# ILLINOIS RETIREMENT BENEFIT CASES – The Last Decade Reviewed

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Illinois case law regarding retirement benefits, Qualified Domestic Relations Orders and QILDROs is one of the most critical areas. Many of the cases in the last ten years have focused on QILDRO type issues because of the critical limitation imposed when the QILDRO legislation was passed in 1999, that is, there had to be a consent for issuance of the QILDRO for the QILDRO to be entered. To get around the problems faced by this, a number of cases have staked out how one can get around the problems faced when a former spouse refuses to sign a consent to issue a QILDRO. Other cases that are critical to understand involve the problems when the QDRO or the QILDRO are not entered at the time of the divorce. And the most recent important

line of cases involves social security benefits. Basically, we are dealing with the fact that Federal law preempts state law and this creates a number of problems.

### 2016 Legislation and Changes to IMDMA re Marital Non-Marital Retirement

PA 99-90 57 provides amendments to the pension provisions of the Illinois Marriage and Dissolution of Marriage Act. One critical change is to provide additional language to Section 503(a)(6): "property acquired before the marriage, except as it relates to retirement plans that may have both marital and non-marital characteristics..." 503(b)(2) is also changed:

(2) For purposes of distribution of property pursuant to this Section, all pension benefits (including pension benefits under the Illinois Pension Code, <u>defined</u> <u>benefit plans</u>, <u>defined contribution plans and accounts</u>, <u>individual retirement</u> <u>accounts</u>, <u>and non-qualified plans</u>) acquired by <u>or participated in by either spouse after the marriage and before a judgment of dissolution of marriage <u>or legal</u> <u>separation</u> or declaration of invalidity of the marriage are presumed to be marital property, <del>regardless of which spouse participates in the pension plan. A spouse</del> <del>may overcome the The presumption that these pension benefits are marital</del> property <del>is overcome by a showing through clear and convincing evidence</del> 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.</u>

Basically, these provisions adopt what is essentially the gist of current case law providing essentially that pension plan division is an exception to the unitary concept of property division. See *Gitlin on Divorce*. But they oversimplify what case law had provided and therefore will likely have the unintended consequence of narrowing some of the other exceptions to what was in essence the unitary concept of property (property being ether marital or non-marital and generally not mixed).

# Division of State / Railroad Retirement Benefits, Federal Preemption and Social Security Benefit Equivalent

#### **Railroad Retirement Benefits**

# *Frank* – Stop, Look and Listen: Division of Tier 2 Railroad Retirement Benefits in Divorce *IRMO Frank*, 2015 IL App (3d) 140292 (July 29, 2015)

The parties were married for 20 years and the husband worked for the railroad for 18 of those years. The parties' 1998 marital settlement agreement had provided:

"BRUCE shall have the sole right, title and interest in his pension and individual retirement plans, including but not limited to past, present and future contributions, interest and principal, whether contributed by BRUCE or his employer or both and whether unvested, partially vested, or fully vested, free and clear of any and all claims of SHIRLEY. A Qualified Domestic Relations Order will be entered which will provide SHIRLEY with \$621.00 per month upon

#### BRUCE's retirement."

The wife was not represented and the Husband filed his petition for dissolution on April 29<sup>th</sup> and the Judgment incorporating the MSA was entered the next day. The judgment had provided:

"Article VIII of the parties' Separation Agreement is incorporated to the extent that it provides that BRUCE is awarded all rights in and to his pension provided by the United States Railroad Retirement Board and to the extent that SHIRLEY will receive a separate payment of \$621.00 per month, however, upon clarification by the plan administrator of the provisions of the pension, it appears that SHIRLEY's benefits will commence not upon BRUCE's retirement but upon her reaching the eligibility age for retirement, upon which date she will receive her spousal pension benefits in the amount of \$621.00 per month without the necessity for any qualified domestic relations order."

The former husband retired from the Union Pacific in 2011. The former wife did not begin receiving pension payments and filed a petition for enforcement of the judgment in 2013. At the hearing that was evidence regarding railroad pension and the various tiers of benefits: Tiers 1 and 2 and the spousal annuity benefit. Ultimately the trial court found an ambiguity in the MSA and allowed parol evidence offered by the former husband and found the former husband's evidence regarding intent more credible. The trial court denied the former wife's petition for enforcement. The former wife appealed and the appellate court affirmed. The appellate court found that where the former wife did not show up for the prove-up, that the trial court should have required her to approve changes to the agreement before incorporating them into the Judgment. And the trial court should not have allowed parol evidence because the agreement was not ambiguous.

But the appellate court also found that because there were other reasons. The appellate court stated in broad language that is accurate regarding the division of social security benefits but not accurate regarding Tier 2 benefits:

Federal benefits, including railroad pensions and Social Security payments, may not be divided directly or used as an offset in a marital property distribution. In re Marriage of Crook, 211 Ill. 2d 437, 449-50 (2004); Hisquierdo v. Hisquierdo, 439 U.S. 572, 582 (1979). \*\*\* The trial court was without authority to divide Bruce's federal pension. [note by GJG: This is an over-statement and is not right. It is correct regarding Tier 1 benefits.] Accordingly, the trial court was compelled to align the parties' marital settlement agreement with the federal requirements, including that benefits under the Railroad Retirement Act cannot be divided or used as an offset in a marital property distribution. The judgment of dissolution, while a unilateral modification of the parties' marital settlement agreement, was consistent with the requirements of the railroad pension. The specific changes the trial court made in modifying the parties' agreement were that Shirley would not be eligible for the divorced spouse annuity until she reached full retirement age of 66 and that she must be unmarried to remain eligible. Pursuant to the Railroad Retirement Act, these requirements must be met before Shirley can receive the divorced spouse annuity provided for in the parties' marital dissolution proceedings. The other portions of Bruce's railroad pension, Tiers I and II, cannot

be divided or used to offset the marital property distribution.

This language is deceptive at best. There is such a thing as a divorced spouse benefit. That is sort of like a social security rights for the divorced spouse and is quite limited in scope. One is not entitled to this based upon the provisions of divorce court order but by operation of law – at least 10 years of benefits, both at least 62 and the divorced spouse is unmarried.

To better understand railroad retirement in divorce, see, e.g., <u>http://www.rrb.gov/pdf/partition.pdf</u> It is a guide titled, "Attorneys Guide to the Partition of Railroad Retirement Annuities."

Tier 1 is a component that cannot be divided. It is essentially a social security equivalent. The Tier 2 component is based only on the rail industry service and earnings. It is divisible. They are divided based on a "partition order." So, Federal law prohibits the division of the social security equivalent but not the other portion.

There are also problems historically regarding division of even Tier 2 benefits when the Participant dies. To address this situation, the Pension Protection Act of 2006 provided that, once in pay status since (a date certain in) 2007, a benefit payable under a court order will remain payable for the lifetime of the non-participant ex-spouse, even if the participant dies. Thus the division should include the phrase that it is "payable even upon death." Since the benefit does not consider the lifetime of the non-participant, it effectively provides a free survivor benefit in the same amount as the partitioned award.

## Social Security Benefits, Federal Preemption and the Interplay with Retirement Benefits

# *Mueller* – Property: Social Security Component of Retirement Benefits of Public Sector Employees and Federal Preemption

IRMO Mueller, 2015 IL 117876 (June 18, 2015) Illinois Supreme Court

*Mueller* involves the nature of a patently unfair issue but one in which the Illinois Supreme Court followed the law. For certain public sector employees, their social security equivalent is part of their retirement benefits. So, the question is whether this social security equivalent can effectively be backed out of a valuation. In this case the wife works in private sector and had Social Security withheld from her pay; while the husband is an officer with city police department and contributes to police pension fund and does not have Social Security tax withheld from his pay. The Husband could retire at age 50 with full pension benefits while the wife would expect full Social Security benefits at age 67.

The Illinois Supreme Court ruled that it was is improper for a circuit court to consider Social Security benefits in equalizing a property distribution upon dissolution. Social Security benefits may not be divided directly or used as a basis for offset during dissolution proceedings.

*Roberts* – Decision Regarding Property Award and Inability to Divide Social Security Benefits / Impact of *Mueller* Supreme Court Decision *IRMO Roberts*, 2015 IL App (3d) 140263 (May 29, 2015) After 37 years of marriage, petitioner, a teacher, filed a petition for dissolution of marriage against respondent, a disabled pharmacist. The trial court divided the property of the parties, and awarded each party a one-half interest in petitioner's pension from the Teachers' Retirement System (TRS). Petitioner appeals, arguing that the trial court should have awarded her pension solely to her, or, alternatively, should have granted her maintenance in an amount equal to the payments respondent would receive from her pension. The appellate court reversed and remanded finding that the trial court erred in awarding half of petitioner's TRS pension to respondent.

And in this case we have the critical tie in with social security benefits and certain public employees not receiving separate benefits:

In this case, the trial court properly excluded respondent's Social Security benefits in its division of marital property. However, the court not only considered petitioner's TRS pension, but equally divided it between the parties. As a result, when petitioner retires, she will receive a total monthly income of \$1,310.00, consisting of her Social Security benefits and her half of her pension, while respondent will receive monthly income of \$3,414.90, consisting of his Social Security benefits and his half of petitioner's pension. The parties' financial affidavits show that petitioner's monthly expenses are \$4,064.36, and respondent's are \$2,235.61. The trial court's division of property will leave petitioner with a monthly deficit of \$2,700, while respondent will enjoy a monthly surplus of \$1,100.

