

QDRO's....THEY'RE NOT JUST FOR BREAKFAST ANYMORE!

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When most of us think of QDRO's, we think of distributing pensions, 401(k)s and other retirement interests. However, QDRO's represent one of the most effective weapons in the arsenal of skilled matrimonial counsel to accomplish a wide variety of other critical objectives in a matrimonial case, including satisfying support arrearages and collateralizing financial obligations. Interestingly, they are rarely used for these additional purposes.

The concept of QDRO's is somewhat new in the vernacular of legal practice. A trend developed in substantive state matrimonial law during the mid-1970s subjecting retirement interests to distribution during a divorce matter. However, a problem existed. At the federal level, Congress enacted ERISA in 1974 which contained antiassignment provisions preventing the distribution of retirement interests.

Finally, in 1984, Congress passed the Retirement Equity Act to reconcile the conflict between developing state law and ERISA, amending the Internal Revenue Code to permit the assignment of certain rights to retirement interests incidental to matrimonial dissolution. This amendment provided an exemption for qualified domestic relations orders. Specifically, 29 U.S.C. § 1056(d)(3)(A) and 29 U.S.C. § 1056(d)(3)(B)(i)(I) define domestic relations orders to be those orders/judgments that create or recognize the existence of an alternate payee's right to receive a portion of the benefits and relate to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child or other dependent of a participant.

Over the last twenty years, a series of court decisions, along with private letter rulings, acknowledged additional uses for QDRO's consistent with the provisions of ERISA. The decisions and rulings fall into two categories, (1) the use of QDRO's to collateralize obligations and (2) the use of QDRO's to satisfy support arrearages.

Collateralize Obligations

In Renner v. Blatte, 650 N.Y.S.2d 943 (1996), the trial court approved the use of a QDRO as security for future support obligations. In Renner, the husband was \$20,825.00 in arrears for maintenance and child support payments, \$7,600.00 in arrears for third party payments, and \$13,500.00 for counsel fees. Wife then sought to obtain a QDRO to not only include the previously mentioned arrears and counsel fees, but to also include \$25,000.00 for "security to ensure future payments of direct and indirect interim

child support and maintenance and \$41,000.00 for aggregate income taxes associated with the withdrawal of the funds from the pension.” Renner, 650 N.Y.S.2d at 946. The trial court found that all of the requested items related to maintenance and child support and therefore could be included in any QDRO. Id.

In Silverman, a Massachusetts case, the court granted husband’s request for attorney fees associated with the order that provided for back child support orders, but denied the inclusion in the QDRO those additional fees related to other aspects of the case as they did not relate to the “provision of child support, alimony payments or marital property rights, as provided in 29 U.S.C. sec 1056(d)(3)(B)(i)(I). Silverman v. Spiro, 438 Mass. 725, 735-736 (2003).

In Private Letter Ruling 9234014 (1992), a litigant successfully utilized a QDRO as security to indemnify a potential co-obligor with regard to certain federal tax obligations.

In Hayden v. Hayden, 662 So.2d 713 (1995) an appellate court in the state of Florida held that a trial court can use a QDRO to secure alimony or child support arrearages.

Satisfying Support Arrearages

Numerous reported decisions permit a trial court to enter a QDRO for purposes of liquidating retirement accounts to satisfy support arrearages, counsel fees previously ordered as well as counsel fees for the enforcement proceedings.

In Renner, *supra*, not only did the court permit the entry of a QDRO to satisfy arrears and counsel fees, it further directed the distribution of sufficient funds to the wife to permit her to pay any income taxes or penalties associated with the liquidation of the defined contribution account.

In Hogle v. Holge, 732 N.E. 2d 1278 (2000), the Indiana Court of Appeals affirmed a Trial Court decision entering a QDRO to satisfy alimony arrears.

In Baird v. Baird, 843 S.W.2d 388 (1992) the Montana Court of Appeals permitted the use of a QDRO to collect child support and alimony arrears.

Although there are no reported New Jersey decisions agreeing or disagreeing with the use of QDRO's to collateralize or satisfy support obligations, in light of the inventive inclinations of the New Jersey judiciary and the public policy mandate of protecting the recipients of support, it appears that the use of QDRO's for these purposes in the State of New Jersey is appropriate and should be regularly utilized by counsel for the obligee. It seems inherently unfair that an obligor, with enormous support arrears, can protect vast sums of wealth held within a retirement account merely by virtue of the provisions of ERISA. Ample legal authority from other jurisdictions and the Internal Revenue Service

clearly empowers the Courts of the State of New Jersey to utilize QDRO's to collateralize and otherwise satisfy support obligations.