit Plan on a military retirement, but the cost came out of her share. However, after years of making payments for that benefit, she remarried before age 55, and found out federal law denied her the benefit when her ex-husband died.

e) The plan required that the date of division be the end of a calendar year. The decree was silent on the division date. Further the plan was unable (or unwilling) to provide values on any date but the end of the year. The parties could not agree on an estimate for the defined contribution balance as of the date of divorce. so it went to Court. The Judge ruled that it would be valued as of the valuation date immediately before the divorce, which was 7 months. Since it was a bull market, the alternate payee/spouse lost thousands of dollars because of the early valuation.

f) After a nasty trial, the Court awarded the wife 50% of husband's military retirement. They had been married 12 years, but because of a break in his service, he had only served 9 year and 7 months during the marriage. There were other decent-sized assets available for an unequal division, but not utilized since the Court anticipated that the military would make direct payments to the wife, and she really needed the steady income after the divorce. Months after the divorce, the wife's attorney received notice that the military could not make direct payment because the husband had not served a full 10 years during the marriage. Husband refused to pay and by the time it got back to Court, wife had lost her house and good credit. Had the Court or attorneys realized the problem, the Court could have given the wife some other asset, which could have produced income.

g) Decree awarded wife a large lump-sum from husband's 401k. The entire division was negotiated under the assumption wife would receive the money within a few months of the divorce, pay her taxes, and use it to by a house. She could not afford rent or mortgage payments, and the award would just pay for a small house for her. Three months after the divorce, the plan notified her that its provisions did not allow for immediate distribution and she would have to wait until she reached age 59 1/2.

h) Wife was awarded 60% of husband's substantial stock option plan, and the option was vested. However, months after the divorce, the employer notified her attorney that the stock plan was non-qualifying and not subject to ERISA. Therefore, the plan would not honor a QDRO or any division order. Although husband was eventually ordered to exercise the option, sell the stock and turn over wife's share of the proceeds, the value of the stock dropped in the interim and wife lost tens of thousands of dollars.

i) Decree wrongly identifies plan name and plan type and awards wife 50%. Husband actually participates in a defined contribution 401k plan, not a defined benefit plan, even though the name of the plan included the word "pension". The plan notified the alternate payee/spouse that the QDRO is for a plan that doesn't exist or is improperly named. The plan is not very cooperative and provides no addition information. During the confusion, husband terminates employment and withdraws 100% of his 401k, which he can do without spousal consent. He disappears. Although wife may have a cause of action against the plan, it's a long shot and costly.

VI. WHERE TO OBTAIN SAMPLE QDROS AND/OR GUIDANCE

A. Private Plans

1. The plan administrator may be able to provide some guidance either through instructions or a sample QDRO, but use caution when using it.

2. You will find sample QDROs for DBPs and DCPs for participants in pay status, not in pay status, actively employed, no longer employed, etc. in Gary A. Shulman, Qualified Domestic Relations Order Handbook (1993). Please be sure to see the 1997 and 1998 supplements for model QDROs, Aspen Publishing, 1-800-446-1717.

3. Texas Family Law Practice Manual, Second Edition, Vol. 3, Form 19-3, 19-4 (1999).

4. Qualified Domestic Relations Orders for a ERISA Plan, Barbara A. Breeding, Advanced Family Law Drafting Course (1990).

5. A Comprehensive Discussion of Retirement Plans, Jack W. Marr, Marriage Dissolution Institute (1994).

6. Employment and Retirement Benefits in Family Law Litigation: An Overview, Checklist and Update of Advance Issues, Advanced Family Law Course (1994).

7. Victor B. Meyen, Esq. & Mark W. Dundee, Qualified Domestic Relations Order Answer Book, Second Edition (1998).

8. Checklists, Vol. 1, (1997), published by

the Family Law Section of the State Bar of Texas.

B. State or Political Subdivision

1. For a discussion of all the state plans mentioned in this subsection, in general terms as to membership in the plan, creditable service, service retirement benefits, disability retirement benefits, and death benefits, please see Jack W. Marr et al., A Comprehensive Discussion of Retirement Plans, Marriage Dissolution Institute, (1994). For a discussion on drafting a QDRO for public retirement systems in Texas, see Jack W. Marr, State Qualified Domestic Relations Orders, Advanced Family Law Drafting Course (1990).