The Act requires that the division of marital assets be equitable. Here, where the trial court equally divided petitioner's TRS pension benefits, between petitioner, who will receive less than \$300 per month in other income after retirement, and respondent, who is receiving more than \$2,000 per month in other income, the division of marital assets was inequitable. Similarly, since petitioner participated in a pension system in lieu of Social Security, the TRS pension benefits that she earned instead of Social Security should not be subject to division. [Citations omitted.] *These jurisdictions hold that only the portion of a pension that exceeds the benefits the party would have earned under Social Security should be included in the marital estate for equitable distribution purposes.* See *Wallach*, 37 A.D.3d at 709; *Cornbleth*, 580 A.2d at 372; *Walker*, 677 N.E.2d at 1253-54. *We agree and find this to be an equitable distribution under the statute.* [Note by GJG: These last two statements are correct.]

The appellate court then concluded:

We reverse that portion of the trial court's award that grants respondent one-half of petitioner's TRS pension. On remand, the court must determine the value of the Social Security benefits petitioner would have received if she had participated in Social Security instead of TRS. See Wallach, 37 A.D.3d at 709. The court should then grant petitioner that portion of her pension equal to what she would have received under Social Security. See id. The portion of petitioner's pension exceeding the value of the Social Security benefits she would have received, if

any, remains subject to equitable distribution.

**<u>Comment</u>**: Unfortunately, this case was issued only a short time before the recent Illinois Supreme Court decision: <u>*IRMO Mueller*</u>, 2015 IL 117876 (June 18, 2015).

### **QDRO and QILDRO Issues**

# Nature of Division of Benefits under Illinois Pension Code Where QILDRO Not Initially Entered

# *Culp* - QILDRO Following Hunt Formula Conformed to Settlement Agreement Although MSA Stated Value of Benefits at Dollar Certain

IRMO Culp, 399 Ill. App. 3d 542 (4th Dist., 2010)

As part of their settlement agreement, the parties agreed that the former husband's retirement benefits were to be "equally divided as of April 20, 1999, pursuant to a separate [Qualified Illinois Domestic Relations Order (QILDRO)]." Because the husband, Jerry, was not near retirement at the time of the dissolution, the trial court reserved jurisdiction for the entry of a QILDRO at a later date. In 2009, the former wife, Susan, filed a motion for entry of a QILDRO along with a proposed order directing Jerry to sign his consent to the QILDRO. The proposed QILDRO set forth a formula for determining the value of the marital portion of Jerry's pension and dividing it between the parties. The trial court ultimately entered an order directing the former husband to sign his consent. He appealed arguing that the trial court erred in finding Susan's proposed QILDRO conformed to the parties' settlement agreement. The appellate court disagreed with the former husband and affirmed the decision of the trial court.

The MSA had provided:

"[Jerry] has certain retirement benefits through [SERS] which are valued at approximately \$84,000 as of April 20, 1999, the date of entry of the [j]udgment of [d]issolution of [m]arriage on grounds. Said retirement benefits shall be equally divided as of April 20, 1999, pursuant to a separate QILDRO to be entered by agreement of the parties or by order of the court."

The appellate court noted that nearly two years then passed during which neither an agreement by the parties nor an order by the trial court divided the pension pursuant to a QILDRO. In June 2001, the court entered a written order stating:

"[t]he entry of a \*\*\* []QILDRO[] is reserved. [Jerry] shall notify [Susan], in writing, 30 days prior to making any application for retirement or request for retirement benefits" to allow Susan time to file for entry of a QILDRO prior to the commencement of the pension's disbursement."

In the proposed QILDRO, Susan named herself as alternate payee and recipient of 50% of the marital portion of Jerry's monthly retirement benefit, any lump-sum payment upon termination of the benefit, any partial refund becoming payable to Jerry, and any benefits payable to Jerry's

beneficiaries upon his death. The QILDRO set forth the following formula for calculating the marital portion of the pension consistent with what is Article 9 of the model QILDRO form, i.e., the model using what is in essence a coverture fraction type approach.

The QILDRO included regular plus permissive service. It included death benefit and it also included the COLA clause, i.e., the former wife to share in the post-retirement increases to the extent of her benefits otherwise provided in the QILDRO.

The former husband on appeal argued that the formula used in distributing his SERS pension deviated from the court's September 1999 supplemental order, which Jerry alleged awarded Susan \$42,000--half of the pension's value when he filed his dissolution petition in April 1999.

The trial court's decision stated:

The [o]rder does not specify that [Susan] is to receive \$42,000[], and in the [c]ourt's opinion, if that were the intention of the parties, provision would have been made for the entry of judgment in that amount and a payment schedule. That was clearly not the intention of the parties. If [Susan's] portion were fixed at \$42,000[], there would be no need for a QILDRO. A subsequent [o]rder on January 12, 2001[,] also reserved the entry of the QILDRO.

\*\*\* [T]he [SERS pension] was the major asset in the divorce proceeding, and [Jerry] was only 44 years old at the time [the court entered its order of dissolution]. Obviously, retirement was many years away. [Jerry] was to notify [Susan] in writing when he planned to retire so that the QILDRO could be entered.

It would be unconscionable to conclude now that the parties intended for [Susan] to wait untold years to receive her interest in the only major asset from the marriage, if her interest was fixed at \$42,000[] and no more. Such an approach would deny her the benefit of interest on her asset or the benefit of any [cost-of-living adjustment] or other increases in the value of the asset. The parties clearly intended to have a QILDRO entered, with the benefits divided using the customary formulaic approach. This is not a case \*\*\* where the parties reached a clear and unambiguous agreement that [Susan] should receive \$42,000[] at some time in the future, with no interest on her asset and no increase in value through the intervening years. There was no such 'bargain[,]' and [Susan] cannot be held to this strained interpretation of the [a]greed [s]upplemental [o]rder."

The court further found Susan's proposed QILDRO conformed to the parties' agreement and ordered Jerry to sign the QILDRO and submit it to the court for entry.

On appeal the former husband urged that the parties' agreement unambiguously valued the pension's marital portion at \$84,000 and provided Susan would receive \$42,000, exactly half without any interest or cost-of-living adjustments, and (2) no language in the agreement indicated the use of the formula set forth in Susan's proposed QILDRO to divide the pension.

The appellate court first reviewed the case law and then commented:

In the case at bar, the trial court opted to reserve jurisdiction as to the division of Jerry's pension until closer to his retirement rather than awarding Susan a lump sum of the pension's value at the time of dissolution. Over 10 years later, the parties now disagree as to the value of Susan's "equal" share.

We quote from the appellate court decision at length because of the importance of it to similar cases:

Because the agreement states "[s]aid retirement benefits shall be *equally divided* as of April 20, 1999 [(the dissolution date)]" (emphasis added), Jerry contends the parties intended Susan's share of the marital portion to be \$42,000, exactly half of \$84,000, the pension's value as of the dissolution date.

He further argues the agreement provided no express language permitting Susan interest or cost-of-living adjustments on her share of the pension. However, limiting Susan's share to \$42,000 would allow Jerry the marital portion's entire growth in value between the date of dissolution and the date of his retirement, thereby rendering the parties' shares of the marital portion unequal. Accordingly, we find Jerry's interpretation of the agreement unreasonable because the agreement simply states an approximate value of the pension on the date of dissolution and provides Susan receive 50% of the retirement plan pursuant to a QILDRO filed in the future.

The settlement agreement never states Susan shall receive \$42,000. Instead, the settlement agreement lists \$84,000 as an approximate valuation of the pension's value on the dissolution date. The agreement further lists the dissolution date, April 20, 1999, for purposes of ascertaining the duration of the marriage. **Both the approximate value of the pension and the end date of the marriage are set forth to assist in the later assessment and division of the pension's marital portion**. The provision for entry of "a separate QILDRO" further evidences the parties' intent to ascertain the value of and equally divide the marital portion of the pension at a later date.

Jerry's pension is a defined-benefit plan pension. Under a defined-benefit plan, the value of the pension's benefit is determined at retirement based on years of service and final - 13 - salary. See *Richardson*, 381 Ill. App. 3d at 54 (1<sup>st</sup> Dist, 2008). Each year of service is valued cumulatively: the longer SERS members work, the higher the percentage of their final salary they will collect as their pension. See *Richardson*, 381 Ill. App. 3d at 54. Because each year of service contributes to the overall value of the pension, the marital portion of the pension increases in value the longer the pension holder works. Thus, its total value is unascertainable until the time of retirement, which is often years after the dissolution of marriage.

Essentially, Jerry argues the parties agreed to freeze Susan's share of the pension

at the dissolution date. This interpretation of the settlement agreement's plain language fails to award Susan the benefits associated with deferring receipt of her share of the pension until Jerry retires. See *Ramsey*, 339 III. App. 3d at 759. **Also**, **by postponing the division of the pension until it is received, both parties shared the risk Jerry would change jobs or die before retiring, which would reduce the pension substantially or forfeit its benefits completely**. See *Ramsey*, 339 III. App. 3d at 759. **Because Susan and Jerry shared those risks when they agreed to postpone the division of the pension, equity requires they share in the benefits of unforseen increases in the value of the pension as well.** See *Ramsey*, 339 III. App. 3d at 759.

Susan had no incentive to postpone receipt of a flat rate, lump-sum payment. The only reasonable interpretation of the parties' settlement agreement is the parties knew the marital portion would grow in value during the period between the dissolution of marriage and Jerry's retirement and thus opted to wait to equally divide the pension until its value fully matured and became ascertainable. Because Jerry's proposed interpretation of the agreement leads to an unfair and unreasonable result, we cannot conclude the parties intended Susan receive half the value of the pension's marital portion at the time of the dissolution.

