CURLEY
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MassNAELA Webinar: Complaints for Separate Support

Handout prepared by Patrick G. Curley, Esq.

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I. How to choose the right case?

A. Consider potentially positive fact patterns: (Community Spouse = CS, Institutionalized Spouse = IS)

1. CS has sufficient life expectancy to need additional financial support
2. CS has or may have exceptional expenses: housing, medical, care, etc.
3. CS has limited assets and/or income
    a. Modest income from current employment, pension, SS, etc.
    b. Could retire soon
    c. Current employment could be terminated at any time (e.g. COVID-19 uncertainty with job market)
    d. Sacrificed their income by focusing on raising family rather lucrative jobs outside home
4. Spousal maintenance allowance under MMMNA formula is inadequate
    a. Extensive mortgage or HELOC or credit card debt
    b. Joint debts – especially if incurred mostly for benefit of IS
5. CS sacrificed her own retirement savings so IS could save in IRAs
6. All interested parties will Assent: adult children and attorney-in-fact for IS
7. IS has valid POA (not required to succeed)

a. POA authorizes gifting and self-dealing (this is not deal breaker but may help sway judge/GAL)

8. No disputes about IS's incapacity and need for MassHealth

9. Complaint for Separate Support should also succeed in MH Community Benefits cases to protect Applicant's IRA and/or protect Applicant's income to eliminate a MH deductible

B. Is it worth it to the client and you?

1. Does IRA value justify costs of Court action vs. liquidate and incur income tax hit?

2. Is IS's excess income above spousal maintenance allowance under MMMNA worth pursuing through Court action?

3. Is CS's or IS's risk of death so high that this strategy may not be worth the time/cost/stress?

4. How will you be paid?

5. What are the risks to the client?

a. No guarantees in Court

b. Court may not appoint a GAL who "gets" what you are doing

c. Client will owe Private pay Nursing Home bills (or home caregiver expenses) while waiting for success on Court strategy

a. Waiting to get before a Judge on the motions

b. Waiting to receive GAL appointment

c. Waiting for Court Hearing

d. Waiting for Certified Judgment

e. Waiting for IRA administrator to implement transfer

f. Waiting for spend down of excess CS assets (SPIA, Fair Hearing to increase CSRA, etc.)

6. Are you prepared to educate the Judge, the clerk, the GAL, etc. each step of the way?

II. What to do before filing in Court?

A. Secure key documents

1. Court Medical Certificate

a. Be sure to calendar to get it updated if Court hearing falls outside 30-day valid period

2. Certified Marriage Certificate

3. Asset/income/expense verifications

B. Notify client's financial advisor (if any) who manages the IS's IRAs

C. Call IRA plan administrator to confirm the following:

1. What language they require in the Court Judgment

2. What forms are required and secure them immediately

3. Will they require original Certified copy of Court Judgment?

4. What is best method to transmit Court Judgment and completed forms to expedite action (fax, FedEx, etc.)

D. Analyze whether to pursue IS's income

1. Can CS pursue IS income through Fair Hearing for increased MMMNA spousal maintenance allowance? Limited to exceptional CS medical expenses in most cases

E. Find GAL to propose to the Court?

1. Have you reviewed the facts of the case with the GAL?

2. Are they available for emergency turnaround on GAL report?

3. What evidence will the GAL require to prove CS has done planning to protect IS if CS predeceases?

III. Draft Pleadings, Motions, etc.

A. Complaint for Separate Support CJ-D 102 (4/07)

B. Motion to Immediately Appoint GAL

C. Motion for Expedited Hearing

D. Affidavit of Emergency

E. Memo of Fact and Law in support

F. Assents

G. Agreement to Judgment

H. Short form financial statements

I. Uniform Counsel Certification form

IV. File with the Probate Divorce department

A. Explain urgency to the clerk to get before a judge on motions

B. Once Complaint filed, immediately secure Summons

1. Consider filing Complaint and serving Summons before trying to get before a judge on the Motion to appoint a GAL

V. Serve the Defendant in hand with photocopy of Summons and Complaint

A. While Summons states that Defendant has 20 days to answer Complaint, Judges have held hearing before 20 days expires (where GAL accepts service of Complaint, parties have all assented, etc.)

VI. File the Return of Service on the Summons and Complaint

VII. Attend Court Hearing on the Complaint

A. CS and GAL should attend

1. CS should be prepared to testify

VIII. Secure Certified copy of Court Judgment

IX. Draft letter to IRA plan administrator requesting immediate transfer of IRA and attach Court Judgment

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OUTLINE

In-Marriage QDROs and Complaints for Separate Support
MANAELA 8-19-2020
Daniel M. Surprenant, Esq.

I. OVERVIEW

a. Basic idea and application.
b. ERISA Pensions vs. Non-ERISA Pensions (ours was MA Teacher's Retirement Pension).
c. Use of In-Marriage QDRO assistance.

II. FACTS OF MY CASE:

Husband's Income: $3,644.
Wife's Income: $1,720.
PPA initially: $1,873.
PPA After MMMNA: $647.
PPA After QDRO: $0.

Wife acted as DPOA.
GAL appointed for incapacitated Husband.

III. DISCUSSION of LAW and PROCEDURE:

a. See M.G.L. c. 209, c. 208 and c. 32 Section 19.
b. Contr. Ret. Bd. of Arlington v. Mangiacotti, 406 Mass. 184 (1989).
c. See also ERISA and Dept. of Labor

IV. NEED or NO NEED?

a. Our case happened to have need.
b. In-Marriage QDRO success without need.