2. Texas Family Law Practice Manual, Second Edition, Vol.3, Form 19-5, (1999).

3. Employment and Retirement Benefits in Family Law Litigation: An Overview, Checklist and Update of Advance Issues, Advanced Family Law Course (1994)

4. Employees Retirement System of Texas. Houston Bar Association Family Law Section QDRO Notebook, December, 1993.

5. Teachers Insurance and Annuity Association College Retirement Fund ("TIAA-CREF"). 730 3rd Avenue, New York, New York. 1-800-842-2733. Houston Bar Association Family Law Section QDRO Notebook, December, 1993. Sample QDROs from the North Texas Family Law Association and the San Antonio Family Lawyers Association.

6. Teacher Retirement System of Texas. Legal Services, Teacher Retirement System of Texas, 1000 Red River Street, Austin, Texas, 78701-2698. See also, Charmaine J. Rhodes, Division of Statewide Retirement System Benefits From a Plan Administrator's Perspective, State Bar of Texas Advanced Family Law Drafting Course (1992); Jack W. Marr, The Teacher Retirement System of Texas: Analysis and Division of Benefits, State Bar of Texas 9th Annual Trial Institute (1995); and Teacher Retirement in Texas, booklet published July, 1994, available through Teacher Retirement System of Texas, 1000 Red River Street, Austin, TX 78701-2698.

7. Texas County and District Retirement System. Fax number (512) 328-8889. Houston Bar Association Family Law Section QDRO Notebook, December, 1993.

8. City of Houston Retirement Programs: Municipal Employees Pension System, Police Officers Pension System, Fireman's Relief and Retirement Fund. Houston Bar Association Family Law Section QDRO Notebook, December, 1993.

9. Police and Fire Pension Fund of the City of Dallas. Sample QDROs from the North Texas Family Law Association and the San Antonio Family Lawyers Association.

10. City Public Service Employees Pension Plan. Sample QDROs from the North Texas Family Law Association and the San Antonio Family Lawyers Association.

11. Judicial Retirement System of Texas Plan One. Sample QDROs are available through the Employees Retirement System, Attn: Legal Division, 18th and Brazos, P.O. Box 13207, Austin, TX 78711-3207, Ph: (512) 8673336. For legal authority, see Government Code Title 8, §831.001 that specifically limits Plan One participants to those judges who took office prior to September 1, 1985.

12. Judicial Retirement System of Texas Plan Two. Sample QDROs are available through the Employees Retirement System, Attn: Legal Division, 18th and Brazos, P.O. Box 13207, Austin, TX 78711-3207, Ph: (512) 8673336. For legal authority, see Government Code Title 8, §836.001 that specifically restricts Plan Two participants to those judges who took office after September 1, 1985.

13. Texas Municipal Retirement System. QDRO guidelines are available through TMRS, P.O. Box 149153, Austin, TX 78714-9153, Ph: (512) 476-7577.

14. Victor B. Meyen, Esq. & Mark W. Dundee, Qualified Domestic Relations Order Answer Book, Second Edition (1998).

15. Checklists, Vol. 1, (1997), published by the Family Law Section of the State Bar of Texas.

C. Federal

1. Federal Employees Retirement System ("FERS") and Civil Service Retirement System ("CSRS")

a. It will be necessary to obtain the publication entitled "A Handbook for Attorneys on Court-ordered Retirement and Health Benefits Under the Civil Service Retirement System, Federal Employees Retirement System, Federal Employees Health Benefits Program" from the Office of Personnel Management ("OPM"). OPM should have a local office that can provide you with this handbook. This handbook is also available on disc. This publication can be obtained by calling (214) 9055270 or request by fax by calling 202-512-2250 request article numbered SN006000013775 or request in writing at Superintendent of Documents, P.O. Box 371954, Pittsburgh, PA 15250-7954. Please note that the FERS and CSRS plans cannot be preapproved.

b. You will find Gary A. Shulman, Qualified Domestic Relations Order Handbook, 1997 Cumulative Supplement Chapter 15 (1993) helpful. It contains sample "Court Orders Acceptable for Processing" ("COAP") for CSRS and FERS. These plans do not recognize the terms "QDRO" because they are federal plans and are not subject to ERISA. Instead, these plans use the term COAP.

c. Texas Family Law Practice Manual, Second Edition, Vol. 3, Forms 19-11, 19-12 (1999).