The former husband argued that the court specifically erred in following the so called *Hunt* formula. The decision stated:

Here, the trial court found the parties intended to divide the marital portion of the pension pursuant to the "customary formulaic approach," as used in Susan's proposed QILDRO. Jerry maintains the court erred in using the *Hunt* formula to determine the value of the marital portion of the pension because at the time of the court's agreed supplemental order in September 1999, QILDROs did not specify the *Hunt* formula for dividing the marital portion of pensions and therefore the parties could not have intended the formula's use.

The former husband argued that the trial court should have followed the *Wenc* decision and allowed extrinsic evidence as to the parties' intent because of the potentially ambiguous nature of the settlement agreement. The appellate court noted that:

Unlike the parties' settlement agreement in *Wenc*, the parties' agreement in this case does not contain mysterious sums and a surplusage of ambiguous phrases. Rather, it contains no explicit language directing the trial court how to divide the marital portion of the pension other than to do so "equally." Therefore, this case is dissimilar to *Wenc* and more akin to *Richardson*.

The appellate court then decided:

While the settlement agreement did not expressly enumerate the formula by which to equally divide the pension's marital portion, the parties' intent is evidenced by

the fact the parties chose to use the reserved-jurisdiction approach and later entry of a QILDRO and did not use language contrary to the customary formulaic approach set forth in *Hunt*.

Regarding the fact that the *Hunt* formula has become the standard for dividing defined benefit plans using the reserved jurisdiction approach the court commented:

The *Hunt* formula, stated in 1979, is a widely used method for dividing pensions' marital portions under the reserved-jurisdiction approach, especially where the approach applies to defined-benefit plan pensions. See *Richardson*, 381 Ill. App. 3d at 52; *In re Marriage of Sawicki*, 346 Ill. App. 3d 1107, 1115 (2004). This was the case at the time of the trial court's supplemental order incorporating the parties' settlement agreement in 1999. The General Assembly's subsequent endorsement of the *Hunt* formula by amending section 1-119 of the Illinois Pension Code to include it within QILDROs addressing the division of governmental pensions' marital portions (see 40 ILCS 5/1-119(n) further indicates the formula's widespread acceptance.

#### Kehoe and Farkas – Standard Coverture Fraction Type QILDRO Not Required Years Later Despite Richardson and Culp Given Savings Clause in Non-Effective QDRO IRMO Kehoe and Farkas, 2012 IL App (1st) 110644

After a six year marriage, the parties were divorced in 1988. The parties separated August 31, 1985. The Judgment for Dissolution of Marriage incorporated a MSA which provided that the wife was entitled to one-half of the value of her husband's pension from the date of his employment with the Village of Schiller Park as a police officer to the date of the separation of the parties. After the former husband's retirement, the former wife filed a motion for entry of a QILDRO along with a proposed consent for issuance. The motion and proposed QILDRO set forth a method of calculation for determining the value of the marital portion of Frank's pension. After a hearing in June 2010, where the former husband objected to the former wife's motion for entry of a QILDRO. The trial court entered a written order denying the former wife's motion for entry of a QILDRO. The trial court also denied her motion for reconsideration. The former wife appealed and the appellate court affirmed.

## The MSA provided:

"The parties agree that LAURETTA shall be entitled to receive one half of the value of the pension from the date of FRANK's employment with the Village of Schiller Park to the date of the separation of the parties, which is August 31, 1985 (hereinafter referred to as 'one-half'). \*\*\* FRANK further understands that a Qualified Domestic Relations Order reflecting the above shall be lodged with the Schiller Park Police Pension Fund directing them and ordering them to pay one-half (½) of FRANK'S pension to LAURETTA commencing at the time of FRANK'S retirement or termination of employment from the Village of Schiller Park. The right of LAURETTA to receive FRANK'S one-half (½) pension shall not survive after LAURETTA'S death."

A QDRO was also incorporated in the divorce judgment. The QDRO identified the amount of

Frank's pension that is payable to Lauretta and specifies the manner in which the amount is to be determined. The QDRO ordered the Schiller Park Police Pension Fund to distribute the amount agreed upon in the parties' marriage settlement agreement. The court did not place a present value on Frank's pension at the time of the dissolution, and neither the marriage settlement agreement nor the QDRO estimated how much the pension was worth at the time of separation between the two parties. The QDRO will be quoted from at length because of the importance of the language:

"The interest in the Husband's name in the SCHILLER PARK POLICE PENSION FUND (hereinafter referred to as 'PLAN') or successor, shall be divided between the parties as follows: \* \* \*

(v.) Marital Portion: An amount equal to the balance in the Husband's account (in the case of a defined contribution plan) and/or the amount accumulated by the Husband under the terms of the plan (in the case of a defined benefit plan) for each Plan multiplied by a fraction, the numerator of which is the number of years (months) of marriage during which benefits were accumulated prior to the 'Marital Retirement Date', aforesaid, and the denominator of which is the total number of years (months) during which benefits were accumulated prior to the marital retirement date.

3. Benefit Due Wife: Types—Formula: The Wife's share of the marital portion of each Plan shall be determined in accordance with the type of benefits available and shall be calculated and distributed to her pursuant to the following: (i.) Monthly or Other Periodic Disbursement of Benefits: To the extent that the disbursement of benefits to the Husband pursuant to either Plan can only be made on a monthly or other regular periodic basis, then the Wife shall be entitled to receive an amount equal to onehalf ( $\frac{1}{2}$ ) of the 'marital portion' (as defined hereinabove) of each such monthly periodic payment.

\* \* \*

5. Increased Benefits: Any increases in the Husband's accrued benefits in either Plan caused by contributions occurring subsequent to the marital retirement date are not to be construed as part of the marital portion. Accordingly such increases shall be disbursed to and enjoyed solely by the Husband and the Wife shall not be entitled to share in any such increases.

\* \* \*

13. Savings Clause: It is the intention of the Wife and Husband that the foregoing provisions shall qualify as a Qualified Domestic Relations Order and whenever the provisions hereunder are inconsistent with the definition of a Qualified Domestic Relations Order as may be contained, from time to time, in the Internal Revenue Code of 1954, as amended, and/or the Employee Retirement Security Act of 1974, as may or may not be amended, this Agreement shall be amended from time to time as may be necessary to comply with the requirements for a Qualified Domestic Relations Order. Both parties shall enter into an agreed order of court as may be reasonably required to amend this Article and/or the Judgment for Dissolution of Marriage to so comply."

The former husband retired November 2009. The Schiller Park Police Pension informed the former wife that they could not honor the QDRO. In January 2010, the former wife then forwarded a

consent to issue a QILDRO which the former husband refused to sign.

The proposed QILDRO followed the following formula to calculate the marital portion:

The amount of the alternate payee's benefit shall be the result of (A/B) x C x D where: "'A' equals the number of months of regular plus permissive service that the member accumulated in the Retirement System from the date of marriage (04-28-1979) to the date of the divorce (12-23-1988). \*\*\* 'B' equals the number of months of regular plus permissive service that the member accumulated in the Retirement System from the time of initial membership in the Retirement System through the member's effective date of retirement. \*\*\*

.; 'C' equals the gross amount of \*\*\* the member's monthly retirement benefits \*\*\* calculated as of the member's effective date of retirement including permissive service, upgrades purchased, and other benefit formula enhancements; \*\*\*
'D' equals the percentage noted in Section III(A)(2) [50% per month of the marital portion of the pension]."

The former husband objected to the method of proposed apportionment since he claimed that the benefits should not be calculated as of when benefits went into pay status and then applying a formula but rather by only providing one half of the value of the pension as of the date of the dissolution of marriage. The trial court entered a written order denying Lauretta's motion for entry of a QILDRO and ordered Frank to pay Lauretta 50% of his pension as of the date of separation, stating:

"Respondent pursuant to the order and judgment for dissolution of marriage shall pay to Petitioner 50% the pension as of the date of separation which is 8/31/85. Said calculation is Petitioner's marital portion."

The former wife appealed and the appellate court affirmed the trial court's award generally but remanded with instructions. The appellate court stated:

"The parties agree that LAURETTA shall be entitled to receive one half of the value of the pension from the date of FRANK'S employment with the Village of Schiller Park to the date of the separation of the parties, which is August 31, 1985 (hereinafter referred to as 'one-half')." If the parties' judgment included only this provision and no other language or additional documents such as a QDRO, the judgment may have been viewed as "silent as to what portion of the pension benefit is marital" and the trial court would then have the discretion to decide how to allocate the pension benefits. However, the marital settlement agreement and QDRO in the case at bar already set out the method of calculation and pension apportionment. The parties' QDRO explains that Frank's pension plan should be "multiplied by a fraction, the numerator of which is the number of years (months) of marriage during which benefits were accumulated prior to the 'Marital Retirement Date', aforesaid, and the denominator of which is the total number of years (months) during which benefits were accumulated prior to the martial retirement date." The term "Marital Retirement Date" referred to the date when the final judgment of dissolution was entered and its definition was used "for the sole purpose of computing the marital purpose" of

Frank's pension plan.

¶ 22 The detail of the QDRO's language regarding the calculation of Frank's pension and, even more notably, the very act of incorporating a completed QDRO into the dissolution judgment show that the judgment is not "silent" as to how the pension should be divided and what portion of the pension benefit is marital. <u>*Richardson*</u>, 381 Ill. App. 3d at 53. The parties clearly agreed upon a formula for calculating the pension apportionment during the time of dissolution. By incorporating a QDRO within the judgment, the trial court had already directed and ordered the Schiller Park Police Pension Fund to pay to Lauretta her share of the pension benefits upon Frank's retirement. Entering a QDRO at the time of dissolution would be meaningless if the trial court actually intended for the marital portion of Frank's pension to be determined at a later time.