V. Application to COMMUNITY MASSHEALTH?

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In Marriage QDRO, LLC

Accessing Retirement Assets Without Penalty or Restriction

What is an In Marriage QDRO? It is a strategy which combines state law contractual agreements between spouses with a federally-approved transaction (an ERISA QDRO). This allows the transfer of funds from a 401(k) in the name of one spouse into an IRA in the name of the other. It allows access to a participant's 401(k) account, without the restrictions associated with an In-Service Distribution and without the need for another type of qualifying event.

Most people ask two questions. First, does this process meet all ERISA guidelines and Department of Labor standards? Second, why would a spouse want to do this?

The answer to the first question is YES. If done properly, the In Marriage QDRO® strategy meets all of the Employee Retirement Income Security Act (ERISA) requirements. Congress created the concept of a Qualified Domestic Relations Order (QDRO) in 1984, when it amended ERISA to incorporate the concept. One of Congress' main objectives was to reduce the complex results from divorce and property division under state law, so most people have associated QDROs only with those concepts. However, the word "divorce" does not appear in the entire statute (29 USC § 1056), and the Department of Labor specifically notes on its website that a divorce proceeding is NOT needed for an order of a state court to be designated a QDRO.

Our strategy, the In Marriage QDRO®, uses the specific definitions contained in the U.S. Code and strategically applies them to several types of interspousal agreements that state law allows between married parties. While some couples may be skeptical of a process that has not been widely used outside of the divorce context, unless Congress amends ERISA, Plan Administrators cannot legitimately challenge the use of a QDRO by a married couple. The second major question is why would spouses want to use this process? The answer may be different for each couple, but here are a few examples. The most popular reason is to transfer funds from a 401(k) to an IRA in order for the family's personal financial advisor to manage their funds through a more diversified portfolio, including income annuities. Alternatively, a younger spouse under the age of 59 ½ old may wish to transfer funds to the other spouse who is over 59 ½ years old, in order to obtain immediate access to funds. A couple may wish to use IRA's as an estate planning tool, in order to efficiently transfer funds to a significantly younger spouse in order to delay required minimum distributions (RMDs). Others may want to use the funds for purposes not possible under the 401(k), such as the purchase of real estate. Some may simply want cash and can utilize the IRS exemption that eliminates the 10% early withdrawal penalty that would ordinarily apply when liquidating 401(k) funds prior to age 59 ½.

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Applications of an

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SAMPLE APPLICATIONS OF AN IN MARRIAGE QDRO

APPLICATION 1

Diversify investments ahead of stock market downturn.

The market has been on an 8 year bull run. How fast can a working individual who looks at their 401(k) statement once per quarter react to a correction or a crash?

George is 56 years old and has $625,000 in his 401(k). His wife, Peggy, is also 56 years old. Both are starting to think about retirement, but cannot do so right now. George fears that the stock market will not continue going up and fears that another stock market correction will cause his 401(k) to lose significant value before he is able to retire and roll it over into a more diversified portfolio.

An In Marriage QDRO® would allow George to take $300,000 from his 401(k) and roll it into an IRA in Peggy's name. With the proper guidance from a financial advisor, Peggy can diversify this $300,000 in various stable accounts which protect against a stock market correction. Meanwhile, George keeps $325,000 in his 401(k) which allows for the chance of continued growth in the stock market, while also continuing to contribute for another few years before retirement.

APPLICATION 2

Rolling funds to the younger spouse to delay Required Minimum Distributions (RMDs).

John is a 68-year old employee with a $595,000 401(k). John is married to Susan who is 57 years old with a good income. John and Susan have very little debt, live a modest life style and are both in good health. John is fast approaching the age where he must begin drawing a mandatory distribution from his 401(k). John would prefer to keep these funds in qualified investments earning a good rate of return.

The In Marriage QDRO® allows John to transfer funds to Susan who would not be under the same mandatory distributions for another 13 years which allows the funds to grow for many more years pretax. Additionally, depending on the amount transferred, it could also be a way to put John's estate under $8 million for tax estate planning should he be near that threshold.

APPLICATION 3

Rolling funds to the older spouse to access funds at earlier time.

Susan has $595,000 in 401(k) and is 55 years old. John was a state employee and has recently retired at the age of 60. The parties would like to be able to utilize some of Susan's 401(k) to subsidize the decrease income from John stopping work.

The In Marriage QDRO® would allow Susan to transfer funds to an IRA under John's name. Since John is over 59 ½ years old, he can begin withdraw funds from an IRA under a controlled plan that maximizes a tax application, yet achieves their goal of additional monthly income.

SAMPLE APPLICATIONS OF AN IN MARRIAGE QDRO

APPLICATION 4

Wealthier spouse has a prenuptial agreement and files married, but separate tax returns, but still wants to provide security for the less wealthy spouse.

Mary and Frank have a prenuptial agreement because Mary comes from a wealthy family. Mary wants to provide some financial security for Frank even though she does not wish to convert to a community property regime. Mary has $600,000 in a qualified profit sharing plan. Without the In Marriage QDRO, the normal way to provide such security is to simply fund an account for Frank with after-tax money.

