

## It's Alive – Posthumous QDROs

Bruce K. Leigh

A small item in the Pension Protection Act of 2006 (PPA) has revived the viability of qualified domestic relations orders (QDROs) entered after the death of the participant. This should concern family law attorneys, employers, plan administrators and TPAs.

Over the years, a series of cases have held, for various reasons, that a domestic relations order (DRO) assigning benefits to an intended alternate payee could not qualify as a QDRO if the order was entered after the participant's death. Many practitioners concluded that this was the law, although more recent cases have held to the contrary. PPA section 1001 is a wake up call: it is not too late to get a QDRO after the participant has died!

PPA section 1001 required the Department of Labor (DOL) to issue regulations under the QDRO rules to clarify that a DRO otherwise meeting the requirements for a QDRO does not fail to be a QDRO solely because of the time when it is issued. Admittedly, this mandate to the DOL did not tell readers much about what Congress had in mind or what could be expected, and so it could easily have slipped under the radar even of attentive readers concerned about QDROs. Even the PPA Committee Report failed to say any more about what was intended and did not mention death of the participant as an issue. However, when the DOL published its new regulation in March 2007, effective April 6, 2007, the issue concerning the viability of posthumous QDROs popped into view.

The new regulation provides that a DRO does not fail to be a QDRO solely because of the time when it is issued. The regulation then explains what this means by giving a series of examples, including the following:

**A participant and spouse divorce.** The administrator of the plan receives a DRO. The administrator determines that it is not a QDRO. Shortly thereafter, the participant dies while actively employed. A second DRO 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.

Unfortunately, this example is not as instructive as it could have been. It is found in a regulation that directs much of its attention to the procedures for handling QDROs, in particular the provisions allowing time after submission of an unqualified DRO to correct the order so that it might qualify. This context and example may give the impression that a posthumous DRO can be a QDRO only if it corrects an earlier DRO that had been submitted to the plan before the participant's death.

Would the result have been different if the participant had died after entry of the judgment of dissolution and marital property settlement but before entry of a DRO? The DOL's preamble to the regulation describes the example, without mentioning such a condition, as illustrating the principle that "a domestic relations order will not fail to be a QDRO solely because it is issued after the death of the participant."

The new regulation helps us to an answer with another example given to illustrate the principle that a posthumous DRO remains subject to the same requirements and protections that apply to QDROs generally. In this example, a DRO is entered after entry of the judgment of dissolution and property settlement and after the participant had died without prior entry of any other DRO. The posthumous DRO directs the plan to distribute benefits to the alternate payee in monthly installments over a ten-year period. However, the plan does not provide distributions in that form. The example states that the DRO fails to be a QDRO, not because it was issued after the participant's death, but because it would require the plan to provide a form of benefit not provided under the plan.

This new regulation leaves many questions concerning the effect of the participant's death still to be answered. For example: whether a DRO may impair the rights of a surviving spouse or other beneficiary; whether a DRO may assign surviving spouse benefits to an alternate payee absent a surviving spouse; whether there is any time limit after the participant's death for a former spouse to produce a QDRO; and whether a deceased participant's surviving spouse or beneficiary must be brought into the QDRO proceeding to dispose of the conflicting claims of the alternate payee and these other survivors. These are all issues that family law attorneys, employers, plan administrators and TPAs will have to address. One thing is for sure, however, a plan can no longer simply dismiss the possibility of a QDRO because the participant has died.

## **What To Do?**

Family law attorneys should be alert to the possibility of posthumous QDROs. Employers, plan administrators and TPAs should determine whether their QDRO procedures and practices comply with the new regulation. If not, they should revise their QDRO procedures and practices immediately and review their determinations regarding DROs received on or after April 6, 2007.

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