What Happens When the Participant Dies?

What happens when the Participant dies? It used to depend upon where the case originated. Now, maybe not. It looks like it may depend upon the plan administrator, or maybe the federal courts. Who knows now?

In order for a former spouse to perfect an interest in a participant's qualified retirement benefits, (i) a state district court with jurisdiction over domestic relations matters must issue a qualified domestic relations order ("QDRO") and (ii) the order must be in a form that meets all of the requirements of the plan, state domestic relations laws and federal laws relating to the assignment of qualified plan benefits.

If you are a prospective alternate payee and a qualified domestic relations order has not been issued, and the participant dies, the answer to the question is simple – you lose. Or do you?

Effective August 17, 2006, the Pension Protection Act of 2006 (PPA) clarified that a domestic relations order may be considered a qualified domestic relations order even if it was issued (key phrase) following the death of the participant or at other unusual times.

The example given in the PPA reads as follows:

> Example 1. Orders issued after death. Participant and Spouse divorce, and the administrator of Participant's plan receives a domestic relations order, but the administrator finds the order deficient and determines that it is not a QDRO. Shortly thereafter, Participant dies while actively employed. A second domestic relations order correcting the defects in the first order is subsequently submitted to the plan. The second order does not fail to be treated as a QDRO solely because it is issued after the death of the Participant.

This issue has been the subject of several cases. The status of post-death QDROs has not been real clear and the Department of Labor's PPA has not done much to settle this issue, except for this one example.

As an example, what would happen if Participant and Spouse divorce and agree in a property settlement to submit a QDRO to the plan, but a domestic relations order is not submitted at that time. Thereafter, Participant dies while actively employed. A domestic relations order is subsequently submitted to the plan. The order would not fail to be treated as a QDRO solely because it was issued after the death of the Participant, but the Order could fail to be a QDRO under ERISA section 206(d)(3)(D) for two reasons. First, since there is no beneficiary to whom a death benefit or surviving spouse annuity was payable at the time of Participant death, the order might fail to be a QDRO because the order requires the plan to provide a benefit not otherwise provided by the plan. Second, the order might fail to be a QDRO because the order requires the plan to provide increased benefits.

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Another example, what would happen if Participant and Spouse divorce and agree in a property settlement to submit a QDTO to the plan, but a domestic relations order is not submitted at that time. The Plan specifies that death benefits under the Plan are to be paid to the children of the Participant in the absence of a specific designation of beneficiaries by the Participant. The Participant subsequently dies and a domestic relation order is submitted to the plan post-death. The order The order would not fail to be treated as a QDRO solely because it was issued after the death of the Participant, but the Order could fail to be a QDRO because the order would require the plan to provide a benefit to someone other than the beneficiary identified by the plan whose benefit vested immediately upon the death of the Participant.

There many more examples of post-death QDRO possibilities that go unanswered by the PPA.

In a recent decision by the United States Court of Appeals, 10th Circuit, No. 02-1040, Patton v. The Denver Post Corporation; Denver Post-Denver Guild Pension Plan, the Court affirmed a lower court decision that let stand a *nunc pro tunc* DRO issued by the state court. The facts of the case are as follows:

1. The parties were divorced on February 10, 1988.

2. At the time of the parties' divorce, the plan administrator informed Mr. Phiper that he was a participant in only one pension plan, the Newspaper Guild International Pension Plan.

3. A QDRO was issued related to that plan that provided that Ms. Patton, Mr. Phiper's divorced spouse, was to be treated as Mr. Phiper's surviving spouse for purposes of the qualified pre-retirement survivor annuity benefit.

4. Mr. Phiper died in 1999.

5. Ms. Patton received a lump sum payout of her survivor benefit which appeared to be very low considering that Mr. Phiper had worked for 27 years.

6. When Ms. Phiper inquired about this, a second plan, Denver Post-Denver Guild Pension Plan, another qualified defined benefit plan, was discovered.

7. The plan administrator refused to divide the undisclosed plan according to the terms established in the QDRO for the disclosed plan.

8. Ms. Patton requested the state court to issue a *nunc pro tunc* domestic relation order, which it did.

9. When Ms. Patton presented the *nunc pro tunc* order to the plan administrator, the plan administrator rejected it.

10. Ms. Patton then filed for a declaratory judgment in federal district court, requesting enforcement of the order and distribution of the benefits.

11. The district court granted Ms. Patton's Motion for Summary Judgment, and the Denver Post appealed.

The Appeals Court reasoned that (i) the *nunc pro tunc* order (i) did not provide a type or form of benefit or an option not otherwise provided by the plan, (ii) did not require the plan to provide for increased benefits, and (iii) did not divest a beneficiary under an earlier established QDRO.

Additionally, the Appeals Court was further persuaded by Gary Shulman's article from the periodical of the ABA's Family Law Section, (QDROs, The Ticking Time Bomb, 23 Family Advocate 26, 29 (2001)). Mr. Shulman writes:

> "Nunc pro tunc QDROs are desperately needed in the domestic relations arena. There must be a way to secure a former spouse's property rights to a pension that could suddenly disappear as a result of a technicality or a family law attorney's inexperience in drafting QDROs."

