Family Law Update 2017:
A French Quarter Festival
Illinois State Bar Association

Public, Private and Military Pension Issues

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Anti-Alienation Clause
40 ILCS 5/1-119 (m)(1)

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

IMRF QILDRO Handbook

- "The consent form must be signed by the member. The law does not provide that the court or anyone else may sign the consent form if the member is absent or refuses to sign the consent. **The court does not have authority to order the member to sign the consent form.**
- This consent form requirement does not apply if the member's original IMRF participation date was on or after **July 1, 1999**." (Enacted July 1, 1999).
- See In re Marriage of Menken, 334 Ill. App. 3d 531, 532, 268 Ill. Dec. 295, 296, 778 N.E.2d 281, 282 (2002)

750 ILCS 5/503(b)(2)

"The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be deemed to be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership." **(Enacted July 1, 1999).**

Co-owner or creditor? That is the question when dividing a marital public pension

Co-owner or Creditor.pdf

By Honorable Mark J. Lopez
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QILDRO Forms

https://www.srs.illinois.gov/SERS/qildroforms_sers.htm

QILDRO Form Order: Monthly Retirement Benefit

Monthly Retirement Benefit, 40 ILCS 5/1-119 (a)(8):

"Retirement benefit" means any periodic or nonperiodic benefit payable to a retired member based on age or service, or on the amounts accumulated to the credit of the member for retirement purposes, including any periodic or nonperiodic increases in the benefit, whether or not the benefit is so called under the applicable Article of this Code.

QILDRO Form Order: Post Retirement Increases

40 ILCS 5/2-119.1

- 40 ILCS 5/2-119.1 – Automatic Increase in Retirement Annuity
- Accrual of increased value (post-judgment cost of living increases in the alternate payee's interest in marital pension)

QILDRO Form Order: Termination Refund or Lump Sum Retirement Benefit

40 ILCS 5/1-119 (g)(2)

- **Requires resignation 40 ILCS 5/1-119 (g)(2):** All QILDROs relating to a member's participation in a particular retirement system shall expire and cease to be effective upon the issuance of a member's refund that terminates the member's participation in that retirement system, without regard to whether the refund was paid to the member or to an alternate payee under a QILDRO. An expired QILDRO shall not be automatically revived by any subsequent return by the member to service under that retirement system.

QILDRO Form Order: Partial Refund

40 ILCS 5/1-119

The amount of a partial refund shall be calculated pursuant to the guidelines provided in 40 ILCS 5/1-119

a) Retirement without a current spouse
b) Overpayment of contributions

QILDRO Form Order: Lump sum death benefit

40 ILCS 5/20-112

Survivor's annuity. “Survivor's annuity”: Payments by a system which are made to the widow or survivors of an employee or participant in the form of a pension or annuity or a **lump sum** which, under the provisions of the law governing such system, is considered as a widow's or survivor's benefit, or a lump sum which is made in lieu of a pension or annuity which would otherwise be payable to the widow or survivor.

Expiration of a QILDRO

40 ILCS 5/1-119(g)(1)

"Upon the death of the alternate payee under a QILDRO, the QILDRO shall expire and cease to be effective and in the absence of another QILDRO the right to receive any effective benefit shall revert to the regular payee."

Survivor's Pensions- Eligibility

40 ILCS 5/17-121

(a) "A surviving spouse of a teacher shall be entitled to a survivor's pension only if the surviving spouse was married to the teacher for at least one year immediately prior to the teacher's death."

See Winter v. Winter (Part II), 2013 IL App (1st) 112836, ¶ 3, 374 Ill. Dec. 578, 580, 996 N.E.2d 25, 27

- Eligibility for surviving spouse benefits is a matter of law.

40 ILCS 5/17-147

"[T]he fund was not an individual or municipal corporation, but merely an aggregation of assets; there [is] no statutory provision for the [F]und to sue or be sued." In re Marriage of Winter (Part I), 387 Ill. App. 3d 21, 326 Ill. Dec. 429, 899 N.E.2d 1080 (2008)(quoting In re Marriage of Krane, 288 Ill. App. 3d 608, 224 Ill. Dec. 294, 681 N.E.2d 609 (1997)

40 ILCS 5/17-147 (eff. January 2, 1998)

Any legal proceedings necessary for the enforcement of the provisions of this Article shall be brought by and in the name of the Board of the Fund.

Disability Payments as Pension Benefits:

Public employee, was disabled at the time of dissolution, years later, at entry of QILDRO, ex-husband claims that disabled status, unlike active payroll statues, does not accrue to ongoing pension benefits

Question: Does an employee in disability status continue to accrue contributions to their public pension?

See In re Marriage of Benson, 2015 IL App (4th) 140682, ¶¶ 15-16, 392 Ill. Dec. 719, 723, 33 N.E.3d 268, 272

See In re Marriage of Carter, 2014 IL App (4th) 130475-U, ¶ 12 (Illinois Supreme Court Rule 23) (Unpublished)

Federal Uniform Services Former Spouses Protection Act

10 U.S.C.S. § 1408 (2006)

- Administered through the Defense, Finance, and Accounting Service Office
- www.dfas.mil: Then click garnishment, FAQ's and Forms
- Pension benefits, Spousal Support, Child Support

Service of Process of a Court Order

10 U.S.C.S. § 1408 (7)(b)(1)

- On an appropriate agent of the Secretary designated for receipt of service of court order;
- If no agent designated:
  - Personal service
  - Service by fax
  - Electronic transmission
  - Regular mail
- *In re Marriage of Robinson & Willis*, 2015 IL App (1st) 132345, ¶ 1, 33 N.E.3d 260

10 U.S.C.S. § 1408 (7)(c)

- Pursuant to the statute, June 25, 1981 forward, the Court can award retirement benefits to current spouses or former spouses.
- Re Military Survivor Benefits: **10 U.S.C.S. § 1447 – 1455 (2012)**
- In re Coviello, 2016 IL App (1st) 141652

- *In re Marriage of Robinson & Willis*, 2015 IL App (1st) 132345, ¶ 1, 33 N.E.3d 260 reversed the trial court.
- The Appellate Court used the long arm statute instead of FUSFA requirement of **10 U.S.C.S. § 1408 (7)(b)(1).**
- **10 U.S.C.S. § 1408 (7)(A):** The Secretary may not accept service of a court order that is an out of state modification or comply with the terms of the order unless the issuing court has jurisdiction in the manner specified per ¶(c)(4), which requires, jurisdiction over a member:
  - (A) By his residence (other than military assignment) in the jurisdiction of the court.
  - (B) His domicile (other than military assignment) in the territorial jurisdiction of the court.
  - (C) The member's consent to the jurisdiction of the court.

