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**No. 70922-4-I**

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES YOUNG,  
Petitioner/Appellant,

v.

SEI PRIVATE TRUST CO., a foreign corporation; and  
R. AUGUST KEMPF, dba Kempf and Company;  
Respondents.

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**BRIEF OF RESPONDENT R. AUGUST KEMPF**

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COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON

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## A. INTRODUCTION

The issue in this case is whether R. August Kempf and Kempf and Company (collectively "Kempf") violated any laws when the funds of James Young's former wife's retirement account ("IRA") were released to him by SEI Private Trust Co. ("SEI") after it received a Qualified Domestic Retirement Order ("QDRO") as part of the Young's divorce proceedings. Mr. Young's current claim rests on the assertion that Kempf, improperly allowed Mr. Young's former wife to withdraw \$3,500 from her IRA after entry of the dissolution decree but prior to entry of the QDRO. Kempf did not control the dispersal of funds from the account since the plan administrator is SEI. However, as plan administrator, SEI's obligation to Mr. Young as alternate payee of the IRA did not arise until after SEI received the QDRO. **In re Marriage of Gardner**, 973 S.W.2d 116, 124. (Mo.App. 1998). Thus, prior to receiving the QDRO, Kempf and SEI could not stop Mr. Young's former wife from accessing her IRA. Mr. Young's claims are against his former wife, not SEI or Kempf. The trial court's decision to dismiss the claims against Kempf on summary judgment should be affirmed.

As to the attorney fees issue, the trial court correctly awarded fees and costs to Kempf as the prevailing parties. The defendant is the prevailing party if the plaintiff recovers nothing. RCW 4.84.270. It is undisputed that Mr. Young recovered nothing from Kempf. Because Mr. Young sought a money judgment less than \$10,000, his claims fall within RCW 4.84.250. As a result, when his claims were dismissed, Kempf was entitled to recover attorney fees. The trial court's decision to award attorney fees and costs to Kempf should be affirmed.

Finally, Kempf asks the Court to reject the new claims raised by Mr. Young. For the first time on appeal, Mr. Young alleges that Mr. Kempf is personally liable for supplying false information regarding the transfer of funds from the IRA. An argument neither pleaded nor argued to the trial court cannot be raised for the first time on appeal. **Wash. Fed. Sav. v. Klein**, 311 P.3d 53, 56 (2013). Moreover, the IRA statements provided to Mr. Young by Kempf listed all transactions for year 2012, including the \$3,500 withdrawal in question. As such, Mr. Young's new claims lack merit.

## **B. STATEMENT OF THE ISSUES**

A. Whether the trial court properly dismissed on summary judgment Mr. Young's claim against Kempf for \$3,903 when the withdrawal in question was made by Mr. Young's former wife from her IRA before the QDRO was entered by the court.

B. Whether the trial court properly awarded attorney fees and costs to Kempf as the prevailing party under RCW 4.84 when all claims against Kempf were dismissed on summary judgment and Mr. Young recovered nothing.

C. Whether, for the first time on appeal, Mr. Young may assert new claims that have never been raised before and are contradicted by the facts.

## **C. STATEMENT OF THE CASE**

### **1. Mr. Young's dissolution decree was entered on March 23, 2013.**

In October 2010, Mr. Young and Billi Dunning started dissolution proceedings. (CP 65). One of the marital assets was Ms. Dunning's IRA ("IRA"). (CP 84). The plan administrator for the IRA was SEI. (CP 85). The IRA was managed by Kempf and Company, of which Mr. Kempf is president. (CP 20). King County Superior Court entered a dissolution decree on March 23,

2012. (CP 67). The decree presumably awarded the IRA to Mr. Young. (CP 118).

**2. The QDRO was entered On September 19, 2012.**

Distribution of the IRA was ordered pursuant to a QDRO entered in King County Superior Court on September 19, 2012. (CP 84). The QDRO was jointly presented by Mr. Young and Ms. Dunning. (CP 86). The QDRO did not value the IRA. (CP 84-86). Rather, the QDRO provided Mr. Young the right to receive 100% of the IRA “as of the date of distribution” (the date the IRA is transferred to Mr. Young as the “Alternate Payee” under the QDRO). (*Id.*).

**3. Dunning withdraws \$3,500 prior to QDRO.**

On September 10, 2012 – nine days *prior* to entry of the QDRO – Ms. Dunning withdrew \$3,500 from her IRA. (CP 27).

On September 25, 2012 – ten days *after* entry of the QDRO – the entire IRA, \$46,860.41, was distributed to Mr. Young. (CP 27, 119). The IRA was then closed. (CP 20).

**4. Procedural History.**

In March 2013, Mr. Young filed a Complaint for Account Disclosure, seeking written accountings for the IRA (and a different account held by Ameritrade) for year 2012 (CP 1-2). Mr.

Young alleged that he had requested accountings for two investment accounts, though he did not state when the requests were made, to whom, or for which account. (*Id.*).

On April 17, 2012, counsel for Mr. Young represented that his client would dismiss his claims against Kempf with prejudice if Kempf provided the 2012 statements for the IRA to Mr. Young. (CP 42). On April 18, 2013, counsel for Kempf provided complete copies of the requested statements for the IRA to counsel for Mr. Young, which included all transactions in the IRA. (CP 46). The final statement, dated October 31, 2012, showed a “change in account value” of \$3,903.29 for the year. (CP 33). The change represented the increase in the IRA value during 2012. (*Id.*; CP 21).

