

Kansas Qualified Domestic Relations Law: Not Fair, Not Equitable and a Malpractice Trap

By Adina F. Morse



When parties divorce and divide retirement assets as part of that divorce, federal law requires a qualified domestic relations order (“QDRO”). A domestic relations order (“DRO”) under the Employee Retirement Income Security Act (“ERISA”) is “any judgment, decree, or order (including approval of a property settlement agreement) which- (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and (II) is made pursuant to State domestic relations law...” 29 U.S.C. §1056(d)(3)(B)(ii). ERISA defines a *qualified* domestic relations order (“QDRO”), as a DRO “(I) which creates or recognizes the existence of an alternate payee’s right to, 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 plan” and meets the requirements of subparagraphs (C) and (D). 29 U.S.C. §1056(d)(3)(B)(i). Under this statutory scheme, a DRO is not qualified, or final until it is approved by the Plan Administrator.

Federal law is also clear that there is no statute of limitations and a DRO will not fail to be qualified simply because of the passage of time. *See* Pension Protection Act of 2006; Pub.L. 109-280, 120 Stat, 780 (2006).

Under Kansas law, a division of assets which includes retirement benefits pursuant to divorce is a judgment subject to dormancy and revivor. A DRO must be submitted to the district court for certification and sent to the plan for qualification within five (5) years from the date of divorce, K.S.A. 60-2403, or within an additional two years if the judgment has been revived under K.S.A. 60-2402. *See also In re Larimore*, 52 Kan.App.2d 31 (2015) (wife’s award of percentage of husband’s retirement account pursuant to decree of divorce was extinguished under Kansas dormancy law).

When a judgment dividing retirement assets pursuant to divorce becomes dormant, the assets (marital property) awarded to the non-participant spouse revert back to the participant spouse. This results in inequities and windfalls never envisioned by the divorcing parties, their attorneys, or the district court when it entered the decree. It may also constitute malpractice.

Donna Porterfield’s story is one of many currently playing out across Kansas. Donna divorced her husband Dennis Porterfield in 1998 after 18 years of marriage. In the parties’ settlement agreement and decree, Donna was awarded 50% of Dennis’ General Motors pension, as a division of marital property. The district court, in issuing the decree, included strong retention of jurisdiction language to enter and amend orders that were necessary to effectuate the property division.

In 2016 Dennis Porterfield retired from General Motors. Until this point, Donna had never heard of a QDRO, nor told that she had a limited amount of time to file one with the court and get it qualified by the plan in order to receive her share of the marital property, Dennis’ retirement benefits. Donna thought “it would all just happen when he retired.” She thought it was all taken care of through the divorce decree and property settlement agreement. Donna didn’t know she was required to do anything else.

Donna’s attempt to secure the division of property awarded to her 19 years later, via QDRO, was rejected by the district court and the Kansas Court of Appeals. Donna not only lost her share of the couple’s marital property, 50% of Dennis’ retirement benefits, she also lost her retirement, financial security, and undoubtedly, her faith in the courts as the arbiters of fairness and equity. And Dennis received an inequitable and unfair windfall. *See In the Matter of the Marriage of Porterfield*, No. 118,479, Ks Ct. of Appeals, February 22, 2019

(applying *Larimore*, 19 year delay executing on entry of judgment by entry of QDRO left no judgment to enforce by operation of state dormancy law).

In Missouri, the state statute of limitations is irrelevant to QDROs. *See Ochoa v. Ochoa*, 71 S.W.3d 593 (Sup.Ct.Mo) En Banc. (2002). As to the husband, the court opined, the judgment in favor of wife was paid and satisfied when the 1987 order granted her separate ownership to his retirement benefits. *Id.* Qualification is simply the procedure required for state property rights to be recognized under federal law. *Id.*

Other states have also figured out equitable ways to manage the unique challenge that QDROs pose under state domestic law:

In Tennessee, "...until the proposed QDRO is approved by the plan administrator and entered by the trial court, the act of the trial court dividing the pension plan *is not complete and hence not enforceable* (emphasis in original). It can accurately be described as inchoate in nature. It follows that wife's attempt to obtain approval of the plan administrator of the proposed QDRO and the entry of that order is not an action to enforce the divorce judgment, and hence is not barred by the ten-year statute of limitations." *Jordan v. Jordan*, 147 S.W.3d 255 (Tenn.Ct.of Appeals) (2004).