Option 1: Depending on Mary's wealth, she is probably at a 36% tax rate. Any funds she gives to Frank would have already been taxed at Mary's higher rate. With In Marriage QDRO®, Mary can transfer $150,000 in pre-tax funds from her profit sharing plan to an IRA in Frank's name. If Frank needs the money now and is under 59 ½, he can liquidate a portion of these funds without the 10% early withdrawal penalty and it is taxed at Frank's tax rate, which is presumably lower than Mary's 36% tax rate.

Option 2: If Mary believes an annuity is the best investment vehicle to provide security for Frank, she can still buy the annuity. The only difference is that an In Marriage QDRO® would allow Mary to transfer into Frank's name $250,000 in pre-taxed funds and Frank could buy the annuity, Mary would have to purchase the annuity with her after tax money. This potentially could save Mary a significant amount in taxes and/or allow her to transfer more funds to Frank.

APPLICATION 5

Avoid normal In Service Distribution rules by clinically removing after-tax funds from the 401(k).

Employee wants to do an In Service Distribution, but only wants to withdraw the after-tax portion of his 401(k). The family wants to put a down payment on a house. However, the Plan says that In Service Distribution rules require the liquidation of certain pre-tax funds before accessing the after-tax portion.

In an In Marriage QDRO®, this allows Jon, the employee, to select precisely which portion of the 401(k) he would like to remove, including withdrawal of the after-tax portion without disturbing the pre-tax portion. Also, if the non-employee spouse is under 59 ½, then the parties could actually liquidate the funds without the 10% early withdrawal penalty.

APPLICATION 6

Turn 401(k) funds into a guaranteed pension.

Husband has good size 401(k) plan. His wife is much younger and we all know the men usually die first. An In Marriage QDRO® would allow him to take pre-tax funds which are captured inside the 401(k) and remove them into an IRA in wife's name. This would allow her to purchase guaranteed annuity products based on her age and gender. There is also annuity products that allow riders for the husband's benefit should the wife unexpectedly die first.

SAMPLE APPLICATIONS OF AN IN MARRIAGE QDRO

APPLICATION 7

Utilize 401(k) to buy property or other alternative investments.

If one of the spouses is familiar with real estate market or in construction and can effectively manage rental properties and/or flip houses, an In Marriage QDRO® will allow funds from a 401(k) to be transferred into a self-directed IRA which can in turn purchase real estate instead of securities. Additionally, it is believed that alternative investments like buying a gold IRA or buying fractional pieces of companies that purchase bad debt for profit, an In Marriage QDRO® allows these types of purchases to be funded from a 401(k) to self-directed IRA rollover.

APPLICATION 8

One spouse wants to retire from state employment early.

Peggy is a State employee with a LASERS pension. She is 50 years old and has been working with the state for 24 ½ years. Peggy would like to retire soon, but cannot because she doesn't have 30 years of service and is not age 55. She is married to Jim who has a 401(k) with $375,000. Peggy has a deferred compensation plan that she only contributes $50/month because the state doesn't match contributions like Jim's 401(k)

An In Marriage QDRO® would allow Jim to transfer funds from his 401(k) to Peggy's deferred compensation plan or regular IRA. This would allow Peggy to purchase five (5) years of airtime service which puts Peggy at 29 years of service. At 30 years of service, Peggy can retire with full state retirement at any age. The cost of airtime services can be expensive, so the guidance from a good financial planner is necessary to determine if such an investment is wise. However, this process gives Peggy options that she didn't have before.

APPLICATION 9

Employee prefers Roth IRAs, but doesn't have the cash to pay for the conversion.

You can transfer from 401(k) to regular IRA, liquidate without penalty enough to pay the Roth IRA conversion. Once in the spouse IRA, convert to Roth IRA and the liquidated cash to pay the conversion cost. This may be in preparation for those who believe tax rates will go up in the next decade because of the US economy and debt.

APPLICATION 10

Family needs cash.

Jane is a 51-year old employee of ABC Corporation with a 401(k) of $220,000. Jane's husband Tom just turned 59 years old and doesn't have his own 401(k) or IRA because he is self-employed. Their family is in need of additional income because Tom's business has been slow the last two years. They previously took out a loan from Jane's 401(k) and another loan won't help their situation.

An In Marriage QDRO® would allow Jane to transfer a significant portion of the $220,000 into an IRA in Tom's name. Since Tom will soon be 59 ½ years old, he would be able to begin drawing funds from his IRA without a 10% early withdrawal penalty and only in those months where his business doesn't earn sufficient funds. This way the family is not liquidating a large amount at one time, thereby creating an unnecessary tax issue.

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The Legal Basis For Separate Support for Retirement Plans

Presented By:
Certified Elder Law Attorney Lucy J. Budman

MassNAELA Webinar on August 19, 2020

What is a Retirement Plan?

- **Plans Covered under Section 401 of the internal revenue code**

Generally Employer Plans – defined benefit and defined contribution

- **Plans Covered under Section 408 of the internal revenue code**

Generally IRAs (individual retirement accounts)

Retirement Plans are *Countable Assets* or *Income*

They are subject to spenddown, transfer or calculations regarding PPA (patient pay amounts)

Impact on a Community Spouse

The full amount of a LIFETIME interspousal transfer of a retirement plan is taxable income

Total tax depends on the rate paid by the spouse

EXCEPTIONS

Qualified Domestic Relations Order

Applies to section 401 retirement plans

Requirements set out in IRC section 414(p)

IRS Publication 504

EXCEPTIONS

Separate Support Order

Applies to section 408 retirement plans (IRAs)

Requirements set out in IRC section 408(d)(6) – Transfers Incident To Divorce See the statutory language, no divorce is required

An action under MGL c. 200, sec 32

MassHealth Treatment

MassHealth regulations appear to require MassHealth to honor court ordered support

130 CMR 520.016(b)(2)(a)(ii) – regarding the CSRA

130 CMR 520.026(b)(3) – regarding the spousal MMMNA (regardless, community spouse income is not countable)

participant's annuity starting date or the date of the participant's death.

