

SUPPORT AND MAINTENANCE ARREARAGE QDROS IN ILLINOIS – The First Tool to Consider for Support Enforcement

By: Gunnar J. Gitlin
The Gitlin Law Firm, P.C., Woodstock, Illinois
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www.gitlinlawfirm.com

Executive Summary: QDROs are fast becoming the tool of choice for the collection of such past due child support for State IV-D enforcement agencies. With ready access to employer databases, a number of enforcement agencies, especially those in Texas, have discovered an inexpensive but often overlooked tool in the QDRO laws to recoup millions in past due child support. Gary Shulman, QDRO Handbook, 3rd Ed. (2015)

Wendy, like many other divorced spouses across the country, had not received child support on behalf of her three children in years. Under the divorce decree, Wendy's husband was required to pay her \$1,200 per month for child support. Her former husband had moved out of state and had a child support arrearage of approximately \$50,000. Because Wendy's husband was self-employed, she had found it difficult to collect child support. Wendy had gone through the usual scenarios to try to collect child support. She had also brought contempt proceedings against her former husband. However, her ex-husband came into compliance with respect to current child support and the court did not send her ex-husband to jail.

Wendy contacted me to address the support arrearage. I asked if her ex-husband had a 401(k) plan or other type of defined contribution plan – with an account balance. Wendy stated that he did have such a plan but she had heard that there was nothing that she could do to collect child support from the plan. I told Wendy that the information she received was misguided and that more and more often child support arrearages are collected through a vehicle which is called a Qualified Domestic Relations Order (or QDRO) to retrieve all or a portion of the child support arrearages from the former husband's 401(k) plan. I gave this advice because she consulted with me before the Illinois appellate court reached its poorly reasoned decision in *IRMO Thomas*, 339 Ill.App.3d 214 (2nd Dist., 2003).

Child support enforcement QDROs can also be an incredibly useful support enforcement tool for never married parents. But there can also be problems. Gary Shulman, in his chapter of the *QDRO Handbook* addressing child support enforcement QDROs, discusses the issue of problems of a QDRO with application to never married parents for support enforcement purposes. He also addresses how this would be done i.e, naming the child as the alternate payee. Shulman points out that the problem, though, is, that the child support arrearage really belongs to the custodial parent and that you “can run into problems where the child does not have a good relationship with the custodial parent. In such cases, the custodial parent may never see any of the QDRO

funds that were distributed to the child.” He also points out there may be another problem if you name the child as the alternate payee and the child is over the age of majority. He suggests that many plan administrators will not honor the QDRO if the child is no longer a minor. In their opinion, the child no longer satisfies the ERISA definition of “alternate payee” because he or she is no longer considered an eligible dependent. See *QDRO Handbook* (2014), §35.02. But we are getting ahead of ourselves and not addressing how useful QDROs can be in enforcement situations involving many married and unmarried parents.

Understand the difference between a defined benefit and a defined contribution plan. A defined benefit plan often is called a traditional pension plan. Many people think of a defined contribution plan as illustrated best by a 401(k) plan – it has an account balance. However, understand that there are more and more plans that do not fall neatly within these two categories. Such plans might be considered to be “hybrid plans,” which a detailed discussion of such plans and is beyond the scope of this discussion.¹

Thomas and its Misguided Reliance on Smithberg: The Second District appellate court in *Thomas* stated with a good discussion of the law in other states when it stated:

Although the issue appears to be one of first impression in Illinois, courts in other states have determined that ERISA authorizes the entry of court orders assigning pension and other retirement benefits to a former spouse to satisfy support (cont'd) arrearages. See *In re Marriage of Rife*, 529 N.W.2d 280 (Iowa 1995) (holding that an order garnishing a retirement plan to satisfy an unpaid alimony order following a divorce was a valid QDRO under ERISA); *Rohrbeck v. Rohrbeck*, 318 Md. 28, 566 A.2d 767 (1989) (holding that a QDRO is available to a former spouse when enforcing a prior judgment of divorce); *Baird v. Baird*, 843 S.W.2d 388 (Mo. App. 1992) (holding that the trial court erred in dismissing a former spouse's application for a QDRO for past-due maintenance and child support); *Taylor v. Taylor*, 44 Ohio St. 3d 61, 541 N.E.2d 55 (1989) (holding that an order withholding pay from a former spouse's monthly pension disbursement to satisfy an alimony arrearage qualified as a QDRO under ERISA); *Stinner v. Stinner*, 520 Pa. 374, 554 A.2d 45 (1989) (holding that ERISA's anti-alienation provision did not invalidate an order garnishing the former husband's ERISA benefits to satisfy an alimony arrearage). In agreement with this quantum of persuasive authority, we hold that ERISA permits a trial court's entry of a QDRO to assign pension and other retirement benefits to a former spouse to satisfy a judgment for past-due maintenance and child support payments.