RETIREMENT SYSTEMS

QDROs - Private employers (ERs)

Account Based Plans
Pensions
Hybrid

QILDROs and Other Orders

State Government Plans
Federal Government Plans
CSRS, FERS, TSP, Military
*IRAs

ERRORS & BEST PRACTICES

1. **Methods of Dividing**
   - **Immediate offset**
   - **Deferred distribution:**
     - **QDROs, QILDROs, COAPs, etc.**

2. MSA Provisions

- **Plan Name and Type**
- **Couple's Circumstances:**
  - **Non-Marital, Rollovers, Loans, Vesting, Subsequent/Previous Spouses, Disabilities**
- **Plan Design Features**
- **Malpractice - Discrepancies**

ERRORS & BEST PRACTICES

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   - Approval
   - Model QDROs
   - Asking for Advice

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   - Multiemployer Plans

ERRORS & BEST PRACTICES

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   - Percentage Allocation
   - Fixed Amount
   - Valuation Date
   - Valuation Methods for Earnings/Losses

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ERRORS & BEST PRACTICES

7. DBPs – Separate Interest vs. Shared Interest

Coverture vs. Straight Percentage
Martial vs. Non-Marital

8. DBPs – Survivor Benefits
All in lieu of Assigned Benefit in QDRO
Pro-rata

ERRORS & BEST PRACTICES

9. Death of Participant and of Alternate Payee
QPSA – Pre-retirement
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10. Disability of Participant
Welfare Benefit
Disability Pension
Age, vesting, etc.

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Public, Private and Military Pensions

By Hon. Mark Lopez and Veronica A. Silva

It has been more than three decades now that the Retirement Equity Act[1] (REA) entered the legal landscape and provided much needed clarifications for domestic relations courts to divide retirement benefits in divorces. Prior to REA, the antialienation rules under the Employee Retirement Income Security Act of 1974 ("ERISA")[2] and the Internal Revenue Code (IRC) prevent retirement benefits from being "assigned or alienated"[3] which created a dilemma in family courts across the country, as retirement benefits are a valuable asset in most marital estates. Since REA, any judgment, decree, or order dealing with alimony or support for a spouse, former spouse, child, or other dependent that is issued in accordance with domestic relations laws constitutes a "domestic relations order" (DRO) under federal law[4] and it would be determined by the Plan Administrator of a retirement plan to be a *Qualified* Domestic Relations Order (QDRO) if certain minimum requirements are met.

There have been numerous articles and white papers written in these three decades and most of those materials mainly focus on the minimum requirements necessary to determine a DRO to be *qualified.* It is the intent of the authors of this article[5] that the content provided here will offer a fresh look and some never heard before insights into the world of QDROs and other retirement division orders. This article will mainly focus in private employers retirement plans, with references to state pensions and other retirement systems when appropriate. For the sake of simplicity, some generalizations have been made.

1. Retirement Systems

It is not uncommon to hear family attorneys be confused and disoriented when it comes to retirement assets. Most family attorneys, to no fault of their own, are unaware of the extensive landscape of retirement systems and the different body of rules that regulate them.

The first, and most *crucial,* step when dealing with a retirement asset (e.g., a pension, a retirement account, etc.) is to determine whether the asset is provided by a private employer/company, a state government or agency, the federal government or a federal agency. This may sound obvious but it is a fairly common occurrence that opposing counsels are arguing about an asset without really knowing how that asset originated and therefore, what body of rules

[1] Pub. L. 98-397, 98 Stat. 1426 (Aug. 23, 1984)
[2] 29 U.S.C. § 1001 *et. seq.*
[3] 29 U.S.C. § 1056(d)(1); §401(a)(13)(A)
[4] 29. U.S.C. §414(p)(1)(B)
[5] A Judge who has witnessed countless nightmares brought up by the division of retirement assets in divorces, and a practitioner who as a pure ERISA attorney has a deep understanding of the issues involved.

apply to it. Thus, the importance of knowing the origin of any retirement asset is to locate that asset within the body of law that regulates it and determines its fate. There are three major sources of retirement assets: private, state and federal government.

Private Employer Retirement Plans

Retirement plans sponsored by private employers are governed by the Employee Retirement Income Security Act of 1974 (ERISA) and the Internal Revenue Code (IRC). [6] Under ERISA, a Qualified Domestic Relations Order (QDRO) is required for distribution of retirement assets. A QDRO is a domestic relations order that creates or recognizes the existence of an alternate payee's right to receive, or assigns to an alternate payee the right to receive, all or a portion of the benefits payable with respect to a participant under a retirement plan, and that includes certain information and meets certain other requirements. [7] Although ERISA and the IRC only list a handful of requirements that are ever so easy to meet for a DRO to be qualified (i.e., name of the parties, last known address, amount of benefit assigned, number of payments or method of payment, etc.). Once those basic requirements are met, the Plan Administrators have no other choice than to approve the QDRO. However, the terms of a QDRO that go beyond those basic requirements have the potential to greatly impact the parties to a divorce, both positively and negatively. For example, the substantive provisions of a QDRO can, *literally*, make a 50% share actually be worth more or less than fifty percent, even when the QDRO explicitly assigns 50% of a marital portion.

State Government Retirement Systems

Generally speaking, state statutes regulate the retirement systems maintain by the state in question. In Illinois, the Illinois Pension Code[8] contains the statutory provisions establishing and regulating the various Illinois Retirement Systems.[9] Similar to a QDRO in the ERISA/IRC setting, a Qualified Illinois Domestic Relations Order ("QILDRO") has to be served upon the retirement system in question, to effectuate division of retirement benefits held by the retirement system. The Illinois Pension Code contains provisions mandating a QILDRO and dictating the terms of a QILDRO.

Some of the many Illinois retirement systems include: Policemen's or Firemen's Annuity and Benefit Funds, the Illinois Municipal Retirement Fund (IMRF), the Teachers' Retirement System of the State of Illinoi (TRS), Judges' Retirement System of Illinois, State Employees Retirement System, State Universities Retirement System, just to name a few.

Although the terms of a QILDRO are incorporated in the Illinois Pension Code, and all QILDROs look identical, there are variations in design features among the Illinois retirement systems that cannot be easily addressed in a cookie-cutter QILDRO model.

One outstanding characteristic of QILDROs, not present in any other retirement division order, is that QILDROs of employees who begun accruing an Illinois pension prior to 1999 must

[6] 29 U.S.C. § 1001 *et. seq.*
[7] ERISA § 206(d)(3)(B)(i); IRC § 414(p)(1)(A)
[8] 40 ILCS 5/1-119
[9] No statutory authority or case law requires each public fund to comply with provisions of the Illinois Pension Code.

be accompanied by a consent form to be signed by the participant/member in the retirement system which benefits are being divided pursuant to the QILDRO. [10]

Federal Government Retirement Benefits

Most federal government employees accrue retirement benefits under the Civil Service Retirement System ("CSRS"), or the Federal Employees Retirement System ("FERS"). These Plans do not accept QDROs in the ERISA or IRC sense of the term, because these Plans are not governed by ERISA or the IRC. These plans have their own set of statutes and regulations establishing their existence and regulating their operation. The domestic relations orders necessary to divide the benefits under either of these systems, are instead called Court Orders Acceptable for Processing ("COAP").[11] These plans have their own unique mechanisms and features for the division of the underlying retirement benefits. The Office of Personnel Management (OPM) administers these plans.[12]

Branches of the Military

The United States Armed Forces offer retirement benefits to the members of their various branches. The Defense Finance and Accounting Service (DFAS) administers the military retirement system for all branches. However, prior to transition into retirement of the service member, you may have to contact one of the branches directly (Army, Navy, Marine Corps and Air Force). DFAS is primarily a payroll office that establishes and maintains military retired pay, annuity accounts and issues monthly payments to military retirees and their eligible survivors. DFAS maintains a website[13] that if fairly up to date and contains useful information and guides. The primary statute for division of military pensions is the Uniform Services Former Spouse's Protection Act ("USFSPA").[14]