2. Thrift Savings Plan ("TSP")

It will be necessary to obtain the publication "Thrift Savings Plan: Information About Court Orders" from the Federal Retirement Thrift Investment Board ("FRTIB"). The latest publication is April, 1995. This publication is updated yearly. It can be obtained by calling (214) 905-5270. Please note that the FRTIB will preapprove court orders.

3. Railroad Retirement Annuity

a. United States of America Railroad Retirement Board, 1919 Smith Street, Suite 845, Houston, Texas, 77002, Ph: (713) 209-3045, or 819 Taylor Street, Rm 10G02, Box 17420, Fort Worth, TX 76102, Ph:(817) 978-2638 or call the Railroad Retirement Board Helpline at 1-800-808-0772.

b. Texas Family Law Practice Manual, Second Edition, Vol. 3 Form 19-14 (1999).

4. Military

a. You will find Gary A. Shulman, Qualified Domestic Relations Order Handbook, 1997 Cumulative Supplement Chapter 16 (1993) most helpful. It contains a sample court order to divide a member's military pension in the U.S. Air Force and an entire chapter devoted to qualifying court orders to divide military pensions. Also, you may want to inquire at the U.S. Air Force, Commander, AFAFC, Attention: JA, Denver, Colorado, 80279-5000. Houston Bar Association Family Law Section QDRO Notebook, December, 1993 contains information as well as Sample QDROs from the North Texas Family Law Association and the San Antonio Family Lawyers Association.

b. Texas Family Law Practice Manual, Second Edition, Vol. 3, Form 19-6 (1999).

c. Recent Developments in Military and Civil Service Retirement Benefits, David R. McClure, Marriage Dissolution Institute, Section E (1994).

d. Recent Developments in Military and Civil Service Retirement Benefits, David R. McClure, State Bar of Texas Marriage Dissolution Institute, Section X (1993).

e. Drafting to Incorporate Changes in Military and Federal QDROS, Jim Higdon, 1995 Advanced Family Law Drafting Course, Section P (1995).

f. State Department U.S. Government. U.S. State Department, FSRDS, Secretary of State, c/o Bureau of Personnel, Bureau of Personnel, State Department, Washington, D.C., 20520. Houston Bar Association Family Law Section QDRO Notebook, December, 1993 contains information as well.

g. U.S. Coast Guard. Sample QDROs from the North Texas Family Law Association and the San Antonio Family Lawyers Association contain information. Commandant of the Coast Guard, 400 7th Street, Washington, D.C. 20590.

h. Victor B. Meyen, Esq. & Mark W. Dundee, Qualified Domestic Relations Order Answer Book, Second Edition (1998).

i. Checklists, Vol. 1, (1997), published by the Family Law Section of the State Bar of Texas.

VII. COMMON AREAS WHERE QDROS FAIL TO BE APPROVED

There are so many ways in which a QDRO can fail to be approved that no paper can adequately cover them, however, the following are some of the most common problems encountered.

A. Incorrect Plan Name

It is rare that a client can provide you with the exact plan name, and many plan summaries and annual statements don't correctly name the plan. The plan name as used in a QDRO must be exact, even as to abbreviations and punctuation. Also, it is common for large corporations to be sold or merged and the old plan may now be succeeded by a new plan. Always contact the plan for the correct name.

B. The QDRO is for the Wrong Type of Plan

Just as there are very basic and significant differences between a **defined benefit plan** and a **defined contribution plan**, the provisions of QDROs that divides these two plan types are also very different. If you use a defined contribution plan form for a defined benefit plan, or vice versa, you are almost assured of a rejection. Remember that many federal and state government defined benefit plans can give the appearance of a defined contribution plan in that an account is maintained tracking employee contributions. However, it is still a defined benefit plan, and must be divided keeping in mind the issues relevant to defined benefit plans.

C. Increases or Decreases Are Not Addressed in Defined Contribution Plans

When an alternate payee is awarded a percentage or specific dollar amount from a participant's defined contribution plan, the QDRO must provide on what date the valuation occurs. That date is usually the date of divorce, although other dates can be used, and some plans require you to use the end of a calendar month or quarter. There will be a lapse of time between this valuation date and the date on which the alternate payee actually receives his or her money from this plan. The QDRO should therefore state whether or not the alternate payee's assigned portion is credited with increases or decreases in the plan's investments from that date of valuation to the date of distribution. There can be a significant effect on the amount received by the alternate payee and the amount remaining to the participant depending upon whether or not increases and decreases are allowed. If this provision is omitted, most plans will reject the QDRO and ask that it be included, however, a few plans provide for a default condition if this provision is omitted, and that default may not be desirable.