On or about May 24, 2013, Mr. Young filed an Amended Complaint, alleging that he should have received an additional \$3,903 when the IRA was distributed to him. (CP 3-4). He prayed for judgment in that amount and interest. (*Id.*).

On July 12, 2013, Kempf was forced to file a motion for summary judgment because Mr. Young refused to dismiss his claims against Kempf after the IRA account statements had been provided to him. (CP 15-19). At the summary judgment hearing

on August 9, 2013, counsel for Mr. Young alleged that Mr. Kempf had improperly allowed Ms. Dunning to withdraw \$3,500 on September 10, 2012 because Mr. Kempf had received notice of the QDRO. (RP 22). The hearing was continued to August 23, 2012 so that issue could be addressed. (RP 25). Also on August 9, counsel for Kempf sent a letter to counsel for Mr. Young identifying the entry date of the QDRO as September 19, 2012, and again asking Mr. Young to dismiss his claims against Kempf. (CP 64).

Neither Mr. Young nor his counsel appeared at the hearing on August 23. (CP 81). The trial court granted Kempf's motion and ordered the claims against Kempf to be dismissed, finding "no evidence to support claims that August Kempf or Kempf & Company mishandled or improperly dispersed any funds from the account in question." (CP 73-74).

On September 10, 2013, the court awarded Kempf \$9,271.38 in attorney fees and costs. (CP 116-117). On September 23, 2013, the court denied Mr. Young's motion for reconsideration. (CP 105). Mr. Young appealed. (CP 121).

#### **D. ARGUMENT**

##### **1. Standard of Review.**

The standard for reviewing both the trial court's dismissal of all claims on summary judgment and the award of attorney fees is *de novo*. **Berrocal v. Fernandez**, 155 Wn.2d 585, 590 (2005); **Ethridge v. Hwang**, 105 Wn. App. 447, 460, 20 P. 3d 958 (2001) (an award, or refusal to award, attorney fees is reviewed *de novo*).

## **2. Mr. Young's appeal should be denied.**

The claims against Kempf are based on the assertion that Kempf improperly allowed Ms. Dunning to withdraw funds from her IRA after entry of the dissolution order but before entry of the QDRO. Mr. Young essentially would like to hold Kempf responsible for Ms. Dunning withdrawing money from the IRA that, until the QDRO was received by the plan administrator, she controlled. Mr. Young's position is contrary to the law. The obligation to the alternate payee arises after the QDRO is received by the plan administrator. **Gardner**, 973 S.W.2d at 124. So there could not have been any obligation to Mr. Young by Kempf or SEI on the date she withdrew the funds. Furthermore, the plan administrator was SEI, not Kempf. (CP 85). Accordingly, Mr. Young's claims against Kempf were properly dismissed by the trial Court.

**a. The rights and duties related to the IRA are determined by the QDRO.**

To alienate or assign Employee Retirement Income Security Act (ERISA) retirement benefits when dividing marital property, a court must enter a QDRO, which assures that a spouse receives pension benefits as an alternate payee. **In re Marriage of Green**, 341 S.W.3d 169, 174 (Mo.App. 2011); see 29 U.S.C. 1056(d)(1), (3)(A) (2000). A QDRO is an order that may be obtained after and pursuant to a previously entered final judgment of dissolution. **Brooks v. Brooks**, 98 S.W.3d 530, 531 (Mo. banc 2003). The QDRO is entered by the trial court to implement distribution or division of a pension plan pursuant to a decree of dissolution. **Id.** at 530.

**i. Mr. Young had no right to enforce his interest in the IRA until the QDRO was entered.**

While a spouse's property right is not contingent on a QDRO being entered, that property right does not vest until the QDRO is entered. **In re Williams**, 50 F.Supp.2d 951, n8 (C.D. Cal. 1999), *citing In re Gendreau*, 122 F.3d 815 (9<sup>th</sup> Cir. 1997). Until a QDRO is obtained, the party cannot enforce his rights: "The QDRO provisions of ERISA do not suggest that a [spouse who does not have a QDRO] has no interest in the plans until

she obtains a QDRO[;] they merely prevent her from enforcing her interest until the QDRO is obtained.” **Gendreau**, 122 F.3d at 819. Thus, while Mr. Young had an interest in the IRA prior to entry of the QDRO, he had no right to enforce that interest until the QDRO was entered on September 19, 2012.

**ii. As plan administrator, SEI had no duty to Mr. Young until it received the QDRO.**

Second, a plan administrator's obligation to an alternate payee does not arise until the plan receives a QDRO. **Gardner**, 973 S.W.2d at 124. SEI was the plan administrator for the IRA, not Kempf. (CP 85). To the extent that there was anything improper related to distributing the IRA to Mr. Young as alternate payee pursuant to the QDRO, SEI would be responsible as plan administrator. But SEI acted properly because it released the IRA funds to Mr. Young when it received the QDRO. If, prior to SEI's receipt of the QDRO, Ms. Young took money to which she was not entitled, Mr. Young has claims against her, not SEI or Kempf.

**iii. Ms. Dunning withdrew money prior to entry of the QDRO.**

Third, until SEI received the QDRO, SEI owed no obligation to Mr. Young. **Gardner**, 973 S.W.2d at 124. The

evidence shows that Ms. Dunning withdrew \$3,500 nine days before the QDRO was entered. (CP 27, 67, 84-87). Therefore, it cannot be true that the QDRO had been received by Kempf or SEI when Ms. Dunning withdrew the money. Until it received the QDRO sometime after September 19, 2012, the plan administrator of the IRA had no obligation to Mr. Young. As the trial court correctly noted, Mr. Young's issue is with Ms. Dunning. (RP 16, 18).