2. Preemption, Anti-Alienation, Are Former Spouses Co-Owners or Creditors?

Private Employers

ERISA preempts state law. Section 514(a) of ERISA[15] provides that the statute will "supersede any and all state laws insofar as they may now or hereafter relate to t any employee benefit plan described in section 1003(a)[16] of this title and not exempt under Section 1003(b) of this title." Ordinarily, state law, including laws that would require the payment of a participant's plan benefits other than to the participant or his beneficiaries, (e.g., a statue that would change a pre-divorce plan beneficiary designation), is preempted by ERISA to the extent that the state law relates to an employee benefit plan. However, state laws that would provide for rights and payments under a QDRO are not preempted by ERISA[17]. ERISA does not preempt a state court

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[10] For employees who became employed post July 1, 1999, a consent form from the participant is not required.
[11] 5 CFR 838.302
[12] Guidelines to divide CSRS and FERS can be found at www.opm.gov
[13] www.dfas.mil/ Further information on DFAS can be obtained at http://www.dfas.mil/dam/jcr:1cbbab12-9765-4eee-8b5f-a6bab98b2e2c/AttorneyGuidance-03-07-2014.pdf
[14] Pub. L. 97-252, Title X, 96 Stat. 730 (1983) (codified as amended at 10 U.S.C. §1408)
[15] 29 U.S.C. 1144(a)
[16] 29 U.S.C. 1003(a)
[17] ERISA § 514(b)(7)

action dividing marital interests in employee benefit plans, or the state's statutory provisions for giving notice to a plan that it will be joined as a party in a marital dissolution action. However, ERISA would have preempted the enforcement of the resulting order if the order were not a QDRO. In summary, when a domestic relations order (DRO) is treated as a QDRO, the state law under which the DRO was issued will not be deemed preempted by ERISA.

ERISA[18] also prohibits voluntary or involuntary assignment or alienation of plan benefits (and the tax qualification rules of Code Section 401(a)(13) contain parallel requirements). This anti-alienation requirement must be met by any pension plan (unless excepted from coverage by part 2 of Title I of ERISA).

State Government

Similarly, pursuant to the Illinois Constitution, creditors are prohibited from seizing any pension benefits. [19] However, Illinois courts consider ex-spouses to be co-owners of the marital portion of retirement assets. [20] Thus, the anti-alienation provision of the Illinois Constitution presents no bar to the former spouse being awarded a marital share of the pension upon dissolution of marriage even though he or she is not a member of the pension fund involved.[21]

Former Spouses – Co-Owners or Creditors?

Please refer to Hon. Mark Lopez's ISBA Family Law Newsletter article[22] "Co-owner or creditor? That is the question when dividing a marital public pension," included with the materials for this session.

3. Pensions vs. Retirement Accounts

Most marital settlement agreements ("MSAs") refer to the parties' retirement plans without the drafter of the MSA fully understanding which category of retirement asset is being divided (private, public, or military) and without specifying whether the underlying retirement plans is a pension type of plan (defined benefit) or an account-based plan (defined contribution)[23]. Just as it was a crucial first step to identify the retirement system being at issue when dividing a retirement asset, it is equally important to have clarity as to whether the underlying retirement benefits is a defined contribution or defined benefit type of benefit.

There are significant differences with regards to the valuation and division of such plans. Thus, it is important to understand the distinction between the two. Although the categorizations as defined benefit plan or defined contribution plans belongs to ERISA, the underlying plan designs for each is found the private employer and public pension sectors.

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[18] ERISA § 206(d)
[19] Illinois Constitution, Article 13 Section 5
[20] In re Marriage of Papeck, 95 Ill. App. 3d 624 (1st. Dist. 1981)
[21] *In re: Marriage of Winter*, 387 Ill.App.3d 21 (2008) ß
[22] Family Law Section Newsletter for August 2014, Volume 58, No. 2
[23] https://www.dol.gov/general/topic/retirement/typesofplans

Defined Benefit Plans – The Hunt Formula

A defined benefit plan (DBP) is a type of retirement plan through which *the employer* promises to pay a monthly benefit to the participant at retirement. Typically, the payments are for the duration of the member's lifetime, but there can be other options of forms of payment available for the participant to chose. The employer sponsoring the pension plan will be obligated to make contributions to a trust for the benefit of the participating employees. Generally speaking, employees/participants do not contribute to the pension plan (at least not in the same sense as contributions to a defined contribution plan (DCP) such as a 401(k) or 403(b))[24]. Generally speaking, there are no individual accounts (at least not in the same sense as such accounts exist in the defined contribution plan arena) to which the employee contributes. Instead, only employers make the necessary monetary contributions to fund the pensions to be paid by the plan. The employers' contributions are held in a trust.

In DBPs , the amount of benefits to be paid to each participant is determined by a pre-defined formula specific to each plan. The amount of benefits does not depend on the amount of contributions made on behalf of the individual employee, and does not depend on the performance of the underlying investments. Participants expect certain amount of benefits based on a formula. The most common types of formulas used in DBPs are: **Fixed Dollar Formula** (the monthly benefit is determined by multiplying a fixed dollar amount by the years of service); **Unit Benefit Formula** (the monthly benefit is the result of multiplying years of service, by the applicable compensation figure, times a factor that depends on the employee's age at retirement); and **Career Average Formula** (adding the amount resulting from applying a percentage to each year's compensation).

The ***total*** value that an individual participant's retirement under a DBP will reach is difficult to determine at any point in time in which the participant is still an active employee. While a participant in a retirement DBP is an active employee, the individual is actively accruing benefits under the DBP while he/she works. Further, if the ***total*** value cannot be determined while the employee is still working, then the marital portion of any such final pension, cannot be determined either. This is the main reason why at the time of the divorce, the marital portion cannot be calculated, and such calculation is best postponed until one of the parties (either the husband or the wife, regardless of who is the participant and who is the alternate payee) is ready to commence his/her benefits. This is what the Hunt formula[25] achieves at a later date via a QDRO.

If the parties to a divorce wish to ascertain the value of a pension that has not yet matured (i.e., the participant/employee continues to "accrue" benefits while in active employment), the only option is to make an educated estimation via an actuarial valuation. In such cases, only professionals with adequate actuarial skills[26] can calculate is the value of the benefit at any given

[24] The categorization of plans as being DBP or DCP pertains mostly to the private sector as those terms are defined under ERISA and the IRC. In the private sector employees do not contribute to DBPs. However, public sector pension plans are similar to DBPs in that benefits are determined by a formula.

[25] In re Marriage of Hunt 78 Ill. App. 3d 653 (1st Dist. 1979)

[26] A proper actuary who has achieved the highest level of actuarial certification (FSA = Fellow of the Society of Actuaries) and with actual experience in the pension and retirement plans area. It is worth noting that just almost anybody can proclaim to be an actuary or be capable of doing such valuations. However, it is the responsibility of the family law practitioner to be inquisitive as to the background and skills of the professional being hired for such malpractice ridden task.

time. Any such calculation will be an estimate, albeit a highly educated estimate based (hopefully) in actuarial principles, and by employment of highly technical and proven actuarial methods. Any such calculation is based on assumptions regarding life expectancy, future performance and career development, etc.