This part of *Thomas* is exactly consistent with my lectures to Illinois' family lawyers on this topic, with one significant exception. It states that the assignment is limited to the value of the

¹For more detailed information about this you would be aware of the impact of the Pension Protection Act of 2006 (PPA). This law contained, among other things, provisions affecting so called “cash-balance plans” and other hybrid retirement plans. Anticipate encountering more hybrid type plans and this will have an impact on using QDROs as a vehicle for child support enforcement.

retirement accounts at the time of the divorce. To justify this position, the *Thomas* case refers to the Illinois Supreme Court *Smithberg* decision. *Thomas* states, "However, the value of the assignment should not exceed the value of the retirement accounts at the time of the marriage dissolution because only that 'beneficial interest was acquired during the marriage.' *Smithberg*, 192 Ill. 2d at 303. Therefore, [the ex-wife] is not entitled to any portion of a fund that did not exist at the time of the dissolution."

Thomas incorrectly relies on *Smithberg* for the proposition that a support arrearage QDRO can only be entered to the extent that retirement benefits exist during the marriage. *Smithberg* is a case which relies on equitable principles in order to allow the first wife to receive survivorship benefits under the Illinois Pension Code despite the fact that the deceased former husband had not taken all appropriate steps required of him under the marital settlement agreement to ensure that his first wife would receive such benefits. Thus, the *Thomas* decision mixes "apples and oranges." Often, QDROs are used to award a spouse a portion of the other spouse's retirement benefits because retirement plans are considered marital property. Typically, the largest assets in a marital estate are the retirement benefits and the marital residence. However, a QDRO can also be used to tap into retirement benefits to pay off child support (and alimony) arrearages and nowhere in the applicable law (ERISA) does it state that such benefits are limited to the property interest available at the time of the divorce.

Preemption and the Clarity of Federal Law: In terms of whether a state court should look to State law or Federal law in this regard, the express terms of ERISA provide that they "*shall* supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan [subject to the ERISA requirements]." The term "State law," for purposes of § 514 of ERISA, includes "all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." ERISA § 514(c)(1); 29 U.S.C. § 1144(c)(1). The preemption provision of ERISA has been regarded by the United State's Supreme Court as "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.'" *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46, 107 S. Ct. 1549 (1987) (quoting in part from *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S. Ct. 1895, 1906 (1981)). See also *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 103 S. Ct. 2890 (1983). See also, *Egelhoff v. Egelhoff*, 532 U.S. 141, 121 S.Ct. 1322 (U.S. Supreme Court-2001).

Recall that the 2009 Illinois Supreme Court *Kennedy* decision was the second time since 2000 that the Supreme Court addressed the question of how plan administrators should deal with an increasingly common problem: the participant who names his or her spouse as plan beneficiary, but later divorces without filing an updated beneficiary form. If such a participant dies before all plan benefits have been distributed, and if the last beneficiary form completed by the participant still names the former spouse, the plan administrator may face conflicting claims by both (i) the participant's ex-spouse, who is the named beneficiary, and (ii) the participant's estate or surviving family members. In *Egelhoff*, the Supreme Court held that plan administrators of ERISA-covered plans need not look to state law in determining a beneficiary's status. The question for the Supreme Court in *Kennedy* was whether the designation of an ex-spouse as beneficiary could be effectively waived in a divorce decree that is not a QDRO. In *Kennedy* the Supreme Court ruled that the plan administrator did its ERISA duty by paying the retirement benefits to the ex-spouse in conformity with the plan documents. In other words, the plan

administrator properly disregarded the waiver provision in the divorce decree because it conflicted with the latest beneficiary designation on file.

Because the reasoning of the Second District's decision is clearly contrary to the United States Supreme Court reasoning, it is clear that the Illinois appellate court's reliance on *Smithberg* was in error – both because of the fact that Federal law preempts state law and because the *Smithberg* case did not stand for the proposition which is suggested in *Thomas*.

A QDRO is simply an order directing the pension plan administrator to pay all or a portion of the employee/participant spouse's retirement benefits to the other spouse or other alternate payee (as discussed in this article.) Federal law clearly states that a QDRO can be entered regarding child support. Specifically, it defines a qualified domestic relations order as "any judgment, decree, or order ... which: (i) relates to the provision of child support, alimony payments, or marital property rights to a spouse, child, or other dependent of a participant, and (ii) is made pursuant to a State domestic relations law (including a community property law)." Retirement Equity Act of 1984 (REA) §§ 104, 204; 29 U.S.C. § 1056(d)(3)(B)(ii); 26 U.S.C. § 414(p)(1)(B) -- (the provisions of the labor and tax codes were both amended to provide for QDROs as part of REA).

Despite the clarity of the provisions of Federal law that a QDRO may be used to child support, a few cases have held that a QDRO may not be used to enforce support arrears, under a rationale similar to the *Thomas* decision – that doing so would be tantamount to a post-divorce modification of the property division.