The cases cited by Mr. Young related to vesting of property upon entry of the decree are not on point because none involve a QDRO. **Sullivan v. C.I.R.**, 256 F.2d 664, 668, (1958) (for purpose of determining whether spouses were permitted to file joint tax return in interim year, appeal of divorce decree does not suspend decree); **United Benefit Life Ins. v. Price**, 46 Wash.2d 587, 589, 283 P.2d 119 (1955) (divorce decree divested wife of any interest she had as beneficiary of life insurance proceeds); **Mickens v. Mickens**, 62 Wash.2d 876, 882, 385 P.2d 14 (1963) (when party to divorce fails to carry out terms for division of property in decree and loss results, other party is entitled to relief). Plan administrators are not bound by

the order until they receive the QDRO. **Gardner**, 973 S.W. 2d at 124.

**b. Kempf is entitled to attorney fees.**

Because Mr. Young sought a money judgment less than \$10,000, his claims fall within RCW 4.84.250.<sup>2</sup> As a result, when his claims were dismissed, Kempf was entitled to recover attorney fees.

**i. Kempf prevailed at summary judgment.**

All claims against Kempf were dismissed on summary judgment. (CP 73-74). The determination of which party is the prevailing party for the purpose of awarding attorneys' fees and costs is based on which party has an affirmative judgment rendered in his favor. **Andersen v. Gold Seal Vineyards**, 81 Wn.2d 863, 865 (1973). The purpose of RCW 4.84.250 is to encourage out-of-court settlements and to penalize parties who unjustifiably bring or resist small claims. **Valley v. Hand**, 38 Wn. App. 170, *review denied*, 103 Wn.2d 1006 (1984).

Mr. Young resisted every effort to settle this case out of court. (CP 42, 64). In an effort to settle this case early, Mr. Kempf,

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<sup>2</sup> This case fits squarely within the statute's purpose, which is the reason attorney fees were awarded to Kempf. Mr. Kempf attempted to resolve this case multiple times early on. Mr. Young refused and recovered nothing from Mr. Kempf or Kempf.

upon receiving the Complaint, immediately produced all account information Mr. Young sought in his Complaint. (CP 42). Mr. Young admitted throughout this case in pleadings and numerous letters between counsel that he received those accountings. (CP 3, 44, 48).

After receiving the account information, Mr. Young filed an Amended Complaint seeking to recover \$3,903 that he alleged was improperly handled by Kempf. (CP 3-4). The Amended Complaint did not seek an accounting. (CP 4). It is well settled law in Washington that an Amended Complaint superseded the Complaint. **Sengfelder v. Hill**, 16 Wash. 355, 357, 47 P. 757 (1897). As a result, when Mr. Young filed the Amended Complaint, the only relief he sought against Kempf was a monetary judgment of \$3,903. The trial court ultimately determined that there was no evidence that Kempf mishandled or improperly dispersed the IRA and dismissed Mr. Young's claims. (CP 74).

Mr. Young admits that Kempf is the prevailing party on the claim for money judgment. (CP 109). But he also asserts that because Kempf voluntarily produced a complete accounting as requested, Mr. Young is the prevailing party on that claim so no

fees should be awarded. (CP 109-110). That argument ignores the fact that the Amended Complaint superseded the first Complaint.

Additionally, Mr. Young cannot be the prevailing party even if, as he implies, the Complaint pressured Kempf into producing IRA statements. Kempf provided the statement without being compelled to do so. Fees and costs at that point were almost non-existent. Rather than comply with the promise to dismiss, Mr. Young brought new claims and prosecuted them vigorously even when the claims contradicted the facts and the law. Kempf was only able to get relief by filing a motion for summary judgment. Kemp fees and costs have come from contesting the alleged mishandling of the funds. Adopting Mr. Young's argument would completely contradict the purposes of the RCW 4.84.250, which is to encourage resolutions with as little court involvement as possible.

**ii. Mr. Young recovered nothing.**

Mr. Young cannot be the prevailing party as that term is defined. RCW 4.84.260 states that the plaintiff "shall be the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the

amount offered in settlement by the plaintiff ... ." (emphasis added). The defendant is the prevailing party if the plaintiff recovers nothing. RCW 4.84.270.<sup>3</sup> It is undisputed that Mr. Young recovered nothing from Kempf. As acknowledged by Mr. Young, he received the accounting prior Kempf filing the motion for summary judgment. Kempf never was ordered by the trial court to produce an accounting. Having recovered nothing, Mr. Young cannot have prevailed.

Mr. Young cites cases for the proposition that parties can prevail on different causes of action. See **Muscek v. Equitable Sav. & Loan Assn'n**, 25 Wash.2d 546, 553 (1946). However, as discussed above, Mr. Young cannot be the prevailing party here because he recovered nothing and the claims against Kempf were dismissed. The court did not err in awarding fees.

**c. New issues may not be raised on appeal.**

**i. For the first time here, Mr. Young alleges that Mr. Kempf is personally liable for supplying false information.**

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<sup>3</sup> RCW 4.84.270: The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280.

Mr. Young now alleges, for the first time, that Mr. Kempf supplied false information regarding the transfer of funds from the IRA and is personally liable for that information. An argument neither pleaded nor argued to the trial court generally cannot be raised for the first time on appeal. **Wash. Fed.**, 311 P.3d at 56; RAP 2.5. On that basis alone, this alleged error should not be reviewed.