(E) Exception for plans described in section 404(c).—
This paragraph shall not apply to a plan which the Secretary has determined is a plan described in section 404(c) (or a continuation thereof) in which participation is substantially limited to individuals who, before January 1, 1976, ceased employment covered by the plan.

(F) Cross reference.—For—

(i) provisions under which participants may elect to waive the requirements of this paragraph, and

(ii) other definitions and special rules for purposes of this paragraph,

see section 417.

(12) A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that in the case of any merger or consolidation with, or transfer of assets or liabilities to, any other plan after September 2, 1974, each participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). The preceding sentence does not apply to any multiemployer plan with respect to any transaction to the extent that participants either before or after the transaction are covered under a multiemployer plan to which title IV of the Employee Retirement Income Security Act of 1974 applies.

(13) Assignment and alienation.—

(A) In general.—
A trust shall not constitute a qualified trust under this section unless the plan of which such trust is a part provides that benefits provided under the plan may not be assigned or alienated. For purposes of the preceding sentence, there shall not be taken into account any voluntary and revocable assignment of not to exceed 10 percent of any benefit payment made by any participant who is receiving benefits under the plan unless the assignment or alienation is made

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for purposes of defraying plan administration costs. For purposes of this paragraph a loan made to a participant or beneficiary shall not be treated as an assignment or alienation if such loan is secured by the participant's accrued nonforfeitable benefit and is exempt from the tax imposed by section 4975 (relating to tax on prohibited transactions) by reason of section 4975(d)(1). This paragraph shall take effect on January 1, 1976 and shall not apply to assignments which were irrevocable on September 2, 1974.

(B) Special rules for domestic relations orders.—
Subparagraph (A) shall apply to the creation, assignment, or recognition of a right to any benefit payable with respect to a participant pursuant to a domestic relations order, except that subparagraph (A) shall not apply if the order is determined to be a qualified domestic relations order.

(C) Special rule for certain judgments and settlements.—
Subparagraph (A) shall not apply to any offset of a participant's benefits provided under a plan against an amount that the participant is ordered or required to pay to the plan if—

(i) the order or requirement to pay arises—

(I) under a judgment of conviction for a crime involving such plan,

(II) under a civil judgment (including a consent order or decree) entered by a court in an action brought in connection with a violation (or alleged violation) of part 4 of subtitle B of title I of the Employee Retirement Income Security Act of 1974, or

(III) pursuant to a settlement agreement between the Secretary of Labor and the participant, or a settlement agreement between the Pension Benefit Guaranty Corporation and the participant, in connection with a violation (or alleged violation) of part 4 of such subtitle by a fiduciary or any other person,

(ii) the judgment, order, decree, or settlement agreement expressly provides for the offset of all or part of the amount ordered or required to be paid to the plan against the participant's benefits provided under the plan, and

26 U.S. Code § 408 - Individual retirement accounts

U.S. Code Notes

(a) Individual retirement account For purposes of this section, the term "individual retirement account" means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements:

(1) Except in the case of a rollover contribution described in subsection (d)(3) or in section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A).

(2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section.

(3) No part of the trust funds will be invested in life insurance contracts.

(4) The interest of an individual in the balance in his account is nonforfeitable.

(5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.

(6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

(i) the taxpayer reasonably relies on information supplied pursuant to subtitle F for determining the amount of a rollover contribution, but

(ii) the information was erroneous,

subparagraph (A) shall be applied by increasing the dollar limit set forth therein by that portion of the excess contribution which was attributable to such information.

For purposes of this paragraph, the amount allowable as a deduction under section 219 shall be computed without regard to section 219(g).

(6) Transfer of account incident to divorce

The transfer of an individual's interest in an individual retirement account or an individual retirement annuity to his spouse or former spouse under a divorce or separation instrument described in clause (i) of section 121(d)(3)(C) is not to be considered a taxable transfer made by such individual notwithstanding any other provision of this subtitle, and such interest at the time of the transfer is to be treated as an individual retirement account of such spouse, and not of such individual. Thereafter such account or annuity for purposes of this subtitle is to be treated as maintained for the benefit of such spouse.

(7) Special rules for simplified employee pensions or simple retirement accounts

(A) Transfer or rollover of contributions prohibited until deferral test met

Notwithstanding any other provision of this subsection or section 72(t), paragraph (1) and section 72(t)(1) shall apply to the transfer or distribution from a simplified employee pension of any contribution under a salary reduction arrangement described in subsection (k)(6) (or any income allocable thereto) before a determination as to whether the requirements of subsection (k)(6)(A)(iii) are met with respect to such contribution.

(B) Certain exclusions treated as deductions

For purposes of paragraphs (4) and (5) and section 4973, any amount excludable or excluded from gross income under section 402(h) or 402(k) shall be treated as an amount allowable or allowed as a deduction under section 219.