In a similarly poorly reasoned decision in *Hoy v. Hoy*, 29 Va. App. 115, 510 S.E.2d 253 (1999), at the time of the divorce, the husband had no interest in a pension plan. The decree awarded the wife maintenance. After the husband accrued an \$84,000 maintenance arrearage, the wife sought that the court enter a QDRO relating to the defined contribution plan created after the divorce. The Virginia appellate court held that the post-divorce order awarding the wife \$84,000 from the pension was not enforcement of a spousal support order via a QDRO, but was instead an improper attempt to reopen and modify the divorce decree. The Virginia appellate court held (similar to the Illinois appellate court) that the QDRO must be consistent with the substantive provisions of the original decree, and that statutory exception does not empower the trial court to make substantive modification of the final decree.

The *Hoy* and the *Thomas* decisions are simply wrong. A spouse is entitled to attach a pension for the enforcement of support. Doing so does not mean the enforcement through pension assets acquired after the divorce is a new property division. Under this reasoning, obtaining a garnishment of the ex-husband's bank accounts or other assets would also be an improper modification of the divorce decree, thereby rendering any attempt at enforcement impossible.

Hoy and *Thomas* should be contrasted with *DeSantis v. DeSantis*, 714 So. 2d 638 (Fla. App. 1998). In *DeSantis*, the divorce judgment had awarded the husband his pension plan and the wife her pension plan. After the wife failed to make a court ordered cash payment to the husband, the trial court entered a QDRO to attach assets on the wife's pension plan. The appellate court reversed, holding that were the court to grant a QDRO attaching the wife's pension in favor of the husband, this would be tantamount to granting the husband an interest in an asset that he was

not entitled to and that the final judgment had extinguished his interest in the wife's pension. The Florida appellate court held that this would be an impermissible modification of the final adjudication of property rights in the divorce case. Compare. *Hayden v. Hayden*, 662 So. 2d 713 (1995) (a QDRO may be used to enforce support obligations). *DeSantis* came to the correct decision. It was proper a decision because the cash payment was not support, but part of the property division. See also *In re Marriage of Marshall*, 36 Cal. App. 4th 1170, 43 Cal. Rptr. 2d 38 (1995) (a QDRO cannot be used to enforce a collateral, contingent tax liability in a dissolution action).

After I wrote my original version of the above, an excellent article authored by Joseph DuCanto (a lawyer many consider to be one of the finest in the nation) appeared in the Illinois Bar Journal in Sept. 2004. Mr. DuCanto wrote, "unfortunately, the court went on to say that assignment [by way of QDRO] is limited to the value of the accounts at the time of marriage dissolution. This limitation is not required by ERISA or REA but was imposed by the *Thomas* court's misreading and citation of a 2000 Illinois Supreme Court case, *Smithberg*." I could not agree with Mr. DuCanto more. The IBJ article continued, "In other words, *Thomas* misread the *Smithberg* quote and used it to substantiate the position that the wife's claim to unpaid child support and alimony is limited in collection by way of a QDRO to the value of the qualified accounts at the time of the divorce." Mr. DuCanto also pointed out that *Thomas* is contrary to the Fourth District's *Murphy and Wronke* decision. 338 Ill.App.3d 1095 (4th Dist. 2003). (See my summary of *Thomas* and *Murphy* in which I place my discussions of these two decisions side by side.)

After reviewing Joseph DuCanto's article, I wrote him. His reply letter was articulate and well reasoned. He stated:

As I read your article and various cases, I was struck by the fact that probationers and the courts seemingly lack understanding that one seeking past-due alimony or child support is a "creditor." Any "creditor," under prevailing creditor's rights doctrine, has the right to attach, levy and execute upon property of the debtor following the claim being reduced to judgment. The only reasons creditors do not have the right to proceed against federally protected pension plans is because federal law has preempted all local law relating to creditors' rights and directs that no claim can be asserted against these funds. This was true until the 1984 Tax Act which specifically permitted one class of creditors (those with past-due alimony and child support) to exercise their right to levy and attach these qualified funds by way of a QDRO, creating a single exception to the sweeping anti-alienation provisions of the 1974 act known as ERISA.

All discussions by the courts and others directed to notions of opening up and setting aside decrees, revisiting property settlements and another form, etc., is way off the mark and quite unbecoming to judicial capacity and analysis. The issue, once stripped of all smoke and mirrors, is really quite simple and your article and mine seek to shed light upon the entire issue.

Well stated!

Other States' Case Law: Fortunately, almost all courts that have addressed the issue have not fallen into the trap of concluding that attaching a pension via a QDRO for enforcement of support is somehow an impermissible modification of the property division. Most courts have come to the correct decision with very little discussion. See *Cody v. Cody*, 594 F.2d 314 (2d Cir. 1979); *Merry v. Merry*, 592 F.2d 118 (2d Cir. 1979); *Sippe v. Sippe*, 101 N.C. App. 194, 398 S.E.2d 895 (1991); *Rohrbeck v. Rohrbeck*, 318 Md. 28, 566 A.2d 767 (1989); *Taylor v. Taylor*, 44 Ohio St. 3d 61, 541 N.E.2d 55 (1989).