There are three subcategories or types of Defined Benefit Plans:

Single Employer Plans -- The single-employer pension plan is established and maintained by a single employer/company to help provide for its employees in retirement. Single-employer pension plans only allow for workers to build their share in a plan while they remain with that particular employer.

Multi-employer Plans -- These are more commonly known as "Taft-Hartley plans." Multi-employer plans link several employers as contributing employers to a common pension fund to provide for their employees. The employers belong to the same industry and they reach a collective bargaining agreement with the same labor union (or a local chapter). Multi-employer plans allow workers to maintain their pension benefits when they switch jobs from one employer to another when both employers contribute to the same pension plan. Furthermore, at a national level, various local chapters of the same labor union will provide for pension credits transfers and credits reciprocity for workers who may move geographically transferring from one local chapter to another. When drafting a QDRO, special care should be taken to properly capture all credits that may have been earned under different pension plans.

Multiple Employer Plans -- A **multiple employer plan** is a plan maintained by two or more employers who are not related under IRC 414(b) (controlled groups), IRC 414(c) (trades or businesses under common control), or IRC 414(m) (affiliated service groups). If a group of employers were related under these code sections they would be treated as a single employer.

In summary, DBPs are significantly different from defined contribution plans. The growth in the value of any pension benefits provided under a DBP depends upon various factors that have no direct correlation to the chronological passage of time or the performance of investments in the financial market. The growth of a DBP is not linear, but in a radius; as if a circle is expanded outward. The overall value of a pension when determined at the highest valuation point possible (at normal retirement age), will impact the value of benefits accrued earlier (the pension credits earned during the earlier years). However, all pension credits are counted equally, regardless of the time in which they accrued. Therefore, valuing a pension at the time of dissolution of marriage when the participant/employee is active, does not yield a fair adequate valuation, because the same benefits accrued during the marriage in the early states of the pension growth, will be worth more at the time of retirement, than they were worth earlier, at the time of dissolution of the marriage.

Defined Contribution Plans – When Hunt Formula is not Appropriate

Unlike DBPs, the participant/employee of a defined contribution plan (DCP) makes voluntary[27] contributions, which are allocated to an account in his or her name. The employer

[27] Certain safe-harbor 401(k) plans have employer provided automatic contributions.

may or may not make matching contributions and other types of discretionary contributions such as profit sharing contributions. Common examples of DCPs are 401(k), 403(b), employee stock ownership plans (ESOPs), 457(b).

Unlike a DBP, a DCP is easier to value and divide because each account under the plan, at almost any point in time, will reflect the actual account balance value. Plan aßdministrators or the recordkeeping companies to which plan administrators outsource the management of these accounts are required to maintain detailed records and issue periodic statements reflecting investment choices and market fluctuations. The participant of any DCP can access their account and obtain balance information often in a daily basis. Thus, since there is an actual value available at the time of the divorce, it is easier to value and divide the plan.

Unlike a DBP, the growth of retirement benefits under a DCP occurs in a chronologically linear manner. It is not related to length of service of the participant/employee performance and/or career advancement. Moreover, at an point in time, the value of the account balance is dependent upon the influx and withdrawal of contributions; and it is also highly impacted by the usual fluctuations of the financial markets and their performance. However, the growth of DCP benefits is unrelated to length of service or performance.

Unlike a DBP, a DCP can lose value over time. Likewise, when the participant/employee has terminated employment and therefore contributions to an employee's account cease, the DCP account can still increase in value due to market performance of the underlying investments.

4. Timing of Division of Retirement Benefits

It is generally accepted that retirement benefits earned outside of the period of the marriage are non-marital property; and therefore, not subject to division. In contrast, retirement benefits earned during the years of the marriage are presumed to be marital property subject to division.

The division of retirement benefits may be executed at two different points in time. Either by immediate distribution at the time of the divorce (with or without offsetting) or by deferred (or delayed) distribution any time after the earliest possible retirement age. These are the two possible methods of executing the division of retirement assets. Split now, or split later.

Immediate Offset

Under the immediate offset method, the value of the retirement benefits are paid to the non-participant spouse at the time of the dissolution. The non-participant spouse receives either cash directly from the participant-spouse or some other marital asset (e.g., equity in the marital home, real estate property, a vehicle, etc.) to offset the value of the retirement benefits that are not distributed from the retirement plan. This is one of the very few occasions in which a valuation of the retirement benefits is indeed needed. A competent actuary would determine the present value of the retirement benefits and the ex-spouse would receive his/her share of benefits as an immediate lump-sum award of cash or other property. Thus, the employee keeps their entire pension and the ex-spouse receives an asset of equal value instead of a direct interest from the pension. A QDRO or a QILDRO is not required for an immediate offset.

Deferred/Delayed Distributions

Under a delayed or deferred distribution method the non-employee spouse will receive the distribution of his/her share of the retirement benefits at a later date, directly from the retirement plan, but no earlier than the earliest possible retirement date under the terms of the plan. A QDRO or a QILDRO is required to obtain deferred distributions. There are various formulas that can be used to obtain a deferred distribution. A deferred/delayed distribution will require a division order (e.g., QDRO, QILDRO, COAP, etc.). Parties to a divorce have various methods at their disposal for determining the share that will be assigned to the non-participant spouse (the alternate payee). The most commonly use methods are:

5. Methods of Calculating the Division

There are three typical methods used to calculate the share of a retirement asset being assigned to the non-participant spouse: fixed dollar amount, straight percentage and percentage of a marital portion.

Fixed Dollar Amount

Both DBPs and DCPs are divisible using a fixed dollar amount. Under DCPs, the fixed dollar amount must be an amount that is fully vested in the participant's account without taking into account any outstanding loan balance. A division order (QDRO, QILDRO, etc.) applicable to a DCP that uses a fixed dollar amount, must clearly specify if the fixed dollar amount is subject to adjustment for earnings and loses between the valuation date and the date of distribution. For purposes of addressing these factors (vesting status, possible outstanding loans, and earnings and losses) the division order must clearly specify the date of valuation. However, parties that agree to a fixed dollar amount must account for earnings, losses and the different retirement tax rate that will affect the value of the account. Attorneys should never allow their client agree to a non-adjustable flat dollar amount without understanding the potential risks. This formula is more commonly used in DCPs than for DBPs.

Straight Percentage Amount

Both DBPs and DCPs are divisible using a straight percentage. Division orders applicable to DCPs should explicitly indicate whether the percentage will be applied to the total account balance, or only to the vested portion of the account balance, and whether outstanding loans will be included or excluded in the account balance prior to applying the straight percentage. Although a straight percentage division order is commonly interpreted to include adjustment for earnings and loses, it is also possible to exclude the adjustment of earnings and loses. In such cases, it is ever more important to explicitly indicate in the division order which is the valuation date to be used for calculating the division. This method is acceptable in situations in which the entirety of the retirement benefits/account is marital.