(6) Other rules For purposes of this subsection—

(A) Related persons
The term "related persons" has the same meaning as when used in section 144(a)(3).

(B) Employees of entities under common control
The rules of subsections (b), (c), (m), and (o) shall apply.

(o) Regulations The Secretary shall prescribe such regulations (which may provide rules in addition to the rules contained in subsections (m) and (n)) as may be necessary to prevent the avoidance of any employee benefit requirement listed in subsection (m)(4) or (n)(3) or any requirement under section 457 through the use of—

(1) separate organizations,

(2) employee leasing, or

(3) other arrangements.

The regulations prescribed under subsection (n) shall include provisions to minimize the recordkeeping requirements of subsection (n) in the case of an employer which has no top-heavy plans (within the meaning of section 416(g)) and which uses the services of persons (other than employees) for an insignificant percentage of the employer's total workload.

(p) Qualified domestic relations order defined For purposes of this subsection and section 401(a)(13)—

(1) In general

(A) Qualified domestic relations order The term "qualified domestic relations order" means a domestic relations order—

(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

(ii) with respect to which the requirements of paragraphs (2) and (3) are met.

(B) Domestic relations order The term "domestic relations order" means 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 a State domestic relations law (including a community property law).

(2) Order must clearly specify certain facts A domestic relations order meets the requirements of this paragraph only if such order clearly specifies—

(A) the name and the last known mailing address (if any) of the participant and the name and mailing address of each alternate payee covered by the order,

(B) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined,

(C) the number of payments or period to which such order applies, and

(D) each plan to which such order applies.

(3) Order may not alter amount, form, etc., of benefits A domestic relations order meets the requirements of this paragraph only if such order—

(A) does not require a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan,

(B) does not require the plan to provide increased benefits (determined on the basis of actuarial value), and

(C) does not require the payment of benefits to an alternate payee which are required to be paid to another alternate payee under another order previously determined to be a qualified domestic relations order.

(4) Exception for certain payments made after earliest retirement age

(A) In general A domestic relations order shall not be treated as failing to meet the requirements of subparagraph (A) of paragraph (3) solely because such order requires that payment of benefits be made to an alternate payee—

(i) in the case of any payment before a participant has separated from service, on or after the date on which the participant attains (or would have attained) the earliest retirement age,

(ii) as if the participant had retired on the date on which such payment is to begin under such order (but taking into account only the present value of the benefits actually accrued and not taking into account the present value of any employer subsidy for early retirement), and

(iii) in any form in which such benefits may be paid under the plan to the participant (other than in the form of a joint and survivor annuity with respect to the alternate payee and his or her subsequent spouse).

For purposes of clause (ii), the interest rate assumption used in determining the present value shall be the interest rate specified in the plan or, if no rate is specified, 5 percent.

(B) Earliest retirement age For purposes of this paragraph, the term "earliest retirement age" means the earlier of—

(i) the date on which the participant is entitled to a distribution under the plan, or

(ii) the later of—

(I) the date the participant attains age 50, or

(II) the earliest date on which the participant could begin receiving benefits under the plan if the participant separated from service.

(5) Treatment of former spouse as surviving spouse for purposes of determining survivor benefits To the extent provided in any qualified domestic relations order—

(A) the former spouse of a participant shall be treated as a surviving spouse of such participant for purposes of sections 401(a)

(11) and 417 (and any spouse of the participant shall not be treated as a spouse of the participant for such purposes), and

(B) if married for at least 1 year, the surviving former spouse shall be treated as meeting the requirements of section 417(d).

(6) Plan procedures with respect to orders

(A) Notice and determination by administrator In the case of any domestic relations order received by a plan—

(i) the plan administrator shall promptly notify the participant and each alternate payee of the receipt of such order and the plan's procedures for determining the qualified status of domestic relations orders, and

(ii) within a reasonable period after receipt of such order, the plan administrator shall determine whether such order is a qualified domestic relations order and notify the participant and each alternate payee of such determination.

(B) Plan to establish reasonable procedures
Each plan shall establish reasonable procedures to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders.

(7) Procedures for period during which determination is being made

(A) In general
During any period in which the issue of whether a domestic relations order is a qualified domestic relations order is being determined (by the plan administrator, by a court of competent jurisdiction, or otherwise), the plan administrator shall separately account for the amounts (hereinafter in this paragraph referred to as the "segregated amounts") which would have been payable to the alternate payee during such period if the order had been determined to be a qualified domestic relations order.

(B) Payment to alternate payee if order determined to be qualified domestic relations order

If within the 18-month period described in subparagraph (E) the order (or modification thereof) is determined to be a qualified domestic relations order, the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons entitled thereto.

(C) Payment to plan participant in certain cases If within the 18-month period described in subparagraph (E)—

(i) it is determined that the order is not a qualified domestic relations order, or

(ii) the issue as to whether such order is a qualified domestic relations order is not resolved,

then the plan administrator shall pay the segregated amounts (including any interest thereon) to the person or persons who would have been entitled to such amounts if there had been no order.

(D) Subsequent determination or order to be applied prospectively only
Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in subparagraph (E) shall be applied prospectively only.

(E) Determination of 18-month period
For purposes of this paragraph, the 18-month period described in this subparagraph is the 18-month period beginning with the date on which the first payment would be required to be made under the domestic relations order.