D. The Valuation Date is Not Feasible or Allowed Under the Plan

As indicated above, some defined contribution plans require that the valuation date be the end of a calendar month, end of a quarter or other such date, and the vast majority of those plans require that this special date be stated in the QDRO. The federal Thrift Savings Plan values only at the end of a month, but your dividing order does not have to specifically provide for this date. The Plan Board will simply use the end of the month immediately preceding the stated date of valuation.

Further, some defined benefit plans have no means available to determine the accrued benefit as of a valuation date in the distant past (1980's). Because of that, the plan may require you to restate the division or the valuation date or even specifically detail in the QDRO the amount of the accrued benefit as of the stated valuation date.

Finally, military orders should not simply state that the former spouse receives a certain percentage of the member's benefit that was accrued as of a stated valuation date, since the military insists that benefits do not accrue in the traditional sense, but only come into existence when the service member completes the required 20 years of service.

E. Requests for Lump-Sum Distributions

Provisions in the QDRO stating that the alternate payee wants a lump-sum distribution can almost always cause a rejection on a defined benefit plan, and can sometimes cause a rejection for a defined contribution plan. Since defined benefit plans pay a monthly (usually) annuity payment based on a formula, very few such plans allow for lump-sum distributions, unless the actuarial value of the benefit accrued is small. Always check with the plan, but in general, warn the alternate payee that a lump-sum distribution probably isn't going to occur.

Although most defined contribution plans do allow lump-sum distributions, since there is actually an account in the participant's name with money in it, a few do not. Further, some plans that allow lump-sum distributions do not allow an immediate distribution but require the attainment of early retirement age or a hardship situation as defined in the plan. Again, check with the plan. Major embarrassment and problems can be created when the alternate payee is expecting her $90,000 share so she can buy a house only to discover, after the divorce, that she has 12 more years to wait before she sees a penny.

As with any lump-sum distribution which will not be "rolled over" to another qualified plan, there will usually be significant tax considerations for the alternate payee, so be certain your client obtains competent advise in that area.

F. Beneficiary for Defined Contribution Plan

Unless the plan provisions state otherwise, the QDRO should provide that in the event the alternate payee dies before he or she gets the distribution, the alternate payee's award will pass to a named beneficiary. Failure to provide this will seldom get your QDRO rejected, but will usually result in the award reverting back to the participant. Most plans will allow you to name the alternate payee's estate as the beneficiary, but some plans believe this is not a proper assignment under ERISA, and require you to name the beneficiaries as additional alternate payees.

G. Combining a Percentage and a Dollar Amount

This problem is actually two-fold for defined contribution plans. The most common problem occurs when the language used is not clear and concise. For example, the QDRO states that the alternate payee is awarded 50% of the account balance less $6,000. Does the $6,000 get subtracted first, then 50% taken, or, is 50% taken, then $6,000 get subtracted. Do the math; it does make a difference. Careful rewording will usually fix this rejection. However, we have dealt with plans that appear to be mathematically challenged, who state that they are incapable of doing simple subtraction and division, or that state that ERISA does not allow such "complicated" formulas! In these instances, get the account balance on the date of valuation and do the math for them so that the QDRO only has a dollar amount.

H. Form a Benefit Designation for Defined Benefit Plan

Not all plans allow the same benefit options. Occasionally, a plan will not allow the alternate payee to choose to have the benefit paid for the lifetime of the alternate payee instead of the lifetime of the participant, and making that choice in the QDRO will cause rejection. Almost all plans do not allow <u>any</u> benefit form options for the alternate payee once the participant has begun receiving benefits, so providing that the alternate payee has options in the QDRO can cause rejection.

I. When Payments Begin

This problem can occur in both plan types. In a defined contribution plan, it is usually due to requesting an immediate distribution, when the plan doesn't so allow. In a defined benefit plan, it is usually due to stating a time for benefits to begin that is not allowed in the plan. It is not that uncommon to see rejected QDROs where the time that benefits are to begin was not even addressed. Remember that benefits can begin either upon:

a) Early Retirement Age, or
b) Regular Retirement Age, or
c) As otherwise provided in the plan

The QDRO should usually allow the alternate payee the option of choosing when payments begin, always subject to the plan terms however. Many older decrees stated that the alternate payee would receive a share of the benefits "if, as and when" the participant receives benefits, so the above options would not be consistent with that decree.