Percentage of the Marital Portion – The Hunt[28] Formula

Both DBPs and DCPs are divisible by applying a percentage to the marital portion of the retirement benefits. This method involves a two-step process: (1) the marital portion of the retirement asset is determined; (2) the percentage is applied to the marital portion only (this second step is similar to the straight percentage method). However, the method to calculate the marital portion in DCPs and DBPs are different. For example, in the case of DCPs, the most appropriate method of determining the marital portion is the "tracing" method which traces the contributions made to the participant's account in the DCPs during the period of the marriage, as well as distributions or withdrawals and adjusts them on account of earnings and losses. Another method commonly used for DCPs is the "subtraction" method. The subtraction method calls for subtracting from the account balance as of the time of dissolution of the marriage, the value of the account as of the time of commencement of the marriage. Although there is nothing inherently wrong with the subtraction method, it is not appropriate when the applicable state domestic relations laws provide that the increase in value of non-marital property during the marriage, is non-marital property as well. The subtraction method results in the inclusion of any such increase in value of the non-marital portion of a retirement account as belonging to the marital portion of that account; and therefore, subject to division.

The Hunt formula method is regarded as the fairest method to determine the marital portion of DBPs retirement benefits. This method should only be used in division orders applicable to DBPs. The Hunt formula does not have proper application to determine the marital portion of DCPs retirement benefits. The Hunt formula determines the marital portion using a fraction the numerator of which represents the number of pension credits accrued by the participant during the period of the marriage; and the denominator represents the number of total pension credits accrued by the participant as of the earliest of the participant's retirement or the alternate payee's benefit commencement dates.

This method takes the value of a retirement plan assets at the date of filing for divorce and divides it by a fraction. In this manner, the alternate payee's share is not frozen as of the date of dissolution of marriage. *This formula should only be used in DBPs and not DCPs.* Using the Hunt formula in account-based plans will yield a marital portion that has no correlation to reality. It may yield a "marital portion" that is either larger or smaller (depending on the period of the marriage and the plan participation history) than the portion of the account that was actually earned during the marriage.

6. Different Benefits Under A Plan

When dividing retirement assets there is one important aspect that should be bared in mind. Each retirement plan may offer more than one type of benefit. The different benefits offered under the retirement plan are separate and different from each other. For example, the monthly benefit paid under a DBP, is different and separate from a survivor benefit available under the same DBP, which is also different and separate from a death benefit.

[28] In re Marriage of Hunt, 78 Ill. App. 3d 653 (1st Dist. 1979)

Monthly Pension

A DBP may offer a stream of payments as the form of distribution of benefits to the retiree. Most often, the payments last as long as the participant is alive. However, the stream of payments may be a fixed number of payments (e.g., 20 years fixed annuity, etc.). Sometimes there is a combination of both, for example a life annuity with a 5 or 10-year guarantee. A single lump-sum is another form of payment option available in most plans. Lifetime payments are calculated over the life expectancy of the participant.

Survivor Benefits

In an effort to protect spouses, Congress made survivorship benefits for spouses mandatory in DBPs unless the spouse voluntarily waived such benefits. The QDRO should clarify the effect of the Participant's death before or after the commencement of benefit payments. Generally, the Alternate Payee will not receive any benefits if the Participant dies *before* payments begin unless the Alternate Payee is listed as the surviving spouse for purposes of the Qualified Pre-Retirement Survivor Benefit ("QPSA"). Further since survivor benefits are reduced in half from the original payout amount, the MSA should clarify whether the Alternate Payee is supposed to be the surviving spouse for the Participant's entire survivor benefit or something lesser. In order to ensure the Alternate Payee's benefit is unaffected, the following provision, or something similar, should be incorporated in the MSA: "That amount of the QPSA necessary to ensure that the Alternate Payee's benefit is not reduced as a result of the Participant's death prior to benefit commencement," OR "That amount of any post-retirement survivor benefit necessary to ensure that the Alternate Payee's benefit is not reduced as a result of the Participant's death following commencement of benefits."

This is one of the benefits payable to the participant's beneficiary. The most common form is a stream of payments received by the survivor/beneficiary (e.g., a spouse, a former spouse, a dependent) after the death of the participant. Although it is often thought as a continuation of the Monthly Benefits, ERISA and the plans administer this benefit as a separate and independent benefit from the monthly pension. While private employer DBPs allow former spouses to be named beneficiaries of survivor benefits, most Illinois state pensions exclude former spouses from the definition of "surviving spouse"[29] under the QILDRO statutes.

QDROs applicable to a DCP are usually prepared as separate interest orders, therefore, the Alternate Payee has a separate and independent right to the assigned share of the retirement benefits that is unaffected by the participant's death. In order to ensure the payment to the Alternate Payee in the event of the participant's death prior to the segregation of the assigned benefit, QDROs would customarily include language that explicitly names the Alternate Payee as surviving spouse to the extent necessary for the Alternate Payee to receive the funds awarded to him/her regardless of the participant's death.

[29] 40 ILCS 5/1-119(a)(10)

Death Benefits

The term “death benefits” is often confused or used interchangeably with the term “survivor benefit.” However, most retirement plans would treat these as different benefits. Generally speaking, the term “survivor benefit” is most frequently used to refer to the benefits payable as an annuity, or stream of payments, rather than a fixed dollar amount single lump sum. Survivor benefits are the payments to beneficiaries that exist as a form of substitution to the monthly benefit that was being paid to the retiree and which ceased to be paid due to the retiree’s death. On the other hand, death benefits are usually a fixed dollar amount (e.g., arbitrary amount established by statute, or under the plan terms, or the equivalent to one or 1.5 annual salary) that is paid as a single lump sum distribution.

Every practitioner involved with the division of retirement benefits should review the Summary Plan Description for the plan at hand to become familiar with all the types of benefits offered under the Plan. This is a necessary step to avoid overlooking benefits that could and/or should be awarded to the alternate payees.

7. Benefit Increases and Other Benefit Enhancements

Pension plans often include certain benefit increases, cost-of-living adjustments and other form of pension enhancements in their benefit design structure. These temporary or supplemental benefits include: early retirement incentives/subsidies, supplemental benefits until commencement of social security benefits, high multiplier for retirees during specific years, etc. The Alternate Payee may be excluded from receiving a proportionate share of this benefit enhancements if he/she choses to commence his/her benefits before the Participant retires. It is important to be knowledgeable and mindful of these possible alternations to the amount of benefits that will be paid when dividing retirement pensions.

Cost of Living Adjustments (COLA) –post retirement pension benefits may also increase due to Cost of Living Adjustments. Often times these COLA apply to alternate payee’s shares automatically, but practitioners are wise to include explicit language assigning a pro-rata share of this adjustments to the Alternate Payee.

8. Death of the Participant – Timing Issues

One of the most misunderstood issues in the division of retirement benefits is probably the survivorship protection needed with respect to an Alternate Payee. Perhaps the cause of the misunderstanding and confusion is the complexity of this subject. Survivorship protection is different under DCPs vs. DBPs; it also varies depending on what type of QDRO is going to be prepared for DBPs (a shared interest QDRO vs. a separate interest QDRO); and finally, whether the survivorship protection comes into play when the participant’s death occurs pre-retirement commencement, or post-retirement commencement.