**ii. Kempf provided complete statements for the IRA to Mr. Young after he was entitled to receive them.**

Regardless, it is undisputed that Kempf provided statements for the IRA to Mr. Young, and that Mr. Young received those statements. (CP 42, 44, 48, 119). Those statements listed all transactions for year 2012, including the \$3,500 withdrawal in question (CP 27). As such, Mr. Young had all of the transactional detail available for the IRA, so his claim of “false information” is without merit. Moreover, Mr. Young fails to identify any duty that Kempf may have had to Mr. Young prior to entry of the QDRO. Rather, as discussed above, Mr. Young had no right to enforce his interest in the IRA until after the QDRO was entered, including to receive a statement for an IRA owned

by Ms. Dunning. There was nothing deceptive, nor could there have been when the statements were given to Mr. Young.

Mr. Young was not forced to bring the underlying lawsuit. He admits to receiving an IRA statement when the fund was distributed to him. (CP 119). Unfortunately, upon receiving it, he simply misunderstood that the “change in account value” was an increase in the value. (*Id.*). He then filed a lawsuit eight months later for an “accounting.” (*Id.*). Still not satisfied after he received detailed statements for 2012, Mr. Young sought \$3,903 in his belief that it was not distributed to him –when in fact the increase during 2012 was included in the total value of the account which he received when the entire IRA was distributed to him on September 25, 2012. (CP 119). This case should have been voluntarily dismissed by Mr. Young after he received the complete statements for 2012 in April 2013.

**d. Kempf should be awarded attorney fees for defending this appeal.**

Kempf is entitled to fees on appeal, should they prevail. RCW 4.84.290 provides: “If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: ...” When

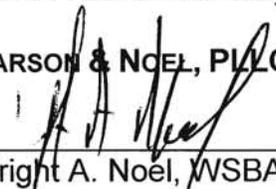
the plaintiff seeks \$10,000 or less in damages and recovers nothing, the defendant is entitled to attorney fees under RCW 4.84.250 regardless of whether an offer of settlement has been made, so long as the plaintiff had actual notice of the possibility of an attorney fee assessment. **Lowery v. Nelson**, 43 Wn. App. 747, 752, 719 P.2d 594 (1986). Mr. Young pleaded for \$3,903. Mr. Young had actual notice of the possibility of attorney fees by virtue of pleading less than \$10,000 and the Answer specifically stating that Kempf would seek attorney fees under RCW 4.84. (CP 12). Mr. Young's appeal should be denied and Kempf should be awarded attorney fees on appeal.

#### **E. CONCLUSION**

Based on the foregoing, Kempf respectfully request that the decision of the trial court on this matter be affirmed in its entirety and attorney fees be awarded to them incurred defending this appeal.

RESPECTFULLY SUBMITTED on January 30, 2014.

**CARSON & NOEL, PLLC**



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## DECLARATION OF SERVICE

The undersigned hereby declare that on this 30<sup>th</sup> day of January, 2014, I caused the foregoing Brief of Respondent R. August Kempf to be served via the methods listed below on the following parties:

**Personal delivery via legal messenger to:**

Robert H. Stevenson  
810 3<sup>rd</sup> Ave. #228  
Seattle, WA 98104  
206-682-3624  
**Attorney for Appellant**

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on January 30<sup>th</sup>, 2014, at Issaquah, Washington.



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Dana Carrothers

## APPENDIX

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**RCW 4.84.270.** ATTORNEYS' FEES AND COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS – WHEN DEFENDANT DEEMED PREVAILING PARTY. The defendant, or party resisting relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250, if the plaintiff, or party seeking relief in an action for damages where the amount pleaded, exclusive of costs, is equal to or less than the maximum allowed under RCW 4.84.250, recovers nothing, or if the recovery, exclusive of costs, is the same or less than the amount offered in settlement by the defendant, or the party resisting relief, as set forth in RCW 4.84.280

**RCW 4.84.250.** ATTORNEYS' FEES AND COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS -- ALLOWED TO PREVAILING PARTY. Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

**RCW 4.84.260.** ATTORNEYS' FEES IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS \_\_\_ WHEN PLAINTIFF DEEMED PREVAILING PARTY. The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

**RCW 4.84.290** ATTORNEYS' FEES AND COSTS IN DAMAGE ACTIONS OF TEN THOUSAND DOLLARS OR LESS – PREVAILING PARTY ON APPEAL. If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court

ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

**RAP 2.5. CIRCUMSTANCES WHICH MAY AFFECT SCOPE OF REVIEW.**

(a) Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of trial court jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not presented to the trial court if the record has been sufficiently developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.

(b) Acceptance of Benefits.

(1) Generally. A party may accept the benefits of a trial court decision without losing the right to obtain review of that decision only (i) if the decision is one which is subject to modification by the court making the decision or (ii) if the party gives security as provided in subsection (b)(2) or (iii) if, regardless of the result of the review based solely on the issues raised by the party accepting benefits, the party will be entitled to at least the benefits of the trial court decision or (iv) if the decision is one which divides property in connection with a dissolution of marriage, a legal separation, a declaration of invalidity of marriage, or the dissolution of a meretricious relationship.

(2) Security. If a party gives adequate security to make restitution if the decision is reversed or modified, a party may accept the benefits of the decision without losing the right to obtain review of that decision. A party that would otherwise lose the right to obtain review because of the acceptance of benefits shall be given a reasonable period of time to postsecurity to prevent loss of review. The trial court making the decision shall fix the amount and type of security to be given by the party accepting the benefits.

(3) Conflict With Statutes. In the event of any conflict between this section and a statute, the statute governs.