J. Didn't Use Sample Form

Although ERISA does not require the use of the plan's sample form, IBM required that their fill-in-the-blank form be used, not even allowing it to be retyped. That has now changed, but you may run into a plan that insists its form be used. Remember that even if you use its form, consider that other options are usually available in addition to the ones stated.

Even though a plan may not require you use their form, most will tell you that if you send the plan a totally different form, it will take longer to process and approve. It is usually best to use the plan form, if one is available, as a starting point, recognizing that few forms provide you with all the provision options available under the plan. At least you will usually have the correct plan name and an idea of <u>some</u> of the plan options. Further, many plans are now including explanation paragraphs or comments after the sample order provisions which can be very helpful in determining the terms of the plan.

K. Unique Terminology – Federal, State and Military Orders

This category of problems consists of failing to use unique terminology and the use of prohibited terminology. Simply entitling a Civil Service Retirement System or Federal Employees Retirement System division order as a "Qualified Domestic Relations Order" will cause rejection, as will any reference to ERISA within the body of the order.

C.S.R.S. and F.E.R.S. orders must award a portion of the "gross", "net" or "self-only" monthly annuity, with the use of one of these three terms only. Their definition is unique, so look at the statutes. If you forget to award cost of living increases, these plans have a default position, but the default is opposite for orders that award a percentage as opposed to a dollar amount. The dividing order must not only state if there is to be a surviving spouse benefit, but also the level of the benefit, i.e., "maximum", "pro rata" or fixed monthly amount. Last, but not least, the award of a "pro rata" share of the monthly annuity has a pre-defined, specific meaning, so use the term only if you understand it and it applies.

Military division orders can now be separate from the decree, unlike in the past. Unless the service member served at least 10 years during a marriage of at least 10 years, the division order cannot be honored. Since military retirement benefits don't accrue as in a traditional defined benefit plan, the order should be worded to account for the occasions in which the service member will continue service after the divorce, which means to include the pay grade and length of service at the time of divorce. Military orders also should state whether or not a Survivor Benefit Plan is elected and the level of the benefit. Although the armed services approve almost anything they receive, just because your order is approved does not mean it is correct, from your client's perspective.

Although most Texas State, county and municipal plans use dividing orders that are called QDROs, each plan has a statutory scheme and its own special terminology. Failure to understand the differences in terms between the various plans can cause unintended results.

L. Reference to ERISA in non-ERISA, church or private plans

As with the governmental plans above, usually a reference to ERISA or certain IRC provisions in a church plan or non-ERISA private plan will cause rejection. Although I.R.A.s do not require a QDRO to be divided, more and more I.R.A. administrators want a QDRO-like order. The order can usually be entitled a "QDRO" without objection, but reference to ERISA within the body of the order usually is not acceptable. Modify your generic defined contribution order accordingly.

M. Supplemental & Early Retirement Benefits

Although seldom cause for rejection, the failure to award the alternate payee a portion of any supplemental and early retirement benefits, in addition to the regular retirement benefits, can lead to an inequitable loss of benefits for the alternate payee. Whenever dealing with a union-intensive employer, such as G.M., union plans themselves, or any large corporation that routinely offers attractive early retirement packages, be aware that unless you specifically include language awarding these "extra" benefits, the alternate payee will likely not receive a portion. We are aware of two highly regarded firms currently in lawsuits due to a failure to include language awarding a portion of these early retirement incentives and benefits.

VIII. PLANS WHERE NO QDRO APPLIES (NON-QUALIFIED PLANS)

A. Examples

Excellent papers have been written recently for the Advanced Course and the Marriage Dissolution Course on non-qualified plans and stock options. These articles should be read for greater detail in understanding the nature of these plans and the current issues surrounding the division of these plans. We are only providing a brief summary of these plans to alert the attorney to potential trouble when attempting to negotiate a settlement, try a case or effectuate a division. Anytime you believe that a non-qualified plan may be involved, immediately contact the plan and see if plan will allow some form of division between spouses upon divorce. As you will discover, some non-qualified plans will still allow a division, but some will not.