(8) Alternate payee defined
The term "alternate payee" means any spouse, former spouse, child or other dependent of a participant who is recognized by a domestic relations order as having a right to receive all, or a portion of, the benefits payable under a plan with respect to such participant.

(9) Subsection not to apply to plans to which section 401(a)(13) does not apply

This subsection shall not apply to any plan to which section 401(a)(13) [27] does not apply. For purposes of this title, except as provided in regulations, any distribution from an annuity contract under section 403(b) pursuant to a qualified domestic relations order shall be treated in the same manner as a distribution from a plan to which section 401(a)(13) applies.

(10) Waiver of certain distribution requirements

With respect to the requirements of subsections (a) and (k) of section 401, section 403(b), section 409(d), and section 457(d), a plan shall not be treated as failing to meet such requirements solely by reason of payments to an alternative payee pursuant to a qualified domestic relations order.

(11) Application of rules to certain other plans

For purposes of this title, a distribution or payment from a governmental plan (as defined in subsection (d)) or a church plan (as described in subsection (e)) or an eligible deferred compensation plan (within the meaning of section 457(b)) shall be treated as made pursuant to a qualified domestic relations order if it is made pursuant to a domestic relations order which meets the requirement of clause (i) of paragraph (1)(A).

(12) Tax treatment of payments from a section 457 plan

If a distribution or payment from an eligible deferred compensation plan described in section 457(b) is made pursuant to a qualified domestic relations order, rules similar to the rules of section 402(e)(1)(A) shall apply to such distribution or payment.

(13) Consultation with the Secretary

In prescribing regulations under this subsection and section 401(a)(13), the Secretary of Labor shall consult with the Secretary.

(q) Highly compensated employee

(1) In general The term "highly compensated employee" means any employee who—

(A) was a 5-percent owner at any time during the year or the preceding year, or

(B) for the preceding year—

520.016: Long-Term Care: Treatment of Assets

130 CMR 520.016 describes the treatment of countable assets when one member of a couple is institutionalized, the post-eligibility transfer of assets, and the allowable income deductions for applicants and members who are residents of a long-term-care facility.

(A) Institutionalized Individuals. The total value of assets owned by an institutionalized single individual or by a member of an institutionalized couple must not exceed $2,000.

(B) Treatment of a Married Couple's Assets When One Spouse Is Institutionalized.

(1) Assessment.

(a) Requirement. The MassHealth agency completes an assessment of the total value of a couple's combined countable assets and computes the community spouse's asset allowance as of the date of the beginning of the most recent continuous period of institutionalization of one spouse.

(b) Right to Request an Assessment. When one spouse has entered a medical institution and is expected to remain institutionalized for at least 30 days, either spouse may request the MassHealth agency to make this assessment, even if the institutionalized spouse is not applying for MassHealth Standard at that time. The period of institutionalization must be continuous and expected to last for at least 30 days.

(c) Right to Appeal. The MassHealth agency must give each spouse a copy of the assessment and the documentation used to make such assessment. Each spouse must be notified that he or she has the right to appeal the determination of countable assets and the community spouse's asset allowance when the institutionalized spouse (or authorized representative) applies for MassHealth Standard.

(2) Determination of Eligibility for the Institutionalized Spouse. At the time that the institutionalized spouse applies for MassHealth Standard, the MassHealth agency must determine the couple's current total countable assets, regardless of the form of ownership between the couple, and the amount of assets allowed for the community spouse as follows. The community spouse's asset allowance is not considered available to the institutionalized spouse when determining the institutionalized spouse's eligibility for MassHealth Standard.

(a) Deduct the community spouse's asset allowance, based on countable assets as of the date of the beginning of the most recent continuous period of institutionalization of the institutionalized spouse, from the remaining assets. The community spouse's asset allowance is the greatest of the following amounts:

(i) the combined total countable assets of the institutionalized spouse and the community spouse, not to exceed $109,560;

(ii) a court-ordered amount; or

(iii) an amount determined after a fair hearing in accordance with 130 CMR 520.017.

(1) The MassHealth agency determines the MMMNA by adding the following amounts:
(a) $1,822 (the federal standard maintenance allowance); and
(b) an excess shelter allowance determined by calculating the difference between the standard shelter expense of $547 and the shelter expenses for the community spouse's principal residence, including
(i) the actual expenses for rent, mortgage (including interest and principal), property taxes and insurance, and any required maintenance charge for a condominium or cooperative; and
(ii) the applicable standard deduction under the Supplemental Nutrition Assistance Program for utility expenses. If heat is included in the rent or condominium fee, this amount is $375. If heat is not included in the rent or condominium fee, this amount is $611.

(2) The maximum-monthly-maintenance-needs allowance is $2,739.00 per month, unless it has been increased as the result of a fair-hearing decision based on exceptional circumstances in accordance with 130 CMR 520.017(D).

(3) If the institutionalized individual is subject to a court order for the support of the community spouse, the court-ordered amount of support must be used as the spousal-maintenance-needs deduction when it exceeds the spousal-maintenance-needs deduction calculated according to 130 CMR 520.026(B) or resulting from a fair hearing.

(C) Deductions for Family-Maintenance Needs.