In *Hogle v. Hogle*, 732 N.E.2d 1278 (Ind. 2000), the husband was ordered to pay \$1,000 a month in child support under a 1979 California decree. By 1999, his arrearage had reached over \$375,000. His former wife reduced the arrears to money judgments and then sought enforcement in Indiana. The Indiana court held that the money judgments (which were technically called writs) satisfied the technical requirements of a QDRO. ERISA, the court reasoned, does not require a QDRO to be a part of the judgment in the case, but a QDRO can be used to garnish a retirement plan to satisfy past due support obligations.

Rife v. Rife, 529 N.W.2d 280 (Iowa 1995), reached the same result. There, in a 1982 divorce, the wife was awarded \$500 a month in alimony. The husband made two payments in the next twelve years. In 1993, the wife obtained a QDRO that ordered the arrearage of \$12,000 be satisfied by means of a garnishment of the corpus of the husband's pension plan. The Iowa court upheld the order, noting that ERISA was not intended to be a vehicle for the avoidance of family support obligations. "We see nothing in the federal statute that prohibits invasion of the corpus." 529 N.W.2d at 281.

In re Marriage of Bruns, 535 N.W.2d 157 (Iowa Ct. App. 1995), also chose not to follow the reasoning employed in *Thomas*. In *Bruns*, the court held that attachment by means of a QDRO of a former spouse's pension plan does not amount to an improper modification of the final adjudication of property rights, even when there has been an adjudication establishing that the creditor spouse has no interest in the debtor spouse's pension. The court held that the wife was not seeking to redistribute property previously awarded in the divorce decree, but was instead seeking to enforce an alimony provision through garnishment or attachment. 535 N.W.2d at 161.

Likewise, in *Baird v. Baird*, 843 S.W.2d 388 (Mo. Ct. App. 1992), the wife sought a lump sum distribution from the pension plan's current balance to cover past due spousal and child support. The trial court denied the request noting that the divorce decree had awarded the husband his pension. The trial court, like the court in *Thompson* and *Hoy*, held that a QDRO entered 11 years after the divorce would be an unlawful modification of the property division portion of the divorce decree. The Missouri appellate court reversed, holding that a QDRO could be used to enforce the past-due support payments. The case stated:

Mother is not seeking to redivide marital property, but is instead attempting to collect a judgment for delinquent maintenance and child support payments...

Property awarded to a spouse pursuant to a division of marital property enjoys no special exemption from attachment or execution.

Stinner v. Stinner, 520 Pa. 374, 554 A.2d 45 (Pa. Ct. App. 1989), also allowed a quasi-QDRO for enforcement of child support. In *Stinner*, the parties' 1977 divorce judgment incorporated a

property settlement agreement which required that the husband pay alimony to the wife. After 18 months, the husband ceased payments and the wife brought an action for breach of the agreement, and a complaint in equity to enforce the agreement. Six years later, the wife filed two writs of execution to garnish the husband's Bethlehem Steel pension. The plan administrator refused to comply with the writ of execution on the grounds that it was not a QDRO. The trial court agreed but the appellate court reversed. The *Stinner* court held that the pension could be attached to enforce the alimony agreement. It ruled that although the writ of execution itself was not a QDRO, a 1980 judgment enforcing the alimony agreement was a QDRO. The court reasoned that the 1980 judgment satisfied the technical requirements of a QDRO because it 1) was related to alimony payments for a former spouse, 2) was made pursuant to Pennsylvania domestic relations law, 3) specified the amount of the participant's benefits to be paid and a period to which the order applied, and 4) named the plan participant and the alternate payee.

In 2004, the Alabama appellate in *Stamm v. Stamm*, 922 So. 2d 920 (AL Ct. App., 2004), court took an expansive view of the entry of a "maintenance QDRO" in a case which was remarkably similarly to *Thomas* but expanded the reasoning of the above line of cases to include individual retirement accounts. The *Stamm* court recognized that IRAs are not covered under ERISA. However, the court noted that according to Alabama law, an IRA is a qualified trust. In an exception to the anti-assignment provisions relating to qualified trusts under Alabama law, an IRA is not protected from assigned if the order assigning the benefits qualifies as a QDRO under 26 U.S.C. § 414(p). The *Stamm* court noted:

The heart of the ex-husband's argument is that the trial court's order is not a QDRO because, he alleges, it fails to comply with Alabama's domestic-relations laws in that it creates in the ex-wife an interest in the ex-husband's retirement account that did not exist under the property-division provisions of the original divorce judgment.

The *Stamm* court recognized the non-modifiability of property judgments but stated, "However, a trial court has the inherent power to enforce its judgments and to make such orders and issue such process as may be necessary to render [the judgments] effective." The court also addressed the argument that, "the trial court's order does not qualify as a QDRO is that the order does not specify the number of payments or period to which the order applies, as is required by 26 U.S.C. § 414(p)(2)(C)." The Alabama court stated, "The order, however, does specify that the payments should continue pending further order of the court or until the funds in the IRAs are exhausted."

Department of Labor's Position Paper: In a similar vein, a 2001 advisory opinion by the Department of Labor ("DOL") stated that a notice to withhold income for support might be considered to be a QDRO such that a support arrearage contained in an income withholding notice might be satisfied from a 401(k) type plan (or other defined contribution plan). In fact, in a 2002 advisory opinion the DOL suggested that child support agencies can collect child support arrearages on behalf of custodial parents.