1. <u>I.R.A. Accounts</u>

Technically, a QDRO or QDRO-like order is not required to divide an I.R.A. Most financial institutions only require a copy of the Decree of Divorce and the completion of certain forms. Usually this method of division involves the signature, and cooperation, of all persons in whose name the account is listed. Contact the financial institution that holds the I.R.A. early in the divorce and determine what will be required. More and more institutions want a QDRO-like order and some even provide sample forms. If a QDRO is required, the usual procedures should apply. In the event the institution only requires the decree and some forms, keep in mind that the decree should clearly and concisely ORDER the party or parties to execute the required forms. Further, in the case of "uncontested" divorce cases, always advise the alternate payee that there is no protection from the other spouse withdrawing the I.R.A. while the case is pending. Letters requesting a "hold" or freezing such accounts are seldom effective for I.R.A.s, but a copy of the temporary restraining order sent to the plan may get the job done.

2. Stock Options

Stock Options may be granted to an employee as a deferred compensation component, which makes it similar to a retirement benefit, or as a current compensation component. As a deferred compensation component, stock options may be qualified (ISO) or non-qualified (NONQ). Usually, even a non-qualified stock option that is part of a deferred compensation component that includes qualified options will be divisible by a QDRO, but check with the company. Non-qualified options that are part of a current compensation package are generally referred to as "stock incentive plans" and are covered below. Be aware that most major corporations reward their upper management with very, very lucrative stock option plans, and that these plans, if exercisable, may represent a significant portion of the community estate. To award a portion of these stock option plans to an alternate payee, then discover after the court has lost its plenary jurisdiction that the stock option plan is not qualified and will not accept a QDRO or any division order can create significant stress. Stock option variations are difficult to understand and vary widely, so begin your investigation early in the case. Many participants in such plans are purposefully secretive about the existence and terms of such plans, and frankly, many attorneys simply don't inquire.

3. Stock Incentives

For simplicity, we will refer to any stock option plan that is intended to compensate an employee for current performance as a stock incentive. General Motors routinely rewards its upper management with stock options as a component of the employees' current compensation. For example, if the manager's department or facility meets certain pre-determined profit or productivity goals, the manager receives, in addition to the normal salary, a significant compensation in the form of stock options or incentives. The corporation considers this compensation as a bonus, not as a deferred compensation. Therefore, the usual discovery questions and tools may not uncover these incentives, unless carefully worded. Confusion can be created because it is not unusual for this executive to participate in a deferred compensation stock option plan, a stock plan as part of a 401k, and a stock plan as a stock incentive, all at the same time. Further, these stock incentives will seldom be subject to ERISA, and hardly ever divisible by QDRO or other division order. It is our opinion that these stock incentives are legally similar to cash bonuses, and unless the decree specifically provides for its division, if the stock incentive is awarded after the divorce, it belongs to the employee, even though it may cover a period of time in which the parties were still married. As one can see, there is the potential for some creativity in this area for shielding significant assets from a divorcing spouse.

4. Certain Governmental or Church Savings Plans

Since governmental and church plans are specifically exempted from ERISA, division orders for any such plans are only honored in the event that there is statutory authority for such assignments. In Texas, many municipal governments offer participation to their employees in savings plans that are authorized by the municipality, not the State. Therefore, such savings plans are not subject to, and will not honor, any division order. In the event you have a city employee who participates in a savings (401k-type) plan, inquire immediately. It is very likely this plan is not divisible, as a practical matter.

B. Specific Decree Language to Effectuate Division

In the event you have determined that the plan does not, and will not, honor a QDRO or other division order, other options must be considered. One of the goals of this paper is to provide information so that the attorney can make this determination early in the divorce process. Options are best considered prior to negotiation of a settlement or trial of a case. Once a divorce is final, these "options" may actually become lost opportunities.

If the plan does not require a QDRO, but allows a division by decree and/or additional paperwork, make certain the decree specifically ORDERS the participant to execute and deliver the required documents by a date and time certain.

C. Monitor for Compliance

Provide in the decree for a legal and practical method assuring compliance when ordering a participant to complete paperwork in the future or effectuate a division in the future. It is of little benefit to your client if you order the spouse to perform certain tasks without providing a method for confirming that the tasks were performed. The client is looking to you to do this, even if not specifically stated. As an example, if the opposing party is ordered to exercise a stock option 22 months from the date of divorce, sell the stock, pay the taxes, then give the former spouse half of the profit, who will be watching to make certain this occurs? If the client expects you to monitor this event, how and when are you to be paid for this service? Always communicate your future responsibility with your client, preferably in writing.