Part of the reason for rejecting the former wife's proposed QDRO was the clause regarding increased benefits. It stated:

Any increases in the Husband's accrued benefits in [the pension plan] caused by contributions occurring subsequent to the marital retirement date are not to be construed as part of the marital portion. Accordingly such increases shall be disbursed to and enjoyed solely by the Husband and the Wife shall not be entitled to share in any such increases."

The appellate court commented, "It is difficult to adopt Lauretta's proposed method of calculating her share of the pension benefits without directly violating the terms of this provision." The appellate court did so regardless of the former wife's argument that the *Hunt* formula was preferred.

The appellate court also distinguished the <u>*IRMO Richardson*</u> decision. The appellate court commented:

First, *Richardson* is only relevant in cases where the judgment of dissolution is "silent" on how the martial portion of the pension benefits is to be calculated. Richardson, 381 Ill. App. 3d at 53. In *Richardson*, the judgment stated nothing more than that the former wife was awarded one-half of the marital portion of the pension and did not state how the marital portion would be calculated. Richardson, 381 Ill. App. 3d at 53. IRMO *Culp*, another case Lauretta relies on, also involved a settlement agreement which "contain[ed] no explicit language directing the trial court how to divide the marital portion of the pension other than to do so 'equally." *In re Marriage of Culp*, 399 Ill. App. 3d 542, 552 (2010).

¶ 31 In contrast to <u>*Richardson*</u> and <u>*Culp*</u>, the judgment in the case at bar incorporated a QDRO that includes specific language detailing the marital retirement date and a formula for calculating the marital portion of pension benefits. The parties' QDRO also explicitly prohibits Lauretta from sharing in any increases in Frank's accrued benefits caused by contributions made after the date of dissolution. The judgment in Richardson and settlement agreement in *Culp* did not include a similar provision or such restrictive language as the QDRO did here. These differences clearly

demonstrate that the judgment in the case at bar was not "silent" in regards to the method of pension apportionment. As a result, Richardson does not control here because the trial court did not have the "discretion" to decide how to calculate the pension benefits and was precluded from using the reserved jurisdiction approach. *Richardson*, 381 III. App. 3d at 53.

¶ 32 Second, the trial court in Richardson was able to choose the reserved jurisdiction approach because the judgment expressly indicated that the court shall retain jurisdiction for the purpose of later entering a QDRO. *Richardson*, 381 III. App. 3d at 52. The court interpreted the judgment to mean "by reserving jurisdiction to enter an allocation order, the court also reserved jurisdiction to determine the calculation of that allocation." *Richardson*, 381 III. App. 3d at 53. The case at bar differs from Richardson in that a QDRO was incorporated into the judgment at the time of the dissolution. The trial court did not retain jurisdiction to allocate the pension benefits because a QDRO had already set forth the calculation of the marital portion of the pension when judgment was entered. Again, Richardson does not apply because the trial court does not have the discretion to decide on a method of pension apportionment when the judgment has already done so through the parties' QDRO.

Finally, the former wife argued that the standard coverture fraction approach should be followed due to the change in the QILDRO statute with the amendments. She urged that these changes rendered the QDRO void and thus triggering the "savings clause" within that QDRO. The appellate court stated:

The savings clause does not afford Lauretta another opportunity to formulate a method of apportionment which will entitle her to a greater share of the pension benefits than what was originally agreed to in the parties' martial settlement agreement and QDRO. However, an appropriate qualified Illinois domestic relations order is required to direct the pension fund to pay Lauretta her share of the benefits.

The case was only remanded for the entry of a QDRO following the former husband's language providing for the limited benefits that he argued for.

### *Richardson* - Defined Benefit Plan (Police Pension Fund) / Coverture Fraction Approach *IRMO Richardson*, 381 Ill.App.3d 47 (1<sup>st</sup> Dist, 2008), <u>GDR 08-31</u>.

In this case, the parties' marital settlement agreement somewhat addressed the husband's interest in a <u>defined benefit plan</u>: Village of Hoffman Estates Police Pension Fund. The MARITAL SETTLEMENT AGREEMENT simply awarded the former wife one-half of her former husband's pension "as it has accrued" from the date of the marriage to the date of the dissolution judgement. The significant dates were:

Date of benefit accrual:	October 12, 1973
Date of Marriage:	June 14, 1984
Date of Divorce:	March 27, 1995

Date Benefits in Pay Status:December 2002 (total years 29 years).Date of Allocation Order:March 2007

Significant amounts as explained below were:Fractional Approach:\$1,112.62Frozen Interest Approach:\$624Husband's Gross Benefits:\$6,012.83

Under the Illinois Pension Code, 40 ILCS 5/3-111, for service in excess of 20 years, the pension benefit is 50% of final salary plus 2.5% of salary for each year up to 30 years. Thus, the cap is 75% of final pay. Because the husband had 29 years of service, his yearly benefit was calculated at 72.5% of his final salary, for a monthly benefit of \$6,012.83 gross. In September 2003, the former husband started paying his former wife an amount toward her share of the benefits admittedly guessing at the amount. His testimony was that he contacted the fund and they told him to pay \$624 per month which he began paying in December 2003 plus additional sums to cover the year of missed payments. The former wife's petition seeking the entry of a QDRO<sup>1</sup> was dismissed and then she brought a motion requesting a judgment for the correct monthly amount and payment of an arrearage. The former wife urged that she should receive either \$1,118.44 or \$1,112.67 per month, depending on which of the two allocation formulas suggested by her expert applied, plus her share of the 3% cost of living increases petitioner would receive annually starting in January 2005. The former husband urged her share should be \$625.40 per month since the former wife should not receive the benefit of the years he worked before and after the divorce.

The former wife's expert used two approaches with the second approach being the traditional fractional approach and the first approach being what he termed a "subtraction approach." The former husband's expert was an actuary for the Village of Hoffman Estates. He urged the \$625 figure based upon the fact that a police officer with more than 10 years of service as of the date of the divorce would have received 2.5% of salary for each year of service. He calculated the marital portion at 25% of the salary the former husband was receiving at the time of the divorce decree in 1995 (the then salary of \$60,037). Both experts agreed that the annual 3% cost of living increases petitioner would receive starting in January 2005 were not earned benefits resulting from petitioner's service as a police officer and he would get them annually no matter how many years he participated in the pension plan.

The appellate court approved of the use of the fractional approach (sometimes called coverture fraction or timeline approach and by the former wife's expert called the "reserved jurisdiction" approach). It also required the former husband to "pass along the 3% cost of living increases whenever he receives them" and to pay the arrearage based upon the proper calculations. The

<sup>&</sup>lt;sup>1</sup>The decision does not comment about the fact that a QILDRO would have been the proper vehicle or the change in the QILDRO law made after the husband went into pay status but before the decision was ultimately entered nor does it comment upon whether there was any impact due to the *Menken* decision.

case has an excellent discussion of case law. The appellate court also affirmed the trial court's award to the former wife of the proportionate share of the cost of living increases.

*Comment*: At the time of the entry of the divorce decree, the first version of the QILDRO law has not yet been passed. Accordingly, the decree anticipated what was essentially a "triangular order", i.e., one in which the plan paid funds to the former husband who in turn paid them over to the former wife.

### Issues Related to Failure / Refusal to Sign Consent to Issue QILDRO

#### **Constructive Trust**

# *Winter I*- QILDROs / Imposition of Constructive Trust for Pension Distributions Where Party Refuses to Sign Consent for Issuance of QILDRO

IRMO Winter, 387 Ill. App. 3d 21 (1st Dist., 2008)

*Winter* is an interesting case in which the First District appellate court faced the issue of a refusal to sign a consent for issuance of a QILDRO in light of the Second District's *IRMO Menken*, 334 Ill. App. 3d 531 (2d Dist. 2002) which had held that the trial court lacks the authority to order a state governmental plan participant to execute a consent for issuance of a QILDRO but the trial court has authority to enter a "triangular" type order, that is, one in which the participant is ordered to pay over the appropriate portion of his or her pension funds if and when received. In this case, the appellate court faced the situation where the triangular order and reliance upon the contempt power of the court was not workable because the participant lived outside of the United States. Based upon the facts of the case the appellate court affirmed the trial court's imposition of a constructive trust. Perhaps the most interesting language of the decision was the comment, "(We note, Ms. Winter did not challenge *Menken's* holding that a court may not compel consent under the QILDRO statute.)" The comment by the court seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

# *Reda v. Estate of Reda –* Court Properly Imposed Constructive Trust on Estate Where No QILDRO Entered / Amount Not Half of Contributions Plus Interest

Reda v. Reda, (1<sup>st</sup> Dist., 2<sup>nd</sup> Div., February 15, 2011)

The wife was properly awarded a half interest in her husband's pension which remained in the pension plan until his death, nine years after the divorce. This had included the interest that had accrued in the pension plan on her half up to the time of his death. The intent at the time of the divorce was to award wife the accrued value of half the benefits when it was time for benefits to be distributed. Otherwise, the husband's estate would be unjustly enriched by husband's breach of the MSA in failing to obtain a life insurance policy or annuity as the MSA required.

The MSA had provided:

"P. Mario currently has an interest in the State University Retirement System Pension of Illinois, hereinafter designated 'the pension plan' \*\*\*. 1. Current

Contribution. Mario's total cash contributions to the pension plan, plus interest thereon, *was currently valued at \$64,920 as of January 1, 1988.* 

2. Termination of Employment. In the event Mario shall, for any reason whatsoever, regardless of cause, prior to retirement, cease to be an 'employee,' \*\*\* or commences a leave of absence or leaves of absence having a total or combined duration of in excess of 2 calender years, \*\*\* he shall apply for a refund of his contributions plus interest thereon and pay to Janis within fifteen (15) days from the date of receipt by him of said lump sum pension payment, the sum of \$32,460 plus the proportion of the interest earned after December 21, 1987 attributable to the sum of \$32,460. 3. Death of Mario Prior or Janis Prior to Retirement. Mario shall obtain within thirty (30) days from the date of entry of the Judgment for Dissolution of Marriage a life insurance policy on his life or an annuity in the face amount of \$32,460.00 payable to Janis as irrevocable beneficiary. \*\*\* Mario shall provide Janis with proof of purchase, the original life insurance policy or annuity contract and proof of premium payment on an annual basis \*\*\*.