(1) The MassHealth agency allows a deduction from the income of a long-term-care resident to provide for the maintenance needs of the following family members if they live with the community spouse:
(a) a minor child — a child younger than 21 years old of either member of the couple;
(b) a dependent child — a child 21 years of age and older who is claimed as a dependent by either spouse for income-tax purposes under the Internal Revenue Code;
(c) a dependent parent — a parent of either spouse who lives with the community spouse and who is claimed as a dependent by either spouse for income-tax purposes under the Internal Revenue Code; and
(d) a dependent sibling — a brother or sister of either spouse (including a half-brother or half-sister) who lives with the community spouse and who is claimed as a dependent by either spouse for income-tax purposes under the Internal Revenue Code.

(2) The deduction for family-maintenance needs is one-third of the amount by which the federal standard maintenance allowance exceeds the monthly gross income of the family member. The federal standard maintenance allowance is $1,822.

Part II REAL AND PERSONAL PROPERTY AND DOMESTIC RELATIONS

Title III DOMESTIC RELATIONS

Chapter 209 HUSBAND AND WIFE

Section 32 MARRIED PERSON ABANDONED BY SPOUSE; ORDER PROHIBITING RESTRAINT OF PERSONAL LIBERTY OF SPOUSE; SUPPORT, CUSTODY AND MAINTENANCE ORDERS; INFORMATION PROVIDED TO COMPLAINANT; DOMESTIC VIOLENCE RECORD SEARCH; INVESTIGATIONS; FACTORS DETERMINING SUPPORT AMOUNT

Section 32. If a spouse fails, without justifiable cause, to provide suitable support of the other spouse, or deserts the other spouse, or if a married person has justifiable cause for living apart from his spouse, whether or not the married person is actually living apart, the probate court may, upon the complaint of the married person, or if he is incompetent due to mental illness or mental retardation upon the complaint of the guardian or next friend, prohibit the spouse from imposing any restraint upon the personal liberty of the married person during such time as the court by its order may direct or until further order of the court thereon. Upon the complaint of any such party or guardian of a minor child made in accordance with the Massachusetts Rules of Civil Procedure the court may make further orders relative to the support of the married person and the care, custody and maintenance of minor children, may determine with

which of the parents the children or any of them shall remain and may, from time to time, upon similar complaint revise and alter such judgment or make a new order or judgment as the circumstances of the parents or the benefit of the children may require.

Upon the filing of a complaint pursuant to this section to prohibit a spouse from imposing any restraint upon the complainant's personal liberty, a complainant shall be informed that proceedings hereunder are civil in nature and that violations of orders issued hereunder are criminal in nature. Further, a complainant shall be given information prepared by the appropriate district attorney's office that other criminal proceedings may be available and shall be instructed by such district attorney's office relative to the procedures required to initiate criminal proceedings including, but not limited to, the filing of a complaint for a violation of section forty-three of chapter two hundred and sixty-five. Whenever possible, a complainant shall be provided with such information in the complainant's native language.

When considering a complaint to prohibit a spouse from imposing any restraint upon the complainant's personal liberty under this section, a judge shall cause a search to be made of the records contained within the statewide domestic violence record keeping system maintained by the office of the commissioner of probation and shall review the resulting data to determine whether the named defendant has a civil or criminal record involving domestic or other violence. Upon receipt of information that an outstanding warrant exists against the named defendant, a judge shall order that the appropriate law enforcement officials be notified and shall order that any information regarding the defendant's most recent whereabouts shall be forwarded to such officials. In all instances where an outstanding warrant exists, a judge shall make a finding, based upon

all of the circumstances, as to whether an imminent threat of bodily injury exists to the petitioner. In all instances where such an imminent threat of bodily injury is found to exist, the judge shall notify the appropriate law enforcement officials of such finding and such officials shall take all necessary actions to execute any such outstanding warrant as soon as is practicable.

Upon request by the court, the state police, local police or probation officers shall make an investigation in relation to any proceedings and report to the court. Every such report shall be in writing and shall become a part of the record of such proceedings.

In determining the amount of a support order, if any, to be made, the court shall consider, but is not limited to, the following factors, to the extent pertinent and raised by the parties: (a) the net income, assets, earning ability, and other obligations of the obligor; (b) the number and ages of the persons to be supported; (c) the expenses incurred by the obligor and the persons to be supported for the necessities of life, and the usual standard of living of the persons to be supported; (d) the assets and net earnings, including a deduction for the provision for childcare, of the persons to be supported; (e) the marriage or remarriage of any person being supported; (f) the responsibilities of the obligor for the maintenance or support of any other children of the obligor, even if a court order for such maintenance or support does not exist, or for any preexisting order for the maintenance or support of any other children from a previous marriage, or for any preexisting order for the maintenance or support of any other children born out of wedlock and that said obligor is fulfilling such responsibility; and (g) the capacity of any person being supported or having custody of supported children, except persons under eighteen years of age, to work or to make

reasonable efforts to obtain employment, including the extent of employment opportunities in fields in which such person is suited for employment, the necessity for and availability to said person of job training programs, and the extent to which said person is needed during business hours by members of the family and the availability to said person of child care services and the extent to which such person needs to attend school to obtain skills necessary for employment. When the court makes an order for maintenance or support on behalf of a spouse or child, said court shall determine whether the obligor under such order has health insurance or other health coverage available to him through an employer or organization or has health insurance or other health coverage available to him at reasonable cost that may be extended to cover the spouse or child for whom support is ordered. When said court has determined that the obligor has such insurance or coverage available to him, said court shall include in the support order a requirement that the obligor exercise the option of additional coverage in favor of the spouse and child or obtain coverage for the spouse and child.