(c) Law of the Case Doctrine Restricted. The following provisions apply if the same case is again before the appellate court following a remand:

(1) Prior Trial Court Action. If a trial court decision is otherwise properly before the appellate court, the appellate court may at the instance of a party review and determine the propriety of a decision of the trial court even though a similar decision was not disputed in an earlier review of the same case.

(2) Prior Appellate Court Decision. The appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.

# NON-WASHINGTON AUTHORITY

*In re Marriage of Gardner*, 973 S.W.2d 116, 124. (Mo.App. 1998)

*Brooks v. Brooks*, 98 S.W.3d 530, 531 (Mo. banc 2003)

*In re Williams*, 50 F.Supp.2d 951, n8 (C.D. Cal. 1999)

*In re Gendreau*, 122 F.3d 815 (9<sup>th</sup> Cir. 1997)

*In re Marriage of Green*, 341 S.W.3d 169, 174 (Mo.App. 2011)

*Sullivan v. C.I.R.*, 256 F.2d 664, 668, (1958)

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Missouri Court of Appeals,  
Southern District,  
Division One.  
In re the MARRIAGE OF Beth Andrews GARDNER  
and John David Gardner.  
Beth Andrews GARDNER, Respondent,  
v.  
John David GARDNER, Appellant.

Nos. 21808, 22070.  
June 12, 1998.

Motion for Rehearing and Transfer to Supreme Court  
Denied July 20, 1998.  
Application for Transfer Denied Aug. 25, 1998.

Action was filed for dissolution of marriage. After dissolution decree was entered, the Circuit Court, Pemiscot County, William L. Syler, Special Judge, entered judgment approving master's report on distribution of husband's pension plan and thereafter awarded wife attorney fees and expenses incurred in responding to husband's appeal. The Court of Appeals, Crow, J., held that: (1) there was no improper retroactive payment of pension funds to wife; (2) challenge to calculation of earning from wife's share of pension was not preserved; (3) earnings from wife's share were not implicitly awarded to husband; (4) expenses incurred by husband to defeat award to wife were not chargeable to wife as reasonable expenses of administering pension plan; and (5) wife could not be divested of her right to distribution under plan.

Affirmed; motions for rehearing and for transfer denied.

West Headnotes

**[1] Divorce 134** 179

134 Divorce  
134IV Proceedings  
134IV(O) Appeal  
134k179 k. Presentation and reservation in lower court of grounds of review. Most Cited Cases

Husband appealing order in dissolution proceeding that approved master's report on distribution of husband's pension plan waived master's failure to take required oath, where father failed to raise issue before master or before trial court.

**[2] Appeal and Error 30** 758.3(3)

30 Appeal and Error  
30XII Briefs  
30k758 Specification of Errors  
30k758.3 Requisites and Sufficiency  
30k758.3(3) k. Grouping assignments; multifariousness. Most Cited Cases

Appellant's point relied on should assert a single claim of error, not multiple claims.

**[3] Labor and Employment 231H** 597

231H Labor and Employment  
231HVII Pension and Benefit Plans  
231HVII(I) Persons Entitled to Benefits  
231Hk594 Qualified Domestic Relations Orders  
231Hk597 k. Operation and effect. Most Cited Cases  
(Formerly 296k138)

Pension plan administrator's calculating and accounting for earnings on segregated amounts claimed

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by participant's former spouse under domestic relations order, for period between date that spouse's interest arose and date order was submitted to administrator for determination of whether it was qualified domestic relations order under ERISA, did not result in any improper retroactive payment to spouse of earnings already distributed to participant, where participant was not yet eligible for any payment from plan. Employee Retirement Income Security Act of 1974, § 206(d), 29 U.S.C.A. § 1056(d).

#### [4] Appeal and Error 30 ↪ 901

30 Appeal and Error

30XVI Review

30XVI(G) Presumptions

30k901 k. Burden of showing error. Most Cited Cases

On appeal, a trial court's action is presumed correct and the burden is on the appellant to establish that the action was error.

#### [5] Divorce 134 ↪ 1251

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1251 k. Briefs. Most Cited Cases  
(Formerly 134k282)

Husband's claim that trial court in dissolution matter wrongly calculated amount due to wife from husband's pension plan, because it based earnings on that realized by plan as whole rather than by segregated amount claimed by wife, was not preserved for appeal, where husband's brief yielded no clue about extent of alleged "difference" and supplied no hint as to where appellate court could find that information in the record. V.A.M.R. 84.04(c).

#### [6] Appeal and Error 30 ↪ 1026

30 Appeal and Error

30XVI Review

30XVI(J) Harmless Error

30XVI(J)I In General

30k1025 Prejudice to Rights of Party as Ground of Review

30k1026 k. In general. Most Cited Cases

For error to require reversal, it must have been prejudicial to the complaining party.

#### [7] Divorce 134 ↪ 1217

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1214 Presentation and Reservation in Lower Court of Grounds of Review

134k1217 k. Objections and motions, and rulings thereon. Most Cited Cases  
(Formerly 134k282)

Husband's claim that trial court wrongly considered exhibit offered by wife in calculating pension plan earnings to be distributed to her in dissolution matter, because exhibit was not received in evidence, was waived by his failure to raise objection in trial court during colloquy about exhibit.

#### [8] Appeal and Error 30 ↪ 882(1)

30 Appeal and Error

30XVI Review

30XVI(C) Parties Entitled to Allege Error

30k881 Estoppel to Allege Error

30k882 Error Committed or Invited by Party Complaining

30k882(1) k. In general. Most Cited

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Cases

Party cannot complain on appeal about an alleged error in which that party joined or acquiesced at trial.