The appellate court also commented that:

Paragraph (P)(4) of the agreement provided Janis with an interest, upon Mario's retirement, of her half of the pension benefits. Paragraph (P)(4) accounted for the accrued value of Janis's half of the monthly annuity payments Mario would have received during retirement.

Testimony at the prove-up stated:

Specifically, Janis testified: "MS. VEON [Attorney for Janis]: In addition to that, Mr. Reda has agreed to *obtain an insurance policy or an annuity which will pay you your portion of the death benefit based on what Mr. Reda currently has accrued in the pension*, if in fact he should remarry and then die prior to you receiving your portion of the death benefit in that plan?

JANIS: That's correct." (Emphasis added.)

The former husband died in 2007. The estate filed a motion to reconsider when the former wife received the contribution amount. The trial court ultimately entered a judgment against the Estate in the amount of \$160,121. The amount of \$160,121, included the former wife's share of the pension at the time of the divorce judgment and the interest that accrued until Mario's death. The trial court reasoned that "[w]hen I read the judgment language and what was at issue here, without any question Jani[s] was awarded a portion of his pension benefits, that being a marital asset."

The appellate court stated:

In this case, the language of the judgment of dissolution of marriage and the oral marital settlement agreement, as testified to by both Janis and Mario, show their intent for Janis to have one-half of Mario's pension based on the amount accumulated at the time of their divorce. Blum, 235 Ill. 2d at 33 ("the court must ascertain the parties' intent from the language of the agreement"). Paragraph (P) of the judgment of dissolution of marriage outlines the parties' rights and obligations as to Mario's pension. Paragraph (P)(3) specifically states what should happen should Mario die before retirement, and, thus, is the controlling provision here.

By the terms of the agreement, Mario was required to buy a life insurance policy or an annuity in the amount of \$32,460 to protect Janis's interest. The Estate argues that Janis should receive only \$32,460 based on the requirement to buy life insurance or an annuity in that amount. However, Mario never bought a life insurance policy or annuity as required under the agreement. Mario's breach in failing to buy such a policy or annuity renders it impossible to ascertain what the parties intended, or at a minimum what Mario intended, to be the exact amount Janis would receive upon his death. We note the judgment of dissolution of marriage does not state what type of life insurance or annuity Mario was required to buy. If he had bought a term policy, then no interest would accrue. Had he purchased whole life or an annuity, then interest would have accrued on Janis's \$32,460. We cannot speculate what amount Janis would have received at Mario's death had Mario fulfilled his obligation under the agreement and purchased insurance or an annuity. It is a nonevent, which due to Mario's breach in failing to perform becomes immaterial to our analysis. Most importantly, Janis agreed in response to the question during her testimony that Mario was "to obtain an insurance policy or annuity which will pay you your portion of the death benefit based on what [Mario] currently has accrued in his pension, if in fact he should remarry and then die prior to you receiving your portion of the death benefit plan." The question and her response supports a conclusion that the purpose of paragraph (P)(3) of the judgment was to insure Janis received her share of the death benefits, which included her designated one-half of the pension and the interest that accrues on her one-half up to the time of Mario's death.

Because of the importance of the case it will be quoted at length:

In determining the parties' intent, we must consider the whole judgment of dissolution of marriage. Karafotas, 402 Ill. App. 3d at 571. Awarding Janis \$161,121, the value of her half of the pension at the time of Mario's death, is an outcome consistent with paragraphs (P)(2) and (4) of the judgment of dissolution of marriage, should those provisions have applied. Paragraph (P)(2) makes clear that if Mario had ceased to be an employee, Janis would have received \$32,460, plus interest in the form of a lump-sum pension payment. Paragraph (P)(4) would have awarded Janis the accrued value of \$32,460 upon Mario's retirement in the form of an annuity. Considering the whole agreement, we find that it was the intent of the parties at the time of the dissolution of marriage to award Janis the

accrued value of her half of the pension benefits when the time came for those pension benefits to be distributed. Awarding Janis only \$32,460, as opposed to the accrued value of \$161,121, would be inequitable as it would go against the intent of the parties at the time of the agreement. Furthermore, doing so would allow the Estate, through Mario's breach of the marital settlement agreement, to be unjustly enriched. See Smithberg v. Illinois Municipal Retirement Fund,192 Ill. 2d 291, 299 (2000) ("[w]hen a person has obtained money to which he is not entitled, under such circumstances that in equity and good conscience he ought not retain it, a constructive trust can be imposed to avoid unjust enrichment"). By failing to obtain either the life insurance policy or the annuity as required by the agreement, Mario avoided having to pay any premium on those policies or to pay a lump sum on an annuity from the time of the judgment of dissolution of marriage in 1988 until his death in 2007. The money that Mario, and by extension the property that became his estate upon his death, should have paid on the life insurance or annuity policy unjustly enriched Mario at the expense of Janis.

Finally, to award Janis \$161,121, comports with the notions of equity and fairness and the ability for the circuit court to enforce its judgment of dissolution of marriage. Our supreme court, in discussing the equitable apportionment of pension benefits in a divorce proceeding, stated: "[I]n many cases pension benefits may constitute one of the most important items of property acquired in a marriage of long duration; in some perhaps, it may be the only asset of any significant value. To deprive a domestic relations court of the power to apportion the value of such a significant marital asset, and enforce the apportionment, would, in many cases, deprive the court of the ability to do justice between the parties. A court's authority to enforce its judgment, equitably apportioning marital assets, surely cannot be subordinate to the whims of one of the parties in the divorce proceeding or defeated by his or her blatant violation of the parties' agreement as incorporated in a judgment of dissolution. As we have demonstrated, courts are not powerless to enforce their judgments." Id. at 304. This statement of our supreme court is particularly relevant in the instant case. Mario did not comport with the judgment of dissolution of marriage by purchasing life insurance or an annuity. Pension benefits are a marital asset that is subject to division. In re Marriage of Abma, 308 Ill. App. 3d at 615. To enforce its judgment, the circuit court properly awarded Janis the value accrued for her half of the pension benefits. The award of \$161,121 comports with notions of justice and fairness and is the most equitable result based on the judgment of dissolution of marriage and Mario's actions in failing to protect Janis's interest in her half of the pension.

#### What Constitutes Consent for Issuance of QILDRO?

# *Plunkett* - QILDROs / MSA as Effectively Constituting Consent for Issuance of QILDRO Even Where it Refers to a QDRO

*IRMO Rafferty Plunkett v, Plunkett*, 392 Ill. App. 3d 100 (Third Dist., 2009) The *Plunkett* decision states:

As part of the settlement agreement incorporated into the dissolution judgment, Marie was awarded 50% of Patrick's pension plan benefits acquired during the marriage. The judgment provided, in part:

"As the Defendant is currently receiving his pension, it is the agreement of the parties that the Defendant shall pay Plaintiff one-half (½) of said pension amounts directly to Plaintiff commencing October 1, 1998[,] and continuing thereafter until such time as a Qualified Domestic Relations Order1 becomes effective for the benefit of Plaintiff."

It then explains in a footnote:

The dissolution order incorrectly called for a qualified domestic relations order (QDRO). A QDRO is a creature of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C.A § 1001 et seq. (2006)), and although it is also a method for dividing pension benefits between the employee spouse and the nonemployee spouse pursuant to a dissolution of marriage, ERISA does not apply to an employee benefit plan if it is a government plan. *In re Marriage of Carlson*, 269 III. App. 3d 464, 466–67 (1995). Prior to July 1, 1999, there was no statutory basis following the dissolution of a marriage for the apportionment of a government pension plan, a void addressed by the QILDRO legislation. C. Fain, Qualified Illinois Domestic Relations Orders: A Retirement System View, 88 Ill. B.J. 533 (2000).

The key quotation stated:

The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of section 1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

**Comment**: The original *Menken* decision is the first post-QILDRO decision holding that because you cannot order a participant (provided benefits began accruing post 1999) to sign a consent and therefore the proper approach is the so called triangular approach. Read *Menken* together with *IRMO Winter*, (1st Dist., 2008), *IRMO Culp* (4th Dist. 2010) and *IRMO Plunkett*, (Third Dist., 2009).

*Winter* held that the court could impose a constructive trust on pension distributions where a triangular order cannot work due to the participant being outside of the jurisdiction of the court, I have noted that the most interesting language of *Winter* was the comment, "(We note, Ms. Winter did not challenge Menken's holding that a court may not compel consent under the QILDRO statute.)" This comment by the later *Winter* decision seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

*Culp*, in turn, addresses a different nuance, i.e., what occurs where the settlement agreement provides for an equal division of benefits under the Illinois Pension Code [there SERS benefits] per a QILDRO but where the participant then refuses to sign the consent to issue a QILDRO. So in *Culp* the question whether the MSA provision was tantamount to a consent such that the a QILDRO could be entered by ordering the husband to sign the consent. Remember that in *Culp* the trial court ordered the ex-husband to sign the consent for issuance of a QILDRO. As a matter of guidance the husband did not appeal from the issue of the order of the trial court to sign the consent based on the MSA language. My speculation is that the participant abandoned this approach based upon the *Plunkett* decision.

