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| **Beyond the Bar**  **Retirement Plan Benefits - Part 2**  **by Joel Brandes**  **In last month's first installment, Mr. Brandes, a nationally renowned matrimonial and family law attorney, introduced his comprehensive article on retirement plan benefits. This month's installment offers the continuation, and in next month's conclusion, case law and court interpretations will be the main focus. (Part 1 is available in the Beyond the Bar archive).**  **TRANSFER OF SURVIVOR BENEFITS**  **Survivor benefits include both benefits payable to surviving spouses and those that are payable after the participant's death. These benefits can be awarded to an alternate payee.**  **A QDRO may provide for treatment of a participant's former spouse with respect to all or a portion of the spousal survivor benefits that must be provided under ERISA.16 Only a spouse or former spouse of the participant can be treated as a spouse under a QDRO.**  **Retirement plans do not need to provide special survivor benefits to the participant's surviving spouse unless the participant is married for at least one year.17 If the retirement plan to which the QDRO relates contains such a one-year marriage requirement, then it cannot require that the alternate payee be treated as the participant's spouse if the marriage lasted for less than one year.**  **FORM OF PAYMENT OF RETIREMENT AND SURVIVOR BENEFITS**  **ERISA requires that defined benefit plans and certain defined contribution plans pay retirement benefits to participants who were married on the participant's annuity starting date, which is the first day of the first period for which an amount is payable to the participant18, in a qualified joint and survivor annuity ("QJSA").19 Under a QJSA, retirement payments are made monthly, or at other regular intervals, to the participant for his or her lifetime. After the participant dies, the plan pays the participant's surviving spouse an amount each month, or other regular interval, in an amount at least one half the retirement benefit that was paid to the participant.20 At any time that benefits are permitted to commence under the plan, a QJSA must be offered commencing at the same time and with an actuarial value at least as great as any other form of benefit payable under the plan. A married participant can choose to receive retirement benefits in a form other than a QJSA if the participant's spouse agrees in writing to that choice.21**  **ERISA requires that defined benefit plans and certain defined contribution plans pay a monthly survivor benefit to a surviving spouse for the spouse's life when a married participant dies prior to the participant's annuity starting date, to the extent the participant's benefit is nonforfeitable under the terms of the plan at the time of his or her death.22 This benefit is called a qualified preretirement survivor annuity ("QPSA").23 An individual loses the right to the QPSA survivor benefits when he or she is divorced from the participant. However, if a former spouse is treated as the participant's surviving spouse under a QDRO, the former spouse is eligible to receive the QPSA unless he or she consents to the waiver of the QPSA.24 If the spouse does not waive the QPSA, the plan may allow the spouse to receive the value of the QPSA in a form other than an annuity.**  **ALTERNATE PAYEE TREATED AS SPOUSE**  **A QDRO may provide that an alternate payee who is a former spouse of the participant will be treated as the participant's spouse for some or all of the benefits payable upon the participant's death, so that the alternate payee will receive benefits provided to a spouse under the plan.25 To the extent that a former spouse is to be treated under the plan as the participant's spouse pursuant to a QDRO, any subsequent spouse of the participant cannot be treated as the participant's surviving spouse.26**  **Under a defined benefit plan, or a defined contribution plan that is subject to the QJSA and QPSA requirements, to the extent the former spouse is treated as the current spouse, the former spouse must consent to payment of retirement benefits in a form other than a QJSA, or to the participant's waiver of the QPSA.27 For example, in a defined benefit plan, the participant would not be able to elect to receive a lump sum payment of the retirement benefits for which the alternate payee is treated as the participant's spouse unless the alternate payee consents. Similarly, the former spouse's consent might be required for any loan to the participant from the plan that is secured by his or her retirement benefits. In a defined contribution plan that is not subject to the QJSA and QPSA requirements, to the extent the QDRO treats the former spouse as the participant's spouse under the plan, the survivor benefits under the plan must be paid to the former spouse unless he or she consents to have those benefits paid to someone else.28**  **ERISA requires the plan to allow the participant to elect at any time, during the applicable election period, to waive the "qualified joint and survivor annuity" form of benefit or the "qualified preretirement survivor annuity" form of benefit, or both29. However, the participant cannot make the election or revoke it without the written consent of his spouse. The definition of "spouse" has been construed to mean the spouse of the participant at the time of the election. Thus, a waiver in a pre-nuptial agreement of a surviving spouse's rights in a participant spouse's ERISA-governed retirement plan is ineffective because the waiver is not made by a person who is a spouse of the participant but merely a spouse to be.30**  **If the participant retires and has elected a joint and survivor annuity, his or her spouse will receive the survivor annuity upon the death of the participant. If a participant dies, and has selected a life-only pension, it is too late to provide the surviving spouse with survivorship rights. If a participant retires and starts to collect payments before a QDRO is approved, the plan may not make retroactive pension payments to the former spouse.**  **These rules are based on the requirement of ERISA that a pension plan (a) may not be required to provide any type or form of benefit, or any option, not otherwise provided by the plan, (b) may not be required to provide increased benefits (determined on the basis of actuarial value), and (c) may not be required to make payment of benefits to an alternate payee that are required to be paid to another alternate payee under another order previously qualified as a qualified domestic relations order.31**  **Case law developments in this area demonstrate that these rules are unbending, and although counsel may obtain a QDRO in a state court, it does not mean that it will be recognized or enforced by the federal courts. [Case law will be discussed next month in Part 3]**  **16 29 USCA s 1056(d)(3)(B)**  **17 29 USCA s 1055(f)**  **18 29 USCA s 1055(h)(2)(A)**  **19 29 USCA s 1055(a)**  **20 29 USCA s 1055(d)**  **21 29 USCA s 1056(c)(1)(A)(i)**  **22 29 USCA s 1055(a)(2)**  **23 29 USCA s 1055(e)**  **24 29 USCA s 1055(c)(1)(A)(i)**  **25 29 USCA s 1056(d)(3)(B)**  **26 29 USCA s 1056(d)(3)(D)**  **27 29 USCA s 1055(c)(1)(A)**  **28 29 USC s 1055 (c)(1)(A); See Notice 97-11, 1997-2 I.R.B. 49, 1996 WL 747904 (I.R.S.)**  **29 See 29 USC s 1055(c)(1)(A)(i)**  **30 Hurwitz v Shur. 982 F2d 778 (2d Cir.,1992); National Auto Dealers and Associates Retirement Trust v Arbeitman, 89 F3d 496 (8th Cir.,1996)**  **31 29 USC s 1056(d)(3)(D); IRC Section 414(p)(3).**  **Joel R. Brandes, a member of the New York Bar, a Fellow of the American Academy of Matrimonial Lawyers, and a Fellow of the International Academy of Matrimonial Lawyers, is the author of Law and the Family New York, Second edition Revised, and co-authored Law and Family New York Forms, both published by West Group. He also writes a monthly column, "Law and the Family" for the New York Law Journal. He can be reached at http://www.nysdivorce.com/**  **Copyright © 2003, New York Divorce and Family Law™. All Rights Reserved.** |

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