**[9] Divorce 134 888**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k888 k. Construction and interpretation. Most Cited Cases

(Formerly 134k254(1))

Dissolution decree awarding wife 50% interest in husband's pension plan as of date 21 months earlier did not, by failing to specifically mention earnings on such interest, implicitly award such earnings to husband. V.A.M.S. § 452.330, subd. 5.

**[10] Labor and Employment 231H 597**

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations Orders

231Hk597 k. Operation and effect. Most

Cited Cases

(Formerly 296k138)

While wife's interest in husband's pension plan, acquired upon dissolution of marriage, could be assessed portion of reasonable expenses of administering plan, such reasonable expenses did not include expenses incurred by husband individually in an effort to benefit himself financially by defeating or delaying

award to wife. Employee Retirement Income Security Act of 1974, §§ 403(c)(1), 404(a)(1)(A)(ii), 29 U.S.C.A. §§ 1103(c)(1), 1104(a)(1)(A)(ii).

**[11] Divorce 134 889**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k889 k. Operation and effect.

Most Cited Cases

(Formerly 134k255)

Wife's rights to receive distribution from husband's pension, distributed under dissolution decree, were those she had at time plan received domestic relations order, and wife could not thereafter be divested of those rights by plan amendment made before order was determined to be qualified domestic relations order under ERISA, or was replaced with qualified order. Employee Retirement Income Security Act of 1974, § 206(d)(3)(H), 29 U.S.C.A. § 1056(d)(3)(H).

**[12] Divorce 134 1236**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1234 Record

134k1236 k. Matters to be shown. Most Cited Cases

(Formerly 134k283)

Divorced husband's challenge to denial of wrongful garnishment claims was barred on appeal by his failure to include claims in legal file. V.A.M.R.

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81.12(a).

**[13] Appeal and Error 30 ↪ 497(1)**

30 Appeal and Error  
30X Record  
30X(A) Matters to Be Shown  
30k497 Grounds of Review  
30k497(1) k. In general. Most Cited  
Cases

It is the appellant's duty to provide a complete record on appeal for the determination of questions presented to the appellate court.

**[14] Action 13 ↪ 59**

13 Action  
13III Joinder, Splitting, Consolidation, and Severance  
13k54 Consolidation of Actions  
13k59 k. Operation and effect. Most Cited  
Cases

Trial court is not empowered to enter a judgment in one case resolving issues in a different case without consolidating the cases.

**[15] Declaratory Judgment 118A ↪ 392.1**

118A Declaratory Judgment  
118AIII Proceedings  
118AIII(H) Appeal and Error  
118Ak392 Appeal and Error  
118Ak392.1 k. In general. Most Cited  
Cases

Spouses in dissolution matter effectively abandoned their claims of contempt, so that order determining their rights decree was appealable as declaratory judgment, despite lack of enforcement. V.A.M.R.

87.11.

**[16] Contempt 93 ↪ 66(2)**

93 Contempt  
93II Power to Punish, and Proceedings Therefor  
93k66 Appeal or Error  
93k66(2) k. Decisions reviewable. Most  
Cited Cases

Civil contempt order is generally not a final judgment for purposes of appeal until the order is enforced.

\*117 John L. Oliver, Jr., Joanna C. Fryer, Oliver, Oliver & Waltz, P.C., Cape Girardeau, for appellant.

King E. Sidwell, Blanton, Rice, Sidwell & Nickell, L.L.C., Sikeston, for respondent.

\*118 CROW, Judge.

These consolidated appeals arise from the second round of a dissolution of marriage fight. The first round ended with this court's opinion in *In re Marriage of Gardner*, 890 S.W.2d 303 (Mo.App. S.D.1994).<sup>FN1</sup> It should be read as a preface to the present opinion.

FN1. This court's mandate was issued January 27, 1995, following denial by the Supreme Court of Missouri of an application to transfer by John David Gardner.

The present appeals, like the first appeal, are brought by John David Gardner. Seven of the eight points relied on in his brief pertain to appeal 21808. That appeal attacks a "Judgment and Order on Master's Report."

The other point relied on in John's <sup>FN2</sup> brief pertains to appeal 22070. That appeal attacks a judgment

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entered six months after the judgment identified in the preceding paragraph. The judgment assailed in appeal 22070 commands John to pay Beth and her lawyers \$7,500 for attorney fees and expenses in responding to appeal 21808.

FN2. For brevity and clarity, this opinion henceforth refers to the parties by their respective forenames. No disrespect is intended.

This opinion addresses the appeals separately, beginning with 21808. The issues raised by John in that appeal concern two provisions of the dissolution decree. The first provision is a paragraph numbered “(E)(5)” in the decree. It awards Beth:

“A fifty percent interest in the John D. Gardner Pension & Profit Sharing Trust as of December 31, 1991 subject to a Qualified Domestic Relation [sic] Order which is attached hereto and made a part of this decree. [\$]216,252.50”

This opinion henceforth refers to the above award as “the E5 award.”

The second provision appears later in the decree. It reads:

“In order to balance equities in the division of the property, [John] is ordered to pay to [Beth] the sum of \$225,000, with \$75,000 to be due October 20, 1993 and the balance to be paid in ten equal annual installments, together with 7.5% interest, with full prepayment privilege, with the first payment due and payable July 1, 1994 and each payment thereafter due on July 1 of each year. If any payment is delinquent for ten (10) days the entire sum shall immediately become due and payable. This debt shall be a lien upon all real estate owned by [John] until paid. [\$]225,000.00”

This opinion henceforth refers to the above award as “the \$225,000 award.”