Instead, the case which effectively addressed this issue was the *IRMO Plunkett* decision. *Plunkett* involved the issue of whether the MSA could constitute a consent for the issuance of a QILDRO where the MSA mistakenly referred to the a Qualified Domestic Relations Order rather than a QILDRO. *Plunkett* had then held:

The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of section 1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

So we have a growing body of exception to the hardship imposed by the requirement based upon the language in the Illinois Pension Code that a participant who accrued benefits prior to the effective date of the original QILDRO legislation needed to sign a consent for issuance of a QILDRO. The reason for this language had been the belief that if it was not included in the statute there may be an unconstitutional wrongful taking. While this belief was surely misguided we are left with cases trying to carve out exceptions to the problems imposed by the limitations of the original QIDRO legislation.

## Are Disability Benefits Pension Benefits Under Illinois Pension Code?

*Benson* – Property: Retirement Benefits: Post-Judgement Order Requiring Payment of Portion of Disability Payments as Being in Nature of Disability Pension

# *IRMO Benson*, 2015 IL App (4<sup>th</sup>) 140682 (May 26, 2015)

In 1999, the trial court entered a judgment for dissolution. The primary marital asset was the husband (David's) pension. The divorce decree judgment entered as a result of a trial provided, in pertinent part:

"[Nancy] is granted a one-half interest in [David's] retirement plan through the Decatur Fire Department and his ICMA retirement account. Transfer of said funds shall be accomplished through qualified [Illinois] domestic relations orders."

David continued to work as a firefighter until 2008 when he was injured on a call. In 2008, he began receiving disability payments. At the time, David was 59 years old, had approximately 35 years of service, and was eligible to retire and draw a retirement pension. He continued to own and operate Benson Disposal, a family-owned garbage service he acquired from his father, until July 2012, when he sold it. In 2013, the former wife filed what was titled, "Petition to Divide Pension Benefits." In her petition, she alleged that she believed David was receiving retirement benefits but he refused to confirm that. Nancy stated she had attempted to file a QILDRO but had been unable to do so. Nancy requested an order directing David to pay her the appropriate share of his retirement benefits pursuant to the 1999 dissolution judgment as of the date he began receiving them. David argued Nancy's petition should be dismissed because the pension benefits had already been divided in the 1999 order and he was "not receiving retirement benefits but [was] receiving disability benefits." In 2013, the former wife filed a petition to enforce the terms of the divorce judgment. She alleged that the former husband refused to sign a consent for the entry of a QILDRO, and that by electing to receive a disability pension instead of a retirement pension, David had "refused, permanently, any share of his pension to [Nancy]."

During the April 15, 2014, hearing on Nancy's petitions, David was the only witness called to testify. David testified there was never any agreement regarding retirement benefits (because the case was contested) and the trial court's ruling pertained only to his retirement pension and did not mention disability benefits. At the time of the hearing, David's monthly benefits were \$4,569.27. David testified he received his disability benefits tax-free. He admitted if he elected to take his retirement pension he would have to pay taxes on it. The disability benefits also included free health insurance for David and his current spouse. David testified he intended to continue to draw disability benefits as long as he was allowed. David argued the dissolution judgment did not mention disability benefits and there was no assignment of disability benefits. In arguing against a retroactive award, David argued Nancy should have come to court and asked for an award earlier.

The appellate court noted:

Nancy introduced plaintiff's exhibit No. 4, a letter from Cary J. Collins, the attorney for the Decatur Firefighters Pension Board, into evidence without objection. That letter referred to David's disability benefits as a "pension benefit." The letter also stated David was not required to convert his disability pension to "a regular retirement pension." Instead, converting to a regular retirement pension "is only an option which a firefighter may exercise." Nancy also introduced

plaintiff's exhibit No. 5, a copy of a document entitled "Firefighter's Pension Plan Description," into evidence without objection. This document shows benefits through the pension plan include disability benefits. Nancy also introduced plaintiff's exhibit No. 9 into evidence as a demonstrative exhibit. It contained figures showing Nancy's share of David's pension would be 37.6% based on the number of years he worked and the time they were married. David did not object to the 37.6% figure. Nancy also requested an award of past-due disability payments dating to February 2008, i.e., when David began receiving those payments. Nancy acknowledged her petition was filed six years after he started to draw disability, but she argued she "never had the ability to take [David] to court to get her share of this pension."

The trial court found David's disability benefits were in the nature of a disability pension and, as a result, Nancy was entitled to a fractional interest in those benefits. The court awarded Nancy 37.6% of David's disability benefits dating back to 2008, when David first began receiving them, as well as 37.6% of David's monthly disability benefits going forward. The court found, although Nancy failed to seek enforcement of the 1999 judgment until 2013, she was still entitled to the benefits because David's obligation to make those payments was already in existence as a result of the 1999 judgment and it had just gone unenforced. The court deferred entering specific dollar amounts to a later date. A later order determined the past-due amount that the former wife was to receive was \$116,345. Nancy was awarded on a going forward basis \$1,718 (as adjusted for increases).

The appellate court stated, "Under the circumstances presented in this case, the trial court did not err in finding Nancy was entitled to a share of David's disability benefits where the dissolution judgment awarded Nancy a portion of David's "retirement plan" and those benefits can reasonably be considered part of that plan."

Next, David argued that disability benefits are not subject to division based on a QILDRO. See 40 ILCS 5/1-119(b)(4)("A QILDRO shall not apply to or affect the payment of any survivor's benefit, disability benefit, life insurance benefit, or health insurance benefit."). David then appears to argue his disability benefits are therefore not subject to division. The appellate court disagreed. The appellate court noted that in essence the order was a triangular order under which the Plan would pay disability benefits to the former husband and then he would pay them over to his former wife:

Nothing in section 1-119 prohibited the court from doing so. See *In re Marriage of Menken*, 334 III. App. 3d 531, 534, (2002) (citing *In re Marriage of Roehn*, 216 III. App. 3d 891, 895, (1991) (in situations where a spouse is awarded a portion of the other spouse's benefits and a QILDRO cannot be entered, payments may be made "triangularly" from the retirement fund to the retiree and then from the retiree to the spouse)).

The holding regarding past-due benefits is even important to this decision. The appellate court

stated, "David mischaracterizes the trial court's \$116,345.19 award to Nancy for past-due benefits as retroactive." It then stated succinctly:

In this case, the trial court did not modify the original 1999 dissolution judgment. Instead, it construed it to have always included disability benefits as part of David's retirement plan. In other words, the court was not creating a new property right in its 2014 order but rather enforcing a preexisting right under the 1999 judgment. The trial court did not err in awarding Nancy a portion of David's disability benefits dating to February 2008, when he first began receiving them.

**Comment**: This is an important case building on the prior case law. Note that the husband was likely actually penalized by being litigious if the amount he was to pay was based upon his gross rather than net. If he had received a normal retirement pension he would have had to pay taxes on it. But his disability benefits were tax free.

SB 57 / PA 99-90 provides at Section (f): "<u>Property provisions of an agreement are never</u> <u>modifiable</u>." This is dangerous language. Case law had held that property settlements are in a sense modifiable in any number of situations. In a sense, the trial court has the authority to reform a marital settlement agreement where it calls only for a division of retirement benefits but instead there are disability benefits. The case law focuses on the ability to reform the marital settlement agreement in appropriate cases. Other cases have focused on the revestment doctrine. Sample quotes from another case state (the 2006 Miller case):

Other Illinois courts have applied the revestment doctrine in similar situations. In Adamson, the Second District relied upon the doctrine to affirm the trial court's judgment, which modified the original final judgment of dissolution entered four years earlier when the parties had agreed to the modification. *Adamson*, 308 Ill.App.3d at 767-68. The court found that the agreement revested the trial court with jurisdiction despite the passage of more than two years. *Adamson*, 308 Ill.App.3d at 767.

Likewise, the Third District affirmed the trial court's denial of the wife's petition to vacate a stipulated judgment, which modified the original judgment of dissolution. *Elmore*, 219 Ill.App.3d at 65. The wife filed her petition to vacate four years after the modified judgment was entered. Citing section 510(b) of the Act, the wife claimed the modified judgment was void for lack of subject-matter jurisdiction because there were no allegations that the original judgment was procured by fraud or coercion or that any facts existed to entitle them to postjudgment relief under section 2-1401 of the Code. *Elmore*, 219 Ill.App.3d at 64. The trial court ruled that jurisdiction had revested by agreement of both parties. The reviewing court agreed, holding that the judgment of modification was binding.

## Schurtz - QILDROs / Defined Benefit Plan (Firefighters Pension Fund - Are Disability

### **Benefits Pension Benefits)?**

IRMO Schurtz, 382 Ill.App.3d 1123 (3rd Dist., 2008)

This case was another case involving retirement benefits covered under the Illinois Pension Code stemming from the time when QILDROs were not allowed. The 1993 settlement agreement stated in part:

As a part of the distribution of marital property, the parties will divide evenly JOHN B. SCHURTZ' accrued retirement pension benefits as of September 16, 1993, if, as, and when received by him. \* \* \* In the event a Qualified Domestic Relations Order is lawfully able to be entered in the future with regard to said pension, each party will cooperate to the entry thereof."

In late 2004, when the former husband was 62 years old, he became unable to work as a firefighter and applied for disability benefits. The City of Peoria Fireman's Pension Board approved his application and he began receiving \$4,374.00 per month in disability payments. In February 2005, the former wife's lawyer sent the former husband a letter requesting consent to issue what should have been called a QILDRO (the decisions indicates the lawyer requested to issue a QDRO). When the former husband refused, the former wife filed a petition for rule in which she sought to enforce to enforce the judgment. The decision discusses the former husband's testimony that he did not necessarily intend to retire although it was possible he could stay on disability as long as he lived therefore bypassing retirement benefits. The trial court granted the former wife's petition for rule holding the disability pension to be a retirement pension consistent with the MSA. The former wife then filed a petition for fees per § 508(b) claiming that his failure to sign the consent for issuance of a "QDRO" was "without cause or justification."<sup>2</sup> The court required the former husband to reimburse his former wife for payments he should have made but did not require pre-judgment statutory interest. The court denied the former wife's request for attorney's fees finding he had a good faith justification for his conduct.