See: <http://www.dol.gov/ebsa/regs/aos/ao2002-03a.html>

Not only should the custodial parent who is owed the back child support be able to collect a lump-sum equivalent to the child support arrearage, but Illinois also provides for statutory

interest to accrue over the period of the arrearage on each missed payment due.

Multiple Support Enforcement QDROs: If a QDRO is used to collect child support arrears and the payor continues to not pay the current support obligation, then a subsequent QDRO can be used to collect the additional arrears. Keep in mind, however, that in this situation, the later QDRO would replace the previous QDRO. A new QDRO would have to be drafted to enforce each subsequent arrearage. A clear danger in cases involving support arrearage QDROs is that a given individual might terminate his or her employment. Once the funds are rolled-over into an IRA, there is no provision under ERISA providing that IRAs are subject to support enforcement QDROs.

Taxes and Child Support QDROs: Once it is determined that a QDRO will be entered for a child support arrearage, critically important is the issue of payment of taxes. Keep in mind that (except in the unusual case of unallocated family support awards) child support is not taxable to the custodial parent. With the usual division of retirement benefits, the recipient (called the alternate payee) must pay taxes on the amounts received if there is a lump-sum distribution. With a support enforcement QDRO, ideally the distribution would be taxable to the plan participant and not taxable income to the custodial parent.

There is a problem with most plans when the written plan procedures specifically require that the recipient of a QDRO distribution is responsible for reporting it as income, as well as reporting the 20% withheld for taxes. However, this is in conflict with the Internal Revenue Code, which states that child support is not taxable as income to the custodial parent. Therefore, the QDRO might state that the distribution is for purposes of child support arrearage payment, and the distribution is to be taxable to the plan participant and not the custodial parent. But, as discussed below, this provision may not resolve the tax issue.

Grossing up the Payments – 20% Withholding: Because the contributions are generally made with before tax dollars, the distribution to be paid to a custodial parent via a QDRO ideally should be based upon the "net" of taxes. Assuming a cash payment, and anticipating the custodial parent / alternate payee will directly receive the funds via the QDRO, the funds provided in the QDRO might be "grossed-up" to account for payment of taxes. For example, assume a \$20,000 arrearage. An order would be entered finding the arrearage to be \$20,000 and finding that the Alternate Payee is to be taxed on the funds. Accordingly, the order might provide for payment of \$25,000 (and withholding of \$5,000 for Federal taxes – \$20,000 divided by .08). Thus, consider including language in the corresponding order and the QDRO reflecting the actual amount to be paid to the custodial parent given the fact that this parent would receive the 1099 form at the year end. Keep in mind that if the Alternate Payee's taxes are more than the automatic 20% withheld, she/he will incur additional out of pocket expenses when taxes are due on the distribution.

Gary Shulman in his *QDRO Handbook* Third Edition, devotes an entire chapter to child support enforcement QDROs. Regarding this issue he states:

Many judges will permit this approach [gross up the payments], knowing that the participant would have paid taxes on his child support payments had he made

them in a timely manner. It is really up to the judge in your jurisdiction. From an equity standpoint, however, the gross-up approach makes sense.

When considering “grossing-up” the funds to be paid via a QDRO, costs may be included. It is urged that such costs might include interest as well as the taxes to be paid. Generally, courts have determined if a state court has entered an order, judgment or decree which includes costs in addition to the actual support obligation owed, such costs can be included in the QDRO. "ERISA does not require, or even permit, a pension fund to look beneath the surface of the order. Compliance with a QDRO is obligatory." *Blue v. UAL Corporation*, F.3d 383. (Attorney fees can be collected through the QDRO over the objection of the payor.) And finally, an additional cost that might be considered when drafting the QDRO is the cost for review of the QDRO. The Department of Labor had previously taken the position that it was improper to charge for the cost of QDRO review. A plan cannot now charge for the cost of QDRO for a defined benefit plan but can charge for the cost of review of a defined contribution plan.

Be careful when entering an order providing for “grossed-up” child support payments. It is urged that, in appropriate cases outside of the Illinois Second Appellate Judicial District, a lawyer should seek a vehicle to determine if another District will take a position contrary to *Thomas*. This is an issue which could ultimately be resolved by the Illinois Supreme Court. If there may be a “test case,” it is appropriate to ensure that only the actual arrearage amount is taken from the participant’s defined contribution plan.

Grossing Up Payments Model Language: If you are “grossing up” the payments, consider including language in your QDRO similar to the following:

8. Assignment of Benefits:

a. **Amount of Benefits to be “Distributed” to Alternate Payee:** This Order assigns to the Alternate Payee an amount equal to the lesser of:

- (i) Eighty percent (80%) of the participant’s total account balance under the plan as of the date of the entry of this order; or
- (ii) \$_____ [enter the amount of the arrears.]