Before Commencement Of Benefits – Pre-Retirement Survivor Protection

DBPs – All DBPs subject to ERISA must offer Participants the right to survivorship coverage in the event that they were to die prior to retirement. This is known as the Qualified

Pre-retirement Survivor Annuity (QPSA). Only the Participant's spouse (or a former spouse who has been named the surviving spouse for purposes of QPSA) can receive this monthly benefit paid for the remainder of the surviving spouse's life. Other dependents are not eligible to receive QPSA benefits. Generally, the amount of the QPSA is 50% of the actuarially reduced annuity, calculated as if the Participant had retired on the date of death. However, amounts can vary depending on the status of the participant at the time of death, and the terms of the plan. **QPSA for former spouse has to be explicitly reserved in the QDRO.** Additionally, careful consideration should be given to the terms of the QPSA assignment and whether the QPSA is granted in lieu of the Alternate Payee's assigned benefit; or only to the extent of securing the same amount of payments as the Alternate Payee would have received under the QDRO. QPSA protection is required in both, separate interest and shared interest QDROs.

DCPs – QDROs applicable to DCPs are prepared as separate interest QDROs. As soon as the QDRO is entered, there is no need for survivorship protection. Therefore, is best practice to prepare the QDRO to be entered on the prove-up date. However, if for some reason the QDRO cannot be ready on time, a quick brief QDRO could be filed at the time of dissolution solely for the purposes of securing survivorship protection for the Alternate Payee. This QDRO would not include the division of the benefits that may be still under negotiation or being worked out with valuations pending, etc. The purpose of this brief QDRO is only to include language naming the former spouse as the surviving spouse entitled to the plan's benefits in the event that the Participant's death occurs prior to the QDRO implementing the division being qualified by the Plan Administrator.

After Commencement Of Benefits – Post-Retirement Survivor Protection

DBPs - All DBPs subject to ERISA must offer Participants the right to survivorship coverage in the event that they were to die after retirement. This is known as the Qualified Joint and Survivor Annuity (QJSA). Only the Participant's spouse (or a former spouse who has been named the surviving spouse for purposes of QJSA) can receive this monthly benefit paid for the remainder of the surviving spouse's life. Other dependents are not eligible to receive QJSA benefits. This is relevant only in shared interest QDROs. Separate interest QDROs do not need QJSA protection because the Alternate Payee is protected as soon as he/she started receiving benefits assigned by the QDRO that may occur before the Participant retires, and is also protected as soon as the Participant retires.

9. Disability Benefits vs. Disability Retirement and the MSA

Occasionally, the Participant will become injured and start receiving disability benefits from his/her employer. It is important to realize that disability payments could be either disability benefits (a welfare benefit that is not divisible with a former spouse) or a disability pension (which courts have found to be equivalent to a regular pension for purposes of a former spouse's entitlement). For example, when a Taft-Hartley plan pays disability benefits, those payments are regarded as welfare benefit payments if paid to the union member before normal retirement age. However, once the employee on disability reaches normal retirement age, the disability pension benefits become payable and the payments are now deemed retirement pension payments subject to division.

Additionally, MSAs often omit any mention of the Alternate Payee's entitlement to a share of disability retirement benefits. In situations of disability retirement, participants have argued that alternate payee's were not entitled to any share of a disability pension, but Courts have ruled otherwise[30].

10. Loans and Hardship Withdrawals Taken from a Retirement Plan

Participants who are active employees of the employer sponsoring the retirement plan are not able to take a "distribution" from their account (whether a partial or total distribution) in the ERISA sense of the word. However, participants may have other options to access the money in their accounts. Some DCPs allow for participants to take loans against their individual account under the plan. Special care should be taken when gathering information about a retirement account the accepts loan withdrawals. Often times the account statement explicitly indicates whether the account balance reported includes the amount of any outstanding loans, and also provides information about the amount of the outstanding loan. However, it is not uncommon that this information will not be easily found in the account statement. Depending on the terms of the assets division in each divorce case, you may want to include or exclude the amount of any outstanding loan that may exist in the account being divided.

Loans are not allowed under DBPs whether private employer or state or government pensions. However, a state employee who participates in a 457(b) plan, which is a DCP, may be allowed to take loans from his/her 457(b) account.

Unlike loans that are expected to be re-paid to the DCP account, participants may withdraw funds while actively employed, without the expectation of repayment. Some DCPs will allow a type of withdrawal that is called a Hardship Withdrawal. These withdrawals are "made on account of an immediate and heavy financial need" of the participant/employee, and the amount must be necessary to satisfy "the financial need," according to the IRS. Retirement plans are not required to offer hardship withdrawals.

In order to obtain a hardship withdrawal, the participant/employee must meet the legal and plan requirements for a hardship withdrawal. There are two ways the plan may allow a hardship withdrawal: (a) by adhering to the safe harbor statutory requirements (i.e., the withdrawn amount is to be used for a specific purpose: unreimbursed medical expenses for yourself, or for your spouse, dependents, or beneficiaries; costs relating to the purchase of a principal residence; tuition and related educational fees and expenses for the next 12 months of postsecondary education for yourself, or for your spouse, dependents, or beneficiaries; funeral expenses; payments necessary to prevent eviction from or foreclosure on your home; or certain expenses for the repair of damage to your principal residence); or (b) by looking at the facts and circumstances in each specific case.

Regardless of what withdrawals/loans were taken, practitioners ought to keep track of any such fluctuations in the account balance and the impact to the quantification of the marital and non-marital portions of the account.

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[30] In re Marriage of Benson, 2015 IL App (4th) 140682

11. Communications With The Plan – How to Obtain Information

ERISA contains rules mandating plans to provide valuable information to their participants and beneficiaries. Plans must provide individual information about rights and interest, and information about the plan's financial condition and operations. There are two categories of reports: to government agencies, and to participants/beneficiaries. Discussing reporting to government agencies is beyond the scope of interest of this article.

Reporting and Disclosure – Various documents containing information about the plan must be distributed periodically to all plan participants[31]. They are also available upon request. These include: (a) the Summary Plan Description (SPD)[32] intended to be the primary source of information for participants and beneficiaries. It must contain an accurate description of what the plan is, how it works, the benefits provided, how to earn them, how they are distributed, etc. It must be written in plain English, in a straightforward, non-technical manner "calculated to be understood by the average plan participant". (b) Summary of Material Modifications (SMM) is the document plans must issue when there have been significant changes. Any future SPD must include the information disclosed in all previous SMMs that were issued since the last SPD was distributed. (c) Summary Annual Report (SAR)[33] summarizes the latest annual report (a document intended to provide a comprehensive financial statement of plan assets and liabilities). (d) QDRO Procedures describing the process and timelines for the review and processing of QDROs. Retirement plans are required to maintain written QDRO Procedures. Model QDROs are usually included as an appendix to the QDRO Procedures, but they are not required. QDRO Procedures may be incorporated as a section of the SPD, or most often are published in a separate, stand-alone document.

Enforcement – ERISA contains remedies for violations of the reporting and disclosure rules. If a plan fails to comply with any participant or beneficiary request for information to which they are entitled.

In summary, beneficiaries and participants can obtain crucial information from the plan. General information regarding the plan's terms and procedures cannot be easily denied. Specific information with respect to an individual plan participant may also be obtain via legal subpoena.

12. Claims Procedure and Legal Actions Against The Retirement Plan/Fund

There are two methods under ERISA for Participants and beneficiaries (including Alternate Payees) to obtain payment of benefits. One is the plan's internal claims procedure that ERISA requires every plan to "establish and maintain" in writing[34]. The other is suing in Federal court.