Schurtz has a good discussion regarding disability and retirement benefits. It states:

When a pension plan provides disability benefits as well as retirement benefits and the marital settlement agreement refers only to "retirement" benefits and is silent as to disability payments, a court may reasonably interpret the agreement in one of two ways: (1) as a grant to the ex-spouse of a portion of any benefits received under the pension plan, or (2) as limiting the ex-spouse's interest in the pension plan to normal, age-related retirement benefits. \*\*\* When a pension plan provides disability benefits as well as retirement benefits and the marital settlement agreement refers only to "retirement" benefits and is silent as to disability payments, a court may reasonably interpret the agreement in one of two ways: (1) as a grant to the ex-spouse of a portion of any benefits received under the pension plan, or (2) as limiting the ex-spouse's interest in the pension plan to normal, age-related retirement benefits. This interpretation is reasonable because

<sup>&</sup>lt;sup>2</sup>The mis-quote from the statute is noteworthy since §508(b) has used the phrase without "compelling" cause or justification since 1997 (at the time of the "Leveling" amendments.)

the disability pay is meant to replace the disabled ex-husband's income, not act as retirement pay. However, when an ex-husband is entitled to receive retirement pay and is receiving disability income instead, a settlement agreement providing the ex-wife a portion of retirement benefits "can be reasonably interpreted in only one way -- the petitioner [should] be paid the percentage of what would be the normal retirement benefits, whether respondent [is] paid normal retirement benefits or disability retirement benefits." It is not the label of the payments (i.e., disability or retirement) that controls.

In this case the appellate court found the former husband was eligible for retirement pay when he began receiving disability benefits instead of retirement benefits. See 40 ILCS 5/4-109(a). Moreover, the amount was exactly the same as he would have received had he received retirement benefits. The appellate court concluded in this regard:

His disability benefits do not serve as income replacement, but as a replacement for his retirement pension. Thus, the trial court properly found that Lynette was entitled to share in the payments.

Of note is the position taken by the dissent pointing out that there were two amicus briefs filed by various firefighter groups urging that the Illinois Pension Code exempts disability benefits where the Pension Code states, ""a QILDRO shall not apply to or affect the payment of any ... disability benefit..." The dissent urged that a matter of statutory construction should be considered as a matter *de novo* and states:

While there are no cases adopting the position articulated by the *amici*, I am convinced that the legislative intent is nonetheless clear. Based upon the statutory analysis proffered by the amici, I would find that the trial court erred as a matter of law in subjecting John's disability benefit to division.

Note: The petition for leave to appeal was denied.

## **Surviving Spouse Benefit**

#### *Winter II* – For Pension Benefits Covered under the Illinois Pension Code (QILDROs), Surviving Spouse Benefit Was Not Marital Property Subject to Distribution *IRMO Winter*, (*Winter II*), 2013 IL App (1st) 112836

Unfortunately, the decision in *Winter II* was to be expected. Recall that *Winter I* was the 2008 decision, 387 Ill. App. 3d 21, 23-24 (2008). That was the case that had held that where a party refuses to sign a consent for issuance of a QILDRO, the imposition of a constructive trust regarding benefits held under the Illinois Pension Code was proper. This was an excellent case law decision developing the law regarding what can occur in the absence of a consent. Unfortunately, the ultimate holding is that based on the language of the statute (the Illinois Pension Code) surviving spouse benefits are not subject to distribution. I liked the arguments posed by the former wife. Unfortunately, Illinois' statutory scheme prevailed. One may recall that Illinois divorce lawyers were told at the time of the compromise in which QILDRO

legislation was passed that very soon amendments would provide for surviving spouse provisions – similar to what is provided via ERISA covered plans. Despite the pension reform, it is hard to imagine that the needed statutory amendments will occur any time soon.

# Executive Summary QILDRO Case Law:

- <u>Menken</u>: 334 Ill. App. 3d 531 (2d Dist. 2002). <u>Menken</u> is the first post-QILDRO legislation decision holding that because you cannot order a participant (provided benefits began accruing post 1999) to sign a consent, the proper approach is the so called triangular approach. Read *Menken* together with *IRMO Winter*, (1st Dist., 2008), *IRMO Culp*, (4th Dist., 2010) and *IRMO Plunkett*, (3rd Dist., 2009).
- <u>Winter</u>: 387 Ill. App. 3d 21 (1<sup>st</sup> Dist., 2008). <u>Winter</u> held that the court could impose a constructive trust on pension distributions where a triangular order cannot work due to the participant being outside of the jurisdiction of the court, I have noted that the most interesting language of *Winter* was the comment, "(We note, Ms. Winter did not challenge *Menken's* holding that a court may not compel consent under the QILDRO statute.)" This comment by the later *Winter* decision seemed to reflect a frustration with not being able to review the issue presented by the Second District's *Menken* decision.

But curiously, the *Winter* decision is not in accord with a recent ERISA decision, *Metropolitan Life Ins. Co. V. Cline*, \_\_\_\_\_ F.2d \_\_\_ (9th Cir. 2010). *Metropolitan Life* held that the imposition of a constructive trust on retirement plan proceeds paid to widow of decedent, and in favor of his second wife, was not permitted. It stated that such a constructive trust circumvented ERISA and, therefore, was preempted. That case has held, "The district court held ERISA did not preempt the creation of such a trust. The appellate court stated: "**While certain circumstances allow for the imposition of a constructive trust over the proceeds from a pension plan**, those circumstances are not present here. The imposition of a constructive trust simply cannot be used to circumvent ERISA preemption except in the limited circumstances where a valid QDRO exists."

<u>Culp</u>: Culp, 399 III. App. 3d 542 (4th Dist., 2010). Culp, in turn, addresses a different nuance, i.e., what occurs where the settlement agreement provides for an equal division of benefits under the Illinois Pension Code [there SERS benefits] per a QILDRO but where the participant then signs the consent to issue a QILDRO. So in *Culp* the question whether the MSA provision was tantamount to a consent such that the a QILDRO could be entered by ordering the husband to sign the consent was not reached. Remember that in *Culp* the trial court ordered the ex-husband to sign the consent for issuance of a QILDRO. But the husband did not appeal from the issue of the order of the trial court to sign the consent based on the MSA language. My speculation is that the participant abandoned this approach based upon the *Plunkett* decision.

•

Plunkett: 392 Ill. App. 3d 100 (3rd Dist., 2009). Instead, the case which effectively addressed this issue was the *IRMO Plunkett* decision. *Plunkett* involved the issue of whether the MSA could constitute a consent for the issuance of a QILDRO where the MSA mistakenly referred to a Qualified Domestic Relations Order rather than a QILDRO. The key holding of *Plunkett* was:

The judgment for dissolution order contained nearly all the provisions required by the Pension Code and as such, meets the requirement of the written consent called for in the Pension Code. Patrick's consent should be considered binding, as would any other provision of the contracted settlement agreement. Patrick's consent, through the agreed settlement, can be read together with the QILDRO forms provided by SURS to give effect to the intention of the parties in reaching the settlement and to fulfill the substantial compliance directive of §1-119(m)(1) of the QILDRO legislation. In the instant case, the trial court retained the authority to enforce the settlement agreement, just as it could have directed SURS at the time of the dissolution order to direct pension payments to Marie.

• <u>Short Conclusion</u>: So we have a growing body of exceptions to the hardship imposed by the requirement based upon the language in the Illinois Pension Code that a participant who accrued benefits before the effective date of the original QILDRO legislation needs to sign a consent for issuance of a QILDRO. The reason for this language had been the belief among some lobbying against the legislation that if it was not included in the statute there may be an unconstitutional wrongful taking of pension benefits. While this belief was misguided, we are left with cases trying to carve out exceptions to the problems imposed by the limitations of the original QILDRO legislation.

## Enforcing Property Division Where No Initial QDRO and Nature of Ultimate Division

# *Hall* – Trial Court had Authority to Enforce Retirement Plan Division Although Plan in MSA Not Mentioned by Name

IRMO Hall, 343 Ill.Dec. 514 (2nd Dist., 2010).

*Hall* involves one more case where the orders dividing the retirement benefits were not entered at the time of the divorce causing problems years later for the parties. The MSA in *Hall* had provided:

18.1 [Respondent] is a plan participant in the Anheuser-Busch Deferred Income Stock Purchase and Savings Plan, and is also a plan participant in a second retirement plan referred to as the Kraft Foods Thrift Plan. With respect to the Anheuser-Busch Deferred Income Stock Purchase and Savings Plan, the parties agree to enter into a Qualified Domestic Relations Order [(QDRO)] providing for the distribution of fifty percent (50%) of the account balance to [petitioner], as alternate payee, as of the date of entry of this [judgment of dissolution of marriage]. With respect to the Kraft Foods Thrift Plan, the parties agree to enter into a [QDRO] providing for the distribution of fifty percent (50%) of the account balance to [petitioner], as alternate payee, as of the date of entry of this [judgment of dissolution of marriage].

\* \* \*

18.4 It is the intention of this [article] that [petitioner] is to receive fifty percent (50%) of the account balance of each of [respondent's] retirement plans valued as of the date of the entry of this [judgment of dissolution of marriage]."