The Alternate Payee's share of the benefits shall be allocated on a pro rata basis among all of the accounts maintained on behalf of the Participant under the Plan.

b. **Additional Amount Assigned to Cover Alternate Payee’s 20% Federal Tax Withholding Requirement:** This Order assigns an additional portion of the Participant’s total account balance for payment by the Plan of 20% Federal tax withholding required by federal law, as follows:

- (i) Twenty Percent (20%) of the participant’s total account balance under the plan as of the date of the entry of this order; or
- (ii) One-Eighth of \$_____ [enter the amount of the arrears.]

If you do not plan to “gross-up” payments, it is still possible to have a second order entered providing that the support arrearage obligor shall pay to the obligee the taxes payable on her (or his) taxes due to the custodial parent's receipt of funds from the obligor's retirement plan.

Naming the Child as the Alternate Payee – Potential 10% Withholding: Keep in mind that Gary Shulman in *QDRO Handbook, Third Edition*, (Aspen Publishers, Last Update 2014) writes,

Under the federal QDRO laws, whenever the alternate payee is the spouse or former spouse of the participant, such spouse or former spouse will be taxed on the QDRO distribution. This is true even if the QDRO was drafted for child support arrearage purposes.

In these cases, the real question is the person to whom the plan administrator sends the IRS Form 1099. If the QDRO is for child support purposes, you may wish to consider listing the child as the Alternate Payee in the QDRO, rather than the participant’s former spouse. While a company will accept a QDRO either way, if the child is named as the Alternate Payee, then the client’s ex-spouse will more clearly be taxed on the distribution (hence likely avoiding the issue of the custodial parent having to pay taxes on the arrearage payments).

However, according to Federal law, the plan administrator is required to withhold 10% of the QDRO distribution for Federal income tax purposes on QDRO distributions when the child is named in the QDRO as the alternate payee. This 10% withholding is reflected in the Form 1099 that is sent to the plan participant. The IRS essentially provides this 10% withholding of cash distributions when the child is named as the Alternate Payee to ensure some payment amount of taxes on this amount. For example, if your QDRO is attempting to provide the child with a \$20,000 arrearage payment from a 401(k) plan, the participant would withhold \$2,000 and the Alternate Payee would receive \$18,000. This 10% withholding requirement is found in [§3405 of the IRC](#).

§3405 states:

Irc Sec. 3405. Special Rules for Pensions, Annuities, and Certain Other Deferred Income.

(b) Nonperiodic Distribution. - [Periodic payment provisions not quoted]

(1) Withholding. -The payor of any nonperiodic distribution (as defined in subsection (e)(3)) shall withhold from such distribution an amount equal to 10 percent of such distribution.

(2) Election of no withholding. -

(A) In general. -An individual may elect not to have paragraph

(1) apply with respect to any nonperiodic distribution. ***

(c) Eligible Rollover Distributions.

(1) In general. -In the case of any designated distribution which is an eligible rollover distribution -

(A) subsections (a) and (b) shall not apply, and

(B) the payor of such distribution shall withhold from such

distribution an amount equal to 20 percent of such distribution.

(2) Exception. -Paragraph (1)(B) shall not apply to any distribution if the distributee elects under section 401(a)(31)(A) to have such distribution paid directly to an eligible retirement plan.

(d) **Liability for Withholding.** -

(1) In general. -Except as provided in paragraph (2), the payor of a designated distribution (as defined in subsection (e)(1)) shall withhold, and be liable for, payment of the tax required to be withheld under this section.

According to Shulman, a QDRO distribution to a non-spouse child/alternate payee is not considered an eligible rollover distribution and therefore the 10% withholding rules apply in the above example relating to a nonperiodic distribution (“one-time” distribution). Shulman acknowledges the argument that no withholding should take place because the child / alternate payee is not taxed at all on the distribution, and he points to IRS Notice 89-25. Shulman quotes from this notice and then points out:

In the author’s experience in dealing with thousands of plan administrators, not many of them are familiar with these tax withholding rules on child support QDROs (where the child is named as the alternate payee.) Most plan administrators know that they should be shifting the tax burden from the child to the plan participant, but they do not withhold the 10 percent on the QDRO distribution. What happens then is the participant receives the Form 1099 to reflect his liability to pay the taxes on the QDRO distribution but he doesn’t have the 10 percent head-start via the withholding. The participant will be strapped with some significant tax payments, especially if the 10 percent withholding never took place.

Shulman then points out that the plan participant could elect not to withhold the 10% payments. This creates a question as to whether the Alternate Payee would receive the entire amount or the amount less 10%. Once again you could attempt to “gross up” the funds to account for the 10% distribution. However, this is more complex than in cases where the custodial parent is named the alternate payee.

Note that the IRS’ web site states, “Benefits paid to a child or dependent. Benefits paid under a QDRO to the plan participant’s child or dependent are treated as paid to the participant.” For information about the tax treatment of benefits from retirement plans generally, see Publication 575.” <http://www.irs.gov/publications/p575/index.html>

Child as Alternate Payee Model Language: For model language to be included in the QDRO when naming the child as the Alternate Payee, consider language similar to the following:

8. Assignment of Benefits:

a. **Amount of Benefits to be “Distributed” to Alternate Payee(s):** This Order assigns to the Alternate Payee an amount equal to the lesser of:

(i) Ninety percent (90%) of the participant’s total account balance under the plan as of the date of the entry of this order; or

(ii) \$_____ [enter the amount of the arrears.]