D. Enforcement

Should the decree provide for actions of a spouse and a division of assets in the future, be aware of Section 9.003(b), Texas Family Code, which requires that a suit for enforcement be filed before the second anniversary of the date the right to the property matures or accrues, or the suit is barred. Further, an enforcement is only as good as the underlying order, so if the decree is not sufficient, the enforcement will fail.

E. Plans That Do Not Allow Division

If the plan will not allow a division order, or otherwise divide the plan benefit, find out early in the case. If at all feasible, find another way to divide the estate without dividing this plan asset. If that is not feasible, then proceed with great caution, because your client must rely upon his or her soon-to-be ex-spouse's good will in the future to collect his or her awarded share, unless creative solutions can be found.

If dealing with a military plan that will not make direct payments to the former spouse because the "10 year rule" was not met, consider having the Court order the service member make an allotment for the portion due to the former spouse. Compliance and enforcement issues will still be important, but at least some form of direct payment will be provided.

If dealing with a plan that allows the participant to make loans against the participant's plan interest, consider negotiating for the participant to make a loan to "cash out" the spouse. Potential problems arise due to the fact that many participants already have loans outstanding, so additional loans may be limited and not sufficient to provide the needed funds. Caution should be used in having a Court order a participant, absent an agreement, to borrow against a plan to "cash out" a spouse, since the creation of debt is likely beyond the power of the Court and may create enforcement problems in the future.

Anytime that you face having to deal with "dividing" a plan that doesn't allow division, make certain that you adequately communicate with your client, if your client is the alternate payee, the very real problems and dangers that accompany such "divisions". Do it in writing. Further, make certain you communicate what, if any, future responsibility you have in this matter, and how you will be compensated if you are assuming future responsibility.

IX. WHEN ALL ELSE FAILS, JOIN THE PLAN TO YOUR LAWSUIT

If the plan you are attempting to divide is subject to ERISA, but continues to reject your QDRO, you can always sue to plan administrator and drag the plan into your divorce action. This will be rarely done, due to the uncertainty in current case law, the fight the plan will wage, and the expense to your client. It is enticing to think that the plan could be ordered by the divorce court to accept you proposed QDRO.

Prior to joining the plan in the state divorce action, always determine and follow the plan's administrative appeals procedure if your QDRO has been rejected.

ERISA is a federal statute and preempts state law as to the requirements of a retirement plan. Because of that, plan administrators almost universally believe that state courts have no jurisdiction over the plans. However, the California Supreme Court and the U.S. District Court for the Northern District of California have held in separate cases that a state divorce court does have jurisdiction to order a plan to accept a QDRO. *Board of Trustees of the Laborers Pension Trust Fund for Northern California v. Levingston,* 816 F. Supp. 1496 (U.S. Dist. Ct. N.D. California - 1993), and *Ordino v. Ordino*, 939 P.2d 1266 (Cal. Sup. Ct. – 1997). Further, the *Ordino* case confirmed the state court's power to distribute plan assets to the alternate payee in a greater amount than the plan administrator had determined.

Regardless of these decisions, one can be certain that a plan administrator will fight a state court's jurisdiction over the plan, and seek removal to federal court. These actions, and the massive funds available to the plan to mount a fight will severely limit a client's ability to challenge the plan in court.

X. CONCLUSION

This paper is intended to provide procedures and inform attorneys and legal assistant of the issues of QDROs, and assist them in obtaining information essential to drafting QDROs. Obtaining QDROs, keeping them "qualified", and modifying them has now been made easier with Sections 9.101 through 9.105 of the Tex. Fam. Code, which allow the court to retain jurisdiction to do all of the above.

Understanding the plan and getting started on the QDRO early in the case aids the attorney with negotiation, settlement and trial, and aids both the attorney and legal assistant in preparing the QDRO. By using the checklists provided herein, a legal assistant and attorney can feel comfortable that they have gathered all the necessary information to draft a QDRO and that they will have given consideration to all the pertinent issues involved in a QDRO.

Hopefully this article will help you establish office procedures regarding QDROs and help you more effectively handle the negotiation, drafting and finalization of QDROs in such a manner that you are relieved of the pressures often associated therewith.