It was later apparently learned by the former wife that the former husband had a defined benefit plan. The defined benefit plan is a traditional pension plan. To divide it you would not be dividing an account balance but dividing a future stream of payments. The former wife had petitioned the court to reform or modify the parties' MSA to ensure that she received 50 percent of all of husband's retirement interests, not just the two specifically enumerated in one section of the MSA.

Although she brought her petition pursuant to §§2-1401 and 13-206 of the Code of Civil Procedure, the appellate court ruled that the substance of the petition sought not to modify the judgment, but to enforce it. Therefore, the trial court had jurisdiction to enforce the terms of the MSA without having to establish a basis to vacate the judgment. The Second District appellate court also held that the language of the MSA was unambiguous because one section of the MSA clearly stated that the parties intended to split all of husband's retirement assets, not just the ones listed in a subsequent section of the MSA.

The concurring opinion was better reasoned. It stated, "I disagree with the majority that article 18.4 of the marital settlement agreement is unambiguous." Article 18.3 then states that respondent was responsible for preparing the QDRO for "each of these retirement plans." Article 18.4 then provides that it was the parties' intention to divide the "balance of each of [respondent's] retirement plans." The concurring opinion then stated:

Given the fact that the parties had testified that they intended to divide the marital property equally and that the pensions in question were marital property, I would predict that respondent would have a difficult time prevailing, but I do believe that the question is proper for the fact finder.

I agree.

# **Defined Contribution Plan Issues**

## **Enhanced Benefits**

## *Jamieson* - QDROs / Defined Contribution Plan (Profit Sharing Plan) / Enhanced Benefits *IRMO Jamieson*, 882 N.E.2d 1221 (1<sup>st</sup> Dist, 2008)

This is another case in which the former husband claimed the divorce decree provided the former wife with increased benefits. However, this case did not involve a significant time lapse such as

in *Richardson* and it involved a <u>defined contribution plan</u>. I have urged that best practices are to enter the QDRO at the time of the divorce decree in order to try to ensure avoiding the cost of post-decree litigation. Some lawyers try to address this by indicating in the divorce decree the provisions the QDRO is to contain. This case is an example of the fact that when such provisions are not comprehensive they provide a dis-service to clients because they do not ensure that postdecree litigation will be kept to a minimum.

The June 30, 2006, Marital Settlement Agreement contained the following language:

a. Name of Plan. It is intended that the Wife shall receive an interest in the Husband's benefits in the Jamieson and Associates Money Purchase Pension Trust, and the Husband shall cooperate in entering a Qualified Domestic Relations Order (QDRO) to effectuate this intent. Said [QDRO] shall include the following information and provisions:

iii. Description of Benefit to be Transferred to Alternate Payee. 55% of the marital portion of the total benefits accrued by the Participant under the Plan, as of the date of entry of Judgment of Dissolution of Marriage, shall be segregated into a separate account established in the Alternate Payee's name and invested in accordance with the Plan provisions."

After the divorce, the parties submitted dueling QDROs. Husband's QDRO provided:

Amount of Assignment: This Order assigns to Alternate Payee \* \* \* 55% of the money purchase account of the Participant's Total Account Balances, of said above accounts as determined by the Plan **on or before June 30, 2006**.

Post-Divorce Contributions Attributable to Periods Before Divorce: In the event that the Plan made any contributions to the Participant's account(s) after June 30, 2006, but that are attributable to periods before this date, then such Total Account Balance shall further include such contributed amounts."

## Wife's QDRO provided:

Amount of assignment: This Order assigns to Alternate Payee \* \* \* 55% of the money purchase account of the Participant's Total Account Balances, of said above accounts as determined by the plan **for Plan Year ending September 30**, **2005**.

Post-Divorce Contributions Attributable to Periods Before Divorce: In the event that the Plan made any contributions to the Participant's account(s) for Plan Year ending September 30, 2006, then the Alternate Payee shall receive 41.25% (which is 55% of 75% of the Plan Year) of such contributions as of September 30, 2006."

To understand the reason for the dueling provisions, consider how the profit sharing plan was funded. The plan is made up of a pooled set of assets in a trust for the benefit of all plan

participants. The assets are valued annually on September 30<sup>th</sup>. At that time, the earnings that have accrued in the plan since the prior September, along with any discretionary contributions made by the employer, are allocated among the participants to their individual accounts. The decision explains:

The earnings are allocated based on a participant's individual account balance for the prior year. For example, if a participant's balance represented 25% of the total assets in the trust, he would be entitled to 25% of the earnings that have accrued throughout the year on September 30. The contributions are generally allocated based on a participant's salary. The earnings and contributions are only allocated to participants employed on September 30 and are credited to participants' individual accounts as of September 30 for that fiscal year. If a participant is terminated or withdraws from employment prior to September 30, he would only be entitled to the balance in his account as of the previous year end. He would not be entitled to earnings or contributions for that fiscal year. Those benefits would then be allocated among the remaining participants. Thus, any growth in the profit-sharing plan enures to the benefit of those who are employed at the end of the fiscal year.

The trial court ruled as follows:

The QDRO proposed by Kathleen Jamieson takes into account what occurred between the last valuation date and the dissolution judgment date and provides for a calculable distribution that is consistent with the parties' agreement and the judgment incorporating their agreement. Edward Jamieson presented insufficient evidence of an impact on other Plan participants to support a conclusion that entry of the QDRO proposed by Kathleen Jamieson is impermissible.

The former contended that this provided his former wife with an increased benefit. The appellate court held that the QDRO entered by trial court did not violate either the terms of the MARITAL SETTLEMENT AGREEMENT or ERISA by providing that wife would be entitled to receive a percentage of increase in plan between the last plan valuation date and the end of the new valuation year. Even though the QDRO awarded the wife benefits that were contingent on husband's continuous employment as of date of entry of settlement agreement, it was no longer contingent at time of entry of QDRO.

*Comment*: This is a case where theoretically there would be favorable treatment to the wife for the delay in entering the QDRO. The query remains whether the cost of trial and appellate resulted in a net positive financial impact to the former wife. The reserved jurisdiction approach, i.e., waiting for some time to determine if retroactive contributions are made depends upon the knowledge of how the plan operates. Any time there is a profit sharing plan, you should be aware of the nature of the plan and the fact that there may be what are essentially discretionary contributions. Shulman in his book QDRO Handbook, §13.02(e) at p 13-10, recommends the following language be included in QDROs to clarify the intent: "Further, such Account Balance shall include all amounts (including plan forfeitures, if applicable, contributed to the Plan on behalf of the Participant after the date of the entry of the judgment for dissolution of marriage that are attributable to periods before such date." However, if there is to be an immediate roll-over

and the QDRO is submitted immediately providing for a immediate rollover this would present a problem in terms of qualification of the DRO (domestic relations order). I agree with Shulman's further statement, "From an equitable standpoint, the alternate payee should be entitled to a pro rata share of the contributions made [following the divorce, but attributable to periods before the divorce.] See, p. 16-29. For profit sharing plans, remember that the cap is 25% of earned income which is up to a maximum of \$46,000 (as of 2008 with COLAs following this year.) For further information regarding profit sharing plans see:

www.irs.gov/retirement/article/0,,id=108948,00.html

#### **Reserved Jurisdiction Approach Type Issues**

### **Completely Reserved Jurisdiction re How to Divide?**

*Manker* -- Completely Reserved Jurisdiction Approach (Reserving Jurisdiction to Determine How to Divide Each Party's Defined Benefit Plan in Error *IRMO Manker*, 375 Ill. App. 3d 465 (Fourth Dist., 2007).

The trial court erred when it reserved the entire issue of the allocation of both the husband's and wife's teachers' retirement system pension benefits. In *Manker*, the wife's pension benefits were not in pay status while the husband's benefits were in pay status. The appellate court stated:

By reserving jurisdiction over both parties' pensions, the trial court created an undesirable situation in which this dissolution proceeding would linger for years before apportionment applied.

The court then stated:

The trial court did provide for the method of apportionment of Robin's and Patricia's pensions. The court would divide Robin's pension by the QILDRO requiring 50% of the then-current and future benefits, including post dissolution increases, to be paid to Patricia. The court would also divide Patricia's pension by the QILDRO in accordance with the proportionality rule set forth in *Wisniewski*. *Wisniewski*, 286 III. App. 3d at 240-43. However, the fact that Patricia's pension had not yet matured did not prevent the court from being able to apply the formula to equitably divide Robin's pension. The trial court heard expert testimony regarding the present value and projected future value of her pension. The court could choose to offset that value now and perhaps modify the judgment if the pay out is larger or smaller than the expert's projections when Patricia's pension matures and goes into pay status.

While I agree with the decision entirely, the exception is the last statement, i.e., that the court could "perhaps modify the judgment if the pay out is larger or smaller than the expert's projections when Patricia's pension matures and goes into pay status." Property settlements are generally non-modifiable and accordingly, I would emphasize the use of the word "perhaps."

### **Reserved Jurisdiction Approach Proper Despite Mutual Request for Immediate Offset**

<u>Mouschovias – Trial Court Correctly Used Reserved Jurisdiction Approach Regarding</u> <u>SURS Pension Despite Both Parties Requesting Immediate Offset</u>: <u>IRMO Mouschovias</u>, 359 Ill. App. 3d 348 (4th Dist. 2005).

In this case both parties asked for an immediate offset of the husband's State University Retirement System (SURS) pension plan. The trial court rejected this approach and divided it on a reserved jurisdiction basis. The appellate court found that the trial court properly divided marital assets and awarded wife a portion of husband's SURS pension in this way because

a) accounts which husband owned at time of marriage but into which he deposited marital funds lost its character as non marital by commingling; and

b) there was widely disparate evidence of the value of husband's pension and the fund will be increased after marriage by virtue of contributions made to the pension with marital funds,

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