Four of John's assignments of error complain about rulings by the trial court regarding the E5 award. Discussion of those complaints requires an account of certain pertinent facts.

As explained in this court's opinion in the first appeal, John is a dentist; he is sole shareholder in the professional corporation through which he practices that profession. 890 S.W.2d at 305. We glean from the record that the name of the corporation is: John D. Gardner, D.D.S., P.C. This opinion henceforth refers to that entity as “JDGDDSPC.”

The dissolution decree contains a finding that JDGDDSPC has a pension and profit sharing trust (inferably the “John D. Gardner Pension & Profit Sharing Trust” referred to in the E5 award). John's brief refers to that entity as “the Plan.” For convenience, so shall this opinion.

The parties' briefs identify John as administrator of the Plan.<sup>FN3</sup>

FN3. Where a statement of fact in one party's brief is conceded to be true in the adversary's brief, we may consider it as though it appears in the record. *State ex rel. Missouri Highway and Transportation Commission v. Sweeney*, 933 S.W.2d 908, 910[1] (Mo.App. S.D.1996).

Although the E5 award recites that a “Qualified Domestic Relation [sic] Order” is attached to the dissolution decree and made part thereof, no such order was signed by the trial court prior to or contemporaneously with entry of the decree.<sup>FN4</sup> The consequences of that omission will become evident later.

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FN4. The dissolution decree was entered September 21, 1993. The judge who entered it is not the judge who entered the judgments from which the present appeals are taken.

\*119 On May 24, 1995, some four months after this court's mandate in the first appeal,<sup>FN5</sup> Beth filed a "Motion for Contempt" in the trial court. The motion averred, *inter alia*, that although the dissolution decree had become final, John had failed and refused to deliver to Beth certain property awarded her including:

FN5. Footnote 1, *supra*.

"Fifty (50) percent interest in the John D. Gardner Pension & Profit Sharing Trust as of December 31, 1991, subject to a Qualified Domestic Relation [sic] Order[.]"

As best this court can determine from the amorphous record,<sup>FN6</sup> the next significant event regarding the E5 award occurred March 1, 1996, when the trial court signed a six-page document denominated "Qualified Domestic Relations Order." This opinion henceforth refers to that document as "QDRO-1."

FN6. The record handed this court consists of: a transcript of a hearing before a special master September 26, 1996; a transcript of a hearing before the trial court June 6, 1997; a 163-page legal file; a two-page supplemental legal file; a 161-page volume denominated "Exhibits" containing 34 documents including a docket sheet, summonses to garnishees, and answers to interrogatories (documents normally found in a legal file); a 106-page volume denominated "Appellee's Exhibits" containing 19 documents including the dissolution decree, an appeal bond, and a motion for preliminary injunction (documents normally found in a legal file).

QDRO-1 stated, *inter alia*, that Beth was to receive her \$216,252.50 share of the Plan "plus accrued earnings and/or losses from December 31, 1991."

The record indicates Beth's lawyer sent John (administrator of the Plan) a copy of QDRO-1.

At John's request, Martin Seiler, a Tennessee lawyer specializing "in the area of employee benefits," reviewed QDRO-1.

In a letter to Beth's lawyer dated May 16, 1996, Seiler proposed certain "language changes" for QDRO-1. Seiler's letter also said:

"My major problem is that [QDRO-1] grants your client a five year retroactive effect. I believe the whole purpose of the 18 month language [<sup>FN7</sup>] is to protect the trust from such long term retroactive requirements. Please remember that the trust is a separate entity and as a matter of federal law could not take knowledge of the divorce terms until it was notified by the March 1996 order."

FN7. This court gleans from John's brief that the "18 month language" mentioned in Seiler's letter is the 18-month period described in 29 U.S.C. § 1056(d)(3)(H)(v), discussed later in this opinion.

On a date this court cannot locate in the record, but evidently prior to June 7, 1996, Beth filed in the trial court a "Motion for Preliminary Injunction." The motion averred, *inter alia*, that John had refused to segregate Beth's share in the Plan into a separate account and that without a "neutral third party" to administer said funds, Beth's share "is in danger of being dissipated."

On June 7, 1996, the trial court signed an "Order upon Stipulation of Parties." The order commanded John, as administrator of the Plan, to deposit in the

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registry of the court “actual possession and control” of certain documents representing ownership of funds “which comprise the segregated amount of \$216,252.50” constituting Beth's share of the Plan. The order recited its purpose was to “preserve the status quo” pending determination of the disposition of assets of the Plan by the trial court or another court of competent jurisdiction. The order further provided that one issue to be determined by such court was “whether or not the corpus of the fund affected by [QDRO–1] is to be determined as of December 31, 1991 or some other date.”<sup>FN8</sup>

FN8. The June 7, 1996, order was signed by a judge other than the judge who entered the judgments from which the present appeals are taken. This court deduces from the docket sheet that Beth's request for injunctive relief was assigned to the judge who entered the June 7, 1996, order, while all other issues remained pending before the judge who ultimately entered the judgments under review here. No issue about that procedure is raised by John.

On August 15, 1996, the trial court entered an “Order Staying Execution Sale [<sup>FN9</sup>] for One \*120 Month and Consolidating Issues for Submission to Special Master.”<sup>FN10</sup> The order provided, *inter alia*, that John agreed “to submit to determination by special master any and all outstanding issues by and between John ... [JDGDDSPC], John ... as Trustee for the John D. Gardner Trust [JDGDDSPC] Pension Trust and [JDGDDSPC] Profit Sharing Trust as those issues ... may exist relating to Beth....”