An ERISA Claims Procedure must afford every participant or beneficiary whose claim is denied the "reasonable opportunity of a fair and full review" of their claim. A written notice of denial and the reasons for it must be provided. The reason behind the mandatory claims

[31] ERISA § §101-111
[32] ERISA § 102(a); 29 C.F.R. §2520.102
[33] ERISA § 104 (b)(3); 29 C.F.R. §2520.104b
[34] ERISA § 503

procedure is to ensure that participants and beneficiaries have a way to challenge denials of benefits in an expedited and inexpensive manner. Once the plan has denied or rejected a QDRO, beneficiaries usually have no more than 60 days from the date of receipt of the denial to file an appeal in writing.

In the event that benefits are denied following the appeal, participants and beneficiaries are deemed to have exhausted the plans' internal claim procedure and are allowed to file law suit in Federal court.

Summary Plan Descriptions of retirement plans are required to describe the Claims Procedure or indicate how to obtain a copy of the written claims procedures. ERISA statutes and regulations only provide an outline of the terms of the claims procedures, therefore, it is imperative that the actual time frames adopted by the plan at issue be considered and studied.

Summary Plan Descriptions are also required to list contact information for the Agent for Services of Legal Process and other individuals or entities (e.g., trustees, plan administrators, QDRO administrator, record-keeper, etc.) occupying key positions in the plan's daily operation and administration. It is always a good idea to obtain a copy of the Summary Plan Description or other brochures issued by the plan administrator and keep it handy when dealing with the division or retirement assets.

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ILLINOIS STATE BAR ASSOCIATION

FAMILY LAW

The newsletter of the Illinois State Bar Association's Section on Family Law

Chair's column

By Kelli Gordon

You have read a lot about HB1452 in this column over the last couple of years. It is a complete re-write of the Illinois Marriage & Dissolution of Marriage Act. It makes many changes; some significant (like eliminating the terms "joint" and "sole" custody) and some insignificant (like eliminating "grounds" other than irreconcilable differences). The bill is still in the process of being amended and the Illinois State Bar Association is playing a role in trying to make additional amendments.

I get asked on a weekly basis, "What is the status of that 'Big Bill'?" So here it is: The bill passed the House of Representatives on April 10, 2014 with House Amendment 2 and it was sent to the Senate the same day. Senate Amendment 1 completely deleted and replaced the underlying bill on May 8, 2014. The bill ended up in the Committee on Assignments at the end of the spring session. During the fall veto session (November 19 to 21, 2014; December 2 to 4, 2014), the bill will most likely be referred to a substantive committee such as the Judiciary Committee. It can, and probably will, be amended again by the Judiciary Committee. If it passes the Judiciary

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Co-owner or creditor? That is the question when dividing a marital public pension

By Hon. Mark J. Lopez

Over the last several years, this writer has regularly encountered the ex-spouse member of a public pension who refuses to sign the required consent form to divide the pension portion which was awarded to the ex-spouse.[1] In most, if not all cases, the member cites the case of *In re: Marriage of Menken*, 334 Ill. App.3d 531 (2nd Dist., 2002) in support of their position.

Virtually all public pension handbooks distributed to membership includes language which states in essence:

> The Court does not have the authority to order the member to sign the consent form.[2]

This Court recently addressed this issue in a post decree enforcement proceeding. The parties' judgment awarded the ex-wife an interest in her ex-husband's marital public pension. Her ex-husband began his public employment prior to July 1, 1999 which requires a consent form to be signed. The ex-wife filed a motion to divide her ex-husband's public pension and included in her prayer for relief that the Court order him to execute the required consent form.

The ex-husband argued that the Court is prohibited from ordering Samuel to execute the consent form and cited the case of *In re: Marriage of Menken*, 334 Ill.App.3d 531 (2002) in support of his argument.

He also argued that the Illinois Constitu-

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Co-owner or creditor? That is the question when dividing a marital public pension

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tion, Article 13, Section 5, which is the Anti-Alienation provision, prohibits creditors from seizing any pension benefits of the litigant. The ex-husband found support for this Anti-Alienation argument in *Menken*, as well. The ex-husband argued that a trial court is prohibited from ordering a pension member's execution of the consent to the division of his public pension because the *Menken* Court found that such an order would violate the Anti-Alienation Provision of the Illinois Constitution.

40 ILCS 5/1-119(m)(1) of the Illinois Pension Code states as follows:

> In accordance with Article XIII, Section 5 of the Illinois Constitution which prohibits the impairment or diminishment of benefits granted under this Code 'a QILDRO' issued against a member of a retirement system established under an Article of this Code that exempts the payment of benefits or refunds from attachment, garnishment, judgment or other legal process shall not be effective without the written consent of the member if the member began participating in the retirement system on or before the effective date of this Section. That consent must specify the retirement system, the court case number, and the names and social security numbers of the member and the alternative payee.

The *Menken* court reversed the trial court's order requiring the pension holder to sign the required consent form to divide his pension finding that to allow the trial court's order to stand would render the protections of Section 1-119(m)(1) meaningless.

In *Menken*, the ex-wife was awarded 60% of her ex-husband's public pension as an award of marital property in the parties' judgment. A review of the *Menken* decision also shows there was no analysis either by the trial court or the court of review to distinguish the ex-wife's status as a co-owner from that of a creditor.

Prior to and contrary to the Second District's *Menken* decision, the First District Appellate Court ruled in the matter of *In re: Marriage of Papeck*, 95 Ill.App.3d 624 (1st Dist., 1981). In *Papeck,* the court distinguished the interest of a former spouse who is awarded a portion of their ex-spouse's public pension from that of a creditor. The *Papeck* court found that as an alternate payee, the ex-spouse who was awarded an interest in the member ex-spouse's public pension becomes a co-owner of the pension with the member spouse.

The court in *Papeck,* however, rejected the ex-wife's argument that merely because she is an ex-wife the anti-alienation clause of the Illinois Constitution does not apply to her unlike other judgment creditors. The *Papeck*, court did state that an ex-spouse may be a judgment creditor, and if found to be a judgment creditor, the Anti-Alienation Clause of the Illinois Constitution would prohibit a court from ordering the execution of a consent.

The court in *Papeck* went on to find that an award of a marital interest in a pension is a property interest and if awarded to an ex-spouse in a judgment for dissolution of marriage, the ex-spouse obtains property rights in the pension and is a co-owner of the pension, and it is the status as a co-owner which exempts the co-owner from the protection of the Anti-Alienation Clause. The *Papeck* court confirmed an ex-spouse can be a co-owner of a pension if awarded an interest in a marital pension. In the case of *In re: Marriage of Winter*, 387 Ill.App.3d 21 (2008) the court found,

> where pension benefits are marital property, former spouses are not considered creditors," 750 ILCS 5-503(b)(1) (2006). It is well settled that the spouse of a member of a pension fund obtains ownership interest in the benefits as marital property which in the course of a dissolution of marriage may be allocated between spouses without regard to membership in the pension fund.

In re: *The Marriage of Hackett* 113 Ill. 2d 286 (1986), also In re: *The Marriage of Carlson* 269 Ill.App.3d 464 (1995), and *Papeck*. The court continued,

> It is the former spouse's status as a co-owner of the pension benefits that precludes the former spouse from being labeled as a creditor. The anti-alienation provision of the pension code presents no bar to the former spouse being awarded a marital share of the pension upon dissolution of marriage even though he or she is not a member of the pension fund involved.