The Alternate Payee's share of the benefits shall be allocated on a pro rata basis among all of the accounts maintained on behalf of the Participant under the Plan.

b. **Additional Amount to be “Withheld” for Participant’s Tax Liability Under IRC §3405:** This Order assigns an additional portion of the Participant’s total account balance for payment by the Plan of Federal tax withholding required under IRC §3405(b), in an amount equal to the lesser of the following:

(i) Ten Percent (10%) of the participant’s total account balance under the plan as of the date of the entry of this order; or

(ii) One-Ninth of \$_____ [enter the amount of the arrears.]

QDROs Entered Following Emancipation of Children: Even if the children have reached the age of majority, in Illinois a QDRO can be entered to enforce the child support arrearage. This is because Section 505 of the Illinois Marriage and Dissolution of Marriage Act provides that:

The court does not lose the powers of contempt, driver's license suspension, or other child support enforcement mechanisms, including, but not limited to, criminal prosecution as set forth in this Act, upon the emancipation of the minor child or children.

While it has been pointed out that a given plan administrator may reject a QDRO if the child is the named alternate payee and the child is not under the age of majority, I believe that this view is mistaken.

Non-ERISA Plans and Plans Not Allowing for Lump-Sum Distributions: Keep in mind that not all 401(k)s, profit sharing plans, etc., allow for an immediate lump-sum distribution to be made to the non-participant spouse. In fact, some plans only make distributions during periods specified under the terms of the plan, such as quarterly or annual distributions. A few plans only allow for distributions at a specific age of the plan participant (such as age 50). In addition, not all plans can be divided by a QDRO. For example, in Illinois any benefits covered under the Illinois Pension Code such as TRS benefits and the like are not subject to division via a QDRO

but might be subject to division via Qualified Illinois Domestic Relations Order (QILDRO). Also, you cannot collect child support from a Federal plan.

In terms of the QILDRO language of the Illinois Pension Code, it provides:

(b) (1) An Illinois court of competent jurisdiction in a proceeding for declaration of invalidity of marriage, legal separation, or dissolution of marriage that provides for **support or** the distribution of property, or any proceeding to amend or enforce such **support or** property distribution, may order that all or any part of any (i) member's retirement benefit, (ii) member's refund payable to or on behalf of the member, or (iii) death benefit, or portion thereof, that would otherwise be payable to the member's death benefit beneficiaries or estate be instead paid by the retirement system to the alternate payee. [40 ILCS 5/1-119(b)(1)].

Note that the changes to the statute in terms of including the language “support” were made in 2006 with PA 94-657. Accordingly, since 2006, we can now enter QILDROs for child support enforcement purposes.

An interesting question is the issue of what would occur should a party fail to sign the consent form and whether the consent form should be required for a support enforcement QDRO. Anticipate the argument as to the potential application of the Second District decision [*In re Marriage of Menken*](#), 334 Ill. App. 3d 531 (Ill. App. Ct. 2002). The critical ruling of *Menken* was that the trial court lacks the authority to order a state governmental plan participant to execute a consent for issuance of a QILDRO. *Menken* discusses the background regarding the original QILDRO legislation in Illinois and the fact that, inserted into the original legislation, was a provision requiring a consent to be executed for a “Member” who began participating in a plan provided under the Illinois Pension Code on or before July 1, 1999. The appellate court recited the language of the Illinois Pension Code which provides, in part:

(1) In accordance with Article XIII, Section 5 of the Illinois Constitution, which prohibits the impairment or diminishment of benefits granted under this Code, a QILDRO issued against a member of a retirement system established under an Article of this Code that exempts the payment of benefits or refunds from attachment, garnishment, judgment or other legal process shall not be effective without the written consent of the member if the member began participating in the retirement system on or before the effective date of this Section.

(2) A member's consent to the issuance of a QILDRO shall be irrevocable, and shall apply to any QILDRO that pertains to the alternate payee and retirement system named in the consent." 40 ILCS 5/1-119(m).

The *Menken* court then stated: “We find that the language of Section 1-119(m)(1) is clear...” Now, a QILDRO may be issued against an individual participating in a retirement system on or

before the effective date of Section 1-119 only if the individual consents.

There is an argument that, for child support enforcement purposes, *Menken* should not apply. This is because of a perception that there was a constitutional limitation on the power of a family law court to allocate a person's pension benefits covered under the Illinois Pension Code. There are now provisions set forth in Section 503 of the IMDMA which provide:

For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code) acquired by either spouse after the marriage and before a judgment of dissolution of marriage or declaration of invalidity of the marriage are presumed to be marital property, regardless of which spouse participates in the pension plan. The presumption that these pension benefits are marital property is overcome by a showing that the pension benefits were acquired by a method listed in subsection (a) of this Section. The right to a division of pension benefits in just proportions under this Section is enforceable under Section 1-119 of the Illinois Pension Code. The value of pension benefits in a retirement system subject to the Illinois Pension Code shall be determined in accordance with the valuation procedures established by the retirement system.