No order shall leave a obligor with less money than is required to provide him minimum subsistence, including food, shelter, utilities, clothing and the reasonable expenses necessary to travel to or obtain employment.

Qualified Domestic Relations Order

A qualified domestic relations order (QDRO) is a judgment, decree, or court order (including an approved property settlement agreement) issued under a state's domestic relations law that:

- Recognizes someone other than a participant as having a right to receive benefits from a qualified retirement plan (such as most pension and profit-sharing plans) or a tax-sheltered annuity;
- Relates to payment of child support, alimony, or marital property rights to a spouse, former spouse, child, or other dependent of the participant; and
- Specifies certain information, including the amount or part of the participant's benefits to be paid to the participant's spouse, former spouse, child, or other dependent.

Benefits paid to a child or other dependent. Benefits paid under a QDRO to the plan participant's child or other dependent are treated as paid to the participant. For information about the tax treatment of benefits from retirement plans, see Pub. 575, Pension and Annuity Income.

Benefits paid to a spouse or former spouse. Benefits paid under a QDRO to the plan participant's spouse or former spouse generally must be included in the spouse's or former spouse's income. If the participant contributed to the retirement plan, a prorated share of the participant's cost (investment in the contract) is used to figure the taxable amount.

The spouse or former spouse can use the special rules for lump-sum distributions if the benefits would have been treated as a lump-sum distribution had the participant received them. For this purpose, consider only the balance to the spouse's or former spouse's credit in determining whether the distribution is a total distribution. See *Lump-Sum Distributions* in Pub. 575 for information about the special rules.

Rollovers. If you receive an eligible rollover distribution under a QDRO as the plan participant's spouse or former spouse, you may be able to roll it over tax free into a traditional individual retirement arrangement (IRA) or another qualified retirement plan.

For more information on the tax treatment of eligible rollover distributions, see Pub. 575.

Individual Retirement Arrangements

The following discussions explain some of the effects of divorce or separation on traditional individual retirement arrangements (IRAs). Traditional IRAs are IRAs other than Roth or SIMPLE IRAs.

Spousal IRA. If you get a final decree of divorce or separate maintenance by the end of your tax year, you can't deduct contributions you make to your former spouse's traditional IRA. You can deduct only contributions to your own traditional IRA.

IRA transferred as a result of divorce. The transfer of all or part of your interest in a traditional IRA to your spouse or former spouse, under a decree of divorce or separate maintenance or a written instrument incident to the decree, isn't considered a taxable transfer. Starting from the date of the transfer, the traditional IRA interest transferred is treated as your spouse's or former spouse's traditional IRA.

IRA contribution and deduction limits. All taxable alimony you receive under a decree of divorce or separate maintenance is treated as compensation for the contribution and deduction limits for traditional IRAs.

For more information about IRAs, including Roth IRAs, see Pub. 590-A and Pub. 590-B.

Property Settlements

Generally, there is no recognized gain or loss on the transfer of property between spouses, or between former spouses if the transfer is because of a divorce. You may, however, have to report the transaction on a gift tax return. See *Gift Tax on Property Settlements*, later. If you sell property that you own jointly to split the proceeds as part of your property settlement, see *Sale of Jointly-Owned Property*, later.

Transfer Between Spouses

Generally, no gain or loss is recognized on a transfer of property from you to (or in trust for the benefit of):

- Your spouse, or
- Your former spouse, but only if the transfer is incident to your divorce.

This rule applies even if the transfer was in exchange for cash, the release of marital rights, the assumption of liabilities, or other consideration.

Exceptions to nonrecognition rule. This rule doesn't apply in the following situations.

- Your spouse or former spouse is a nonresident alien.
- Certain transfers in trust, discussed later.
- Certain stock redemptions under a divorce or separation instrument or a valid written agreement that are taxable under applicable tax law, as discussed in Regulations section 1.1041-2.

Property subject to nonrecognition rule. The term "property" includes all property whether real or personal, tangible or intangible, or separate or community. It includes property acquired after the end of your marriage

IRS

Retirement Topics - QDRO - Qualified Domestic Relations Order

A QDRO is a judgment, decree or order for a retirement plan to pay child support, alimony or marital property rights to a spouse, former spouse, child or other dependent of a participant. The QDRO must contain certain specific information, such as:

- the participant and each alternate payee's name and last known mailing address , and
- the amount or percentage of the participant's benefits to be paid to each alternate payee.

A QDRO may not award an amount or form of benefit that is not available under the plan.

A spouse or former spouse who receives QDRO benefits from a retirement plan reports the payments received as if he or she were a plan participant. The spouse or former spouse is allocated a share of the participant's cost (investment in the contract) equal to the cost times a fraction. The numerator of the fraction is the present value of the benefits payable to the spouse or former spouse. The denominator is the present value of all benefits payable to the participant.

A QDRO distribution that is paid to a child or other dependent is taxed to the plan participant.

An individual may be able to roll over tax-free all or part of a distribution from a qualified retirement plan that he or she received under a QDRO. If a person receiving QDRO payments is either the employee's spouse or former spouse (not as a nonspousal beneficiary), then he or she can roll it over, just as if he or she were the employee receiving a plan distribution and choosing to roll it over.

Additional Resources:

Publication 504, Divorced or Separated Individuals
Publication 575, Pension and Annuity Income

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