In New York, wife's right to distribution of benefits under the plan did not accrue until husband retired. Therefore "...an action to compel entry of a QDRO [is one] to compel the other [spouse] to perform a mere ministerial task necessary to distribute funds previously allocated by the parties' own binding agreement." *Duhamel v. Duhamel*, 194 Misc.2d 100, 101, 753 N.Y.S.2d 673 (N.Y.Sup.Ct. 2002).

In Michigan, the trial court found that the statute of limitations did not apply to entry of a proposed QDRO because entry was "*part of the judgment*," not a separate action to enforce a judgment. (emphasis in original) (internal citations omitted). *Joughin v. Joughin*, 320 Mich.App.380, 382 (Mich.Ct. App. 2017).

Just days before I argued *Porterfield*, No. 118,479, Ks.Ct. of Appeals, February 22, 2019. before the Court of Appeals, a different panel decided *In re Strom*, 56 Kan.App.2d 65 (2019). Christina Strom waited 22 years to collect her share of her ex-spouses' monthly retired military pay. The district court awarded Christina 5 years, plus years 6 and 7 for revivor, in monthly payments from her ex-husband. The Court of Appeals affirmed and held that "[t]he same rules that apply to alimony and child support installments also apply to a judgment for a division of property which is payable in installments commencing in the future and payable over a term of years" and "[a]s to a judgment payable in installments, the dormancy period commences as to each installment when it became due and collectible by execution or other legal process."

On February 18, 2021, the 10th Circuit Court of Appeals issued its opinion in *Festini-Steel v. ExxonMobil*, No. 20-1052. The court reasoned that "...whether a DRO is a QDRO presents a legal question, not a matter over which a plan administrator could have discretionary authority." *Id.* at 7. At issue was whether the decree of divorce in this matter is a Qualified Domestic Relations Order ("QDRO") under ERISA. If the decree is a QDRO, then plaintiff is entitled to her deceased ex-husband's life insurance proceeds through ExxonMobil. The court analyzed the requirements under ERISA for a DRO to be a QDRO, and held that the decree in this matter satisfied those requirements and was a QDRO.

While I hope that these decisions indicate a retreat from the hardline espoused in *In re Marriage of Larimore*, 52 Kan. App.2d 31 (201), the current state of Kansas law with regard to QDROs presents a real threat of malpractice to family law attorneys, ignores the intent of the divorcing parties, and disproportionately impacts women.

I believe the dormancy provisions in K.S.A. 60-2403 should not apply to qualified domestic relations orders in Kansas regardless of when they issue or the nature of the payments. If you are interested in this issue and

would like to work with me to approach the legislature prior to next session, please contact me at afm@barnhill-morse.law, 785-856-1628.

Biographical Information

Adina Morse serves on the panel of mediators and arbitrators for Associates in Dispute Resolution LLC. She is an approved civil mediator, domestic mediator, conciliator and certified arbitrator in Kansas. Adina is also a partner in the firm of Barnhill & Morse, P.A. located in Lawrence, KS. Her law office specializes in the areas of securing QDROs, drafting language to divide retirement accounts, and litigating post-divorce QDRO issues.

Adina served as adjunct professor for 7 years teaching all forms of dispute resolution. She has taught courses at William Mitchell College of Law, Washburn Law School, and the University of Kansas Law School. Adina has been a member for the Douglas County District Court mediation panel for over 2 years. Adina was recently appointed as a member of the Supreme Court's Dispute Resolution Advisory Council.