The *Winter* case further cited *In re: Marriage of Roehn*, 216 Ill.App.3d 891 (2nd Dist., 1991) finding that the *Roehn* court failed to recognize *Papeck's* "crucial distinction" between a creditor and a co-owner and failed to include in its analysis the anti-alienation provision or its meaning as explained by *Hackett*.

Additionally, 750 ILCS 5/503(b)(2) at paragraph 3 states as follows:

> The recognition of pension benefits as marital property and the division of those benefits pursuant to a Qualified Illinois Domestic Relations Order shall not be a diminishment, alienation, or impairment of those benefits. The division of pension benefits is an allocation of property in which each spouse has a species of common ownership.

This Court believes that the plain language of 750 ILCS 5/503(b)(2) supports the finding that contrary to the *Menken* decision, our legislators have already confirmed that a division of a public pension as a marital asset by way of a QILDRO form is not a violation of the Anti-Alienation Clause. It is no coincidence that 750 ILCS 5/503(b)(2) was enacted on July 1, 1999 the same effective date as the QILDRO statute and the consent requirement became effective. To rule as the court did in *Menken* suggests that the court cannot enforce its own award of a marital asset, which is absurd.

Given the Court's rulings in *Papeck*, *Smithberg*, and *Winter*, it is clear that if an ex-spouse, alternate payee is awarded a marital portion of a property interest in his or her former spouse's public pension, then the Court is authorized to directly enforce its own orders to ensure that the alternate payee, former spouse receives the property interest they were awarded in their Judgment for Dissolution of their marriage. This enforcement authority includes, but is certainly not limited to, a direct order to the member ex-spouse to execute a consent to QILDRO.

If *Papeck's* "crucial distinction" between a creditor and a co-owner has any legal significance, then a Domestic Relations Court

that has awarded an ex-spouse an interest in their ex-spouse's public pension, must be authorized to order a pension holder of a public pension to sign the consent form to the division of his or her public pension to ensure that the co-owner, alternate payee, ex-spouse, receives his or her Court awarded property interest in their ex-spouse's public pension. Such authorization not only satisfies the Court's historic authority to directly enforce its own orders by the use of its contempt powers, but such authority would do no violence to the intent and purpose of the anti-alienation provision of the Illinois Constitution, as the public pension holder is still afforded its full protection against all creditors.

The recognition by the Illinois Legislature in 750 ILCS 5/503(b)(2) that a division of pension benefits as marital property by QILDRO is not an alienation of those benefits as contemplated by Section 1-119(m)(1) of the Pension Code clearly controls resolution of the issue. Also the rulings in *Papeck* and *Winter* that a former spouse alternate payee is a co-owner and not a creditor, of the ex-spouse member support the conclusion that contrary to the holding in *Menken*, Section 1-119(m)(1) of the Pension Code would not be rendered meaningless because pension holders still retain the full protection of Article 13, Section 5 of the Illinois Constitution against all other creditors.

In conclusion, this Court believes that ordering a member spouse to execute a consent to QILDRO is an appropriate, and statutorily authorized enforcement power of the Court in dealing with the division of public pension interests between spouses. ■

1. Consent form is required if public employee began prior to July 1, 1999. (40 ILCS 5/1-119)

2. Cited from the Illinois Municipal Retirement Fund QILDRO handbook.

Bankruptcy, divorce and judicial estoppel

By James Hanauer

With the recent recession, most family law attorneys have experienced the situation where a spouse files for bankruptcy during the divorce proceeding. In that situation, the family law attorney must consider the doctrine of judicial estoppel.

According to Section 541 of the Bankruptcy Code, the bankruptcy estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case. 11 U.S.C. 541 (1994). In divorce proceedings, Illinois courts have recognized that the filing of a bankruptcy petition creates an estate which includes all the property in which the debtor spouse has a legal or equitable interest. *In Re: Marriage of Pullen*, 409 Ill. App.3d 1161, 2 N.E.3d 667 (Ill. App. 1st Dist. 2011) (Rule 23 Opinion). As such, the debtor spouse's bankruptcy estate should include any property in which that spouse not only has a legal interest, but also an equitable interest.

Section 503(b)(1) of the Dissolution Act states that all property acquired by either spouse after the marriage and before a judgment for dissolution of marriage or declaration of invalidity of marriage is presumed to be marital property, regardless of whether title is held individually or in some form of co-ownership. The presumption of marital property can be overcome by a showing that the property was acquired by a method listed in Section 503(a).

The Second District Appellate Court has held that, under Illinois divorce laws, a non-titled spouse has a potential equitable interest in the marital home upon a divorce. *GMAC Mortgage, LLC v. Arrigo*, et al, 2014 IL App (2d) 130938, 8 N.E.3d 621, 2014 Ill. App. Lexis 230 (Ill. App. 2nd Dist. 2014). Although the case is not directly on point, it does adhere to the mandates of Section 503(b)(1) of the Dissolution Act. Specifically, the spouse that is not on title to property acquired after the marriage still has an equitable interest in the property when there is a divorce proceeding.

Section 541 of the Bankruptcy Code requires a debtor to list all legal or equitable interests in property as of the commencement of the case. If a divorce proceeding is pending at the time the spouse files a petition for bankruptcy, then that spouse would have an equitable interest in any marital property, even though his/her name is not on title. That spouse must disclose any marital property in which they may have an equitable interest.

The question then becomes what happens if the spouse that files for bankruptcy does not disclose the equitable interest they may have in marital property that is just titled in the other spouse's name? Can the spouse that did not file bankruptcy use the failure to disclose the marital assets to their advantage? Under the doctrine of judicial estoppel, the answer appears to be yes.

In two recent Illinois Appellate decisions, the Courts have applied judicial estoppel to Illinois civil proceedings from Federal bankruptcy proceedings. *Shoup v. Gore, et al.*, 2014 IL App (4th) 130911; 2014 Ill. App. LEXIS 458 (2014). *Berge v. Mader and DMG America, Inc.*, 957 N.E.2d 968; 2011 Ill. App. LEXIS 1054; 2011 IL App (1st) 103778; 354 Ill. Dec. 374 Although each of the cases involved a personal injury cause of action, the same logic and legal principal would apply to divorce proceedings.

According to both *Shoup* and *Berge*, the doctrine of judicial estoppel bars a party from making a representation in a civil case after he has successfully taken a contrary position in another case. The goal of the application of judicial estoppel is to protect the integrity of the system of justice and prevent a party from manipulating and making a mockery of the system of dispensing justice in all its forms. At its heart, this doctrine prevents chameleonic litigants from shifting positions to suit the exigencies of the moment, engaging in cynical gamesmanship, or hoodwinking a court.

Judicial estoppel applies if the following five separate elements are present. Those are as follows: (1) the two positions must be taken by the same party; (2) the positions must be taken in judicial proceedings; (3) the positions must be given under oath; (4) the party must have successfully maintained the first position, and received some benefit thereby; and (5) the two positions must be totally inconsistent.

In both *Shoup* and *Berge* the Illinois Appellate Courts applied judicial estoppel to Illi-