Perhaps *Menken* was meant to apply to QILDROs for property purposes where it is more possible to provide for a “triangular order” where the court orders one party (called the “Participant” in ERISA type plans) to pay over the funds he / she receives or his / her then former spouse. Thus payments are not made directly from the system to the non-pension holding spouse. However, the fact that a party is not likely to consent to the issuance of a QILDRO for support enforcement purposes can likely be assumed by the existence of the arrearage, itself. Accordingly, the question is whether the appellate courts (and especially those outside of the Second District) would limit *Menken* to property distributions.

Procedures to Enter Support QDRO for Defined Contribution Plan QDRO: The procedure to collection child support via a QDRO should be straight-forward. First, determine the arrearage including statutory interest using simple interest at the rate of 9% per year (according to Illinois law.) Next, enter into discovery to obtain the plan participant's account statements and summary plan description. These will then reveal what can be withdrawn from the retirement plan with a QDRO. If you are from the Second Judicial District of Illinois, determine the extent of the retirement benefits accrued during the marriage. Then determine whether you plan to name the child or the support recipient as the Alternate Payee. Consider whether your approach will be to seek to “gross up” the amounts to consider the tax implications. Have the QDRO entered and then submitted to the plan administrator for qualification purposes.

Defined Benefit Plans and QDROs: On the other hand, if the only retirement benefit is what I often refer to as a tradition pension plan (one which pays a monthly retirement benefit starting at a certain retirement age), it is generally not practical to try use a QDRO to collect a support

arrearage. This sort of plan is referred to as a defined benefit plan (as opposed to a defined contribution plan). This is because most defined benefit plans will not pay out lump-sum amounts (as opposed to most defined contribution plans which will allow such distributions.)

When drafting child support QDROs, be aware of the “Bible” that family lawyers use. It is Gary Shulman’s *QDRO Handbook, Third Edition* (mentioned throughout this article). It has an excellent discussion on child support QDROs at Section 15.02. The model form QDRO that I use is generally adapted from Gary Shulman’s form QDRO – which is at Section 15.03 of this treatise. He even has a defined benefit shared interest QDRO. I have not included such a defined benefit QDRO in these materials because of the many complications with a shared interest, defined benefit QDRO. Of note, however, is that Gary Shulman writes:

If your client’s ex-husband is only covered under a defined benefit pension plan, which will pay him a monthly pension check for life when he retires, it is slightly more difficult to obtain past-due child support... right away using a QDRO. [Author’s note: I believe this is an under-statement.] Remember, in a defined benefit pension plan, there are no individual accounts established for any plan participants. Consequently, there is no “pot of money” from which to take the child support arrearage. This does not necessary mean you are out of luck. You may still draft a QDRO that provides your client with a portion of his monthly pension benefit once he retires. However, because defined benefit plans do not typically provide for lump-sum distributions, your client will not be able to receive the full arrearage in one single payment. Rather, through the use of a “shared payment” QDRO, she will receive a specified dollar amount each month until such times as the arrearage is paid in full.

Keep in mind that in terms of present collections, a child support QDRO would only work in obtaining current payments for someone whom is already in pay status.

Letter to Judges – Shulman's One Bad Idea: His book even includes a “Model Letter to Send to Judges/Magistrates to Convince Them of Efficacy of QDRO for Child Support Arrearage.” Quoting this model letter might be of interest, but I believe its use could constitute an improper ex parte communication. Nevertheless, a lawyer in a case such as this should review pages 15-17 to 15-19 in detail – but not follow his all of his recommendations in this regard.

ERDOs: But it’s not only QDROs that can be used to collect past-due support from retirement benefits. An Eligible Domestic Relations Order (EDRO) is a support order against a state or federal government pension plan.

Conclusion: Retirement benefits are probably the most overlooked vehicle to satisfy child support arrearage. It is urged that if there is an appropriate case (probably outside of the Second Illinois Appellate Judicial District), that the Illinois appellate courts should come a decision opposite that of *Thomas* and more consistent with the majority view in the United States

followed by the above discussed appellate court decisions in other states which have addressed the issue (such as Pennsylvania, Missouri, Iowa, Indiana, Maryland, Ohio and North Carolina.)

Exhibits and Notes:

Portions of Chapters 15 and 35 of Gary Shulman's [*QDRO Handbook, Third Edition*](#) (Aspen Publishers, Last Update 6/1/2015) – \$445.

For a California order that may be of some interest, see:
<http://www.courtinfo.ca.gov/forms/documents/fl460.pdf>

Department of Labor Advisory Opinion: See: <http://www.dol.gov/ebsa/regs/aos/ao2002-03a.html>

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The Gitlin Law Firm
Practice Limited to Family Law
663 East Calhoun Street
Woodstock, IL 60098
815/338-9401

www.gitlinlawfirm.com

Last Updated: February 19, 2016

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