The 10th Circuit's opinion in this matter appears to be in direct conflict with the 3rd Circuit's opinion in Samoroo (Samoroo v. Samoroo), AT&T Management Pension Plan v. Robichaud, 1999 WL 744019 (3rd Cir. (N.J.)), decided September 24, 1999, United States Court of Appeals, Third Circuit). In Samoroo, the U.S. Court of Appeals struck down a *nunc pro tunc* QDRO granting an alternate payee survivorship rights. The order was prepared and filed after the plan participant's death. Ms. Robichaud (the former Ms. Samaroo) argued that the Court of Appeals must give retroactive effect to the state court amendment of the decree because that decree stated that it was "*nunc pro tunc*." The Court of Appeals rejected this theory and stated that the "effect of the amended QDRO on the plan is a matter of federal law which the district court did not remand to the state court." The Court of Appeals relied on Hopkins v. AT&T Global Information Solutions Co. in concluding that the entitlement to a survivor's annuity in respect of Mr. Samaroo had to be determined as of the day Mr. Samaroo died, and that the amended order represented an attempt to obtain increased benefits from the plan.

More recently, the 9th Circuit issued it opinion in Trustees of the Directors Guild of America-Producer Pension Benefit Plan v. Tise and Curry (243 F.3d 415 (December 6, 2000)

Background. Mr. Myers, who was an independent television and movie director, was a member of the Directors Guild and a participant in the Guild's pension plan. In the late 1960s and early 1970s, Mr. Myers lived with Ms. Tise and has two children with her. Mr. Myers never voluntarily paid child support. Ms. Tise collected about $11,500 from him via a court action.

In 1981, Ms. Tise obtained a default paternity and support judgment against Mr. Myers. In 1981, Ms. Tise obtained a state court order directing the trustees of the Plan to inform her attorney prior to paying out Mr. Myers's benefit.

In July 1994, the Plan notified Ms. Tise that Mr. Myers' benefits would soon be payable and asked if she intended to obtain a QDRO. Ms. Tice obtained, in the state court, a writ of execution and notice of levy against the Plan in the amount of $210,000, the amount of Mr. Myers' back

child support payments. In December 1994, Ms. Tise secured an order enjoining distribution of Mr. Myers' funds until a state court could issue a QDRO. Why the state court just didn't issue a QDRO instead of all of the other orders is beyond me.

In late December 1994, Mr. Myers executed a Plan beneficiary designation form in favor of Ms. Curry, with whom he was living at the time, as his sole beneficiary. On February 12, 1995, Mr. Myers died. Under the Plan's terms, Mr. Myers' benefit, in 120 equal payments, then became payable to his designated beneficiary, Ms. Curry.

In state court hearings in 1995, Ms. Tise asked for an order declaring her entitled to a QDRO. The Plan argued that as a matter of law, Ms. Tise was not entitled to a QDRO attaching Mr. Myers' benefits. Ms. Curry also contested Ms. Tise's claim. I can understand Ms. Curry's position, but why would the Plan take a position on this matter?

The 9th Circuit found that under ERISA, a DRO creates an interest in favor of an alternate payee. A QDRO makes that interest enforceable against a plan. Further, the Court found that Ms. Tise's 1994 order form the state court put the Plan on notice of her rights (that would be the one issued prior to Mr. Myers' untimely death). Upon receipt of the 1994 court order enjoining the Plan from distributing benefits, the Plan was obligated to segregate Mr. Myers' benefit and determine whether the order was a QDRO before any benefits could be distributed. Since Ms. Tise's QDRO was issued within the 18-month period described in ERISA section 206(d)(3)(H), the Plan was required to honor the QDRO with regard to Mr. Myers' benefit.

The Court held that Mr. Myers' death did not affect Ms. Tise's rights, since the QDRO attached to benefits payable "with respect" to Mr. Myers. That is, benefits that accrued as a result of his plan participation and payable to Mr. Myers or his beneficiaries. Thus, Mr. Myers's death did not alter Ms. Tise's right to his benefit. Since the plan was served with Ms. Tise's DRO, Mr. Myers' death did not stop her from obtaining a QDRO.

In short, upon Mr. Myers' death in 1995, the proceeds from his pension became payable as a death benefit. At that time, the Plan was obligated to segregate the funds that would be due Ms. Tise if her order ultimately became a QDRO within the 18-month period required by ERISA. Only if Ms. Tise could not obtain a QDRO within the 18-month period would Mr. Myers' benefit become payable to Ms. Curry.

The Court noted that it did not decide whether a QDRO could be issued after a participant's death if the plan did not have notice of a DRO-created interest before the participant's death.

There is a simple solution to all of this. File the appropriate QDROs on time. If you cannot obtain a QDRO timely, send the Decree to the plan administrator and ask that it be reviewed for acceptance. That will at least start the 18-month period.

Warning: Make sure the QDROs are filed timely.