FN9. An execution sale had been set for August 15, 1996. This opinion has not yet mentioned that circumstance because it is not pertinent to the complaints of error addressed first. Relevant details about the proposed sale are set forth later.

FN10. The copy of the August 15, 1996, order in the record furnished us is not signed by the trial court and is not stamped filed by the circuit clerk. However, as we comprehend the parties' briefs, they agree the order was entered.

The August 15, 1996, order appointed “Honorable Paul McGhee” special master and commanded the parties to submit “all issues in controversy between them” to the master for determination. Those issues included the “qualified status of the domestic relations order” and “the issues for approval and qualification of the domestic relations order as presented to [a United States District Court<sup>FN11</sup>].”

FN11. The statement of facts in John's brief does not enlighten us about the litigation in that court. Neither does the statement of facts in Beth's brief.

Special Master McGhee<sup>FN12</sup> conducted a hearing September 26, 1996. Two witnesses testified: lawyer Seiler (mentioned earlier in this opinion) and Susan Callison, a Tennessee lawyer specializing in “taxation ... and employee benefits.”

FN12. John's brief refers to McGhee as “Senior Judge Paul McGhee.” Beth's brief adopts that designation. This court takes judicial notice that McGhee was formerly an associate circuit judge in Stoddard County. Official Manual, State of Missouri 1993–1994, p. 282. This opinion henceforth refers to him as “the Master.”

Seiler avowed the Plan is a defined contribution plan, not a defined benefit plan. Consistent with his letter of May 16, 1996, to Beth's lawyer, Seiler asserted the “primary problem” with QDRO–1 was “the issue of earnings and interest.” The problem exists,

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said Seiler, because the E5 award valued Beth's interest in the Plan at \$216,252.50 as of December 31, 1991, the decree was entered September 21, 1993, and QDRO-1 was signed March 1, 1996. As we have seen, QDRO-1 states Beth's share in the Plan is the \$216,252.50 in the E5 award "plus accrued earnings and/or losses from December 31, 1991."

According to Seiler, QDRO-1 compels the Plan administrator to retroactively calculate the earnings and losses on Beth's \$216,252.50 share after December 31, 1991. Such a task, said Seiler, requires extraction of data from the Plan's financial records for 1992 through 1995. Seiler's belief, as we comprehend it, is that crediting Beth with those earnings (or losses) after a delay of that length would violate the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended. That notion is carried forward in John's third point on appeal, addressed later.

Lawyer Callison testified that QDRO-1 meets the ERISA requirements for a qualified domestic relations order and its validity is not impaired by the lapse of time between the valuation date of Beth's share in the Plan and the date QDRO-1 was signed. According to Callison, retroactive calculation for allocation of earnings among participants in retirement plans is "done all the time."

On October 29, 1996, the Master filed his report in the trial court. Regarding QDRO-1, the Master concluded: (a) Beth became entitled to her share in the Plan as of December 31, 1991, hence she is entitled to all earnings on her share from and after that date; (b) John's expert is able to make those calculations; (c) QDRO-1 can be modified to meet Seiler's requirements and, when so modified, will be a qualified domestic relations order.

On June 6, 1997, the trial court held a hearing on whether it should adopt the Master's report. No one testified; the proceeding consisted of lawyers' argu-

ments.

On June 26, 1997, the trial court filed a judgment confirming the Master's report. That is the judgment from which John brings appeal 21808. The judgment provides, *inter alia*, that Beth's share in the Plan is ordered \*121 segregated as of December 31, 1991, and that she shall receive earnings (less losses) on her share from that date.

Attached to the judgment is a four-page document denominated "Amended Qualified Domestic Relations Order" signed by the trial court June 24, 1997. This opinion henceforth refers to that document as "QDRO-2."

The judgment contains a finding that QDRO-2 is deemed "qualified" under ERISA. Pertinent ERISA provisions regarding qualified domestic relations orders are set forth later when this opinion addresses John's third point.

[1] Before reaching the third point, we confront a threshold issue—John's eighth point. It avers:

"The trial court erred in adopting the report of the ... Master because it misapplied the law in determining that it could properly adopt the report in that Rule 68.01(d) requires that the ... Master 'shall take and subscribe an oath' before hearing any testimony and the ... Master in this instance failed to take such an oath."

At oral argument in this court, John's lawyer conceded this issue was not raised in the trial court.

The only case cited by John in support of his eighth point is *R.J. v. S.L.J.*, 732 S.W.2d 574 (Mo.App. E.D.1987). There, in an action for dissolution of marriage, the trial court appointed a special master to "hear custody and visitation matters" regarding the parties' children. *Id.* at 575. After con-

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ducting hearings, the master filed a report unfavorable to the father. *Id.* The father lodged objections to the report in the trial court. *Id.* One objection was that Rule 68.01(d)<sup>FN13</sup> had been violated. *Id.*

FN13. Rule 68.01(d), Missouri Rules of Civil Procedure (1998), reads the same today as it did when *R.J.* was decided. It provides:

“Before proceeding to hear any testimony in the action, a master shall take and subscribe an oath, before some officer duly authorized to administer an oath, faithfully to hear and examine the matters at issue and to make a just, impartial and true report.”

The trial court in *R.J.* adopted the report. *Id.* at 576. At the time the court did so, no transcript of the master's hearing was on file. *Id.*

The appellate court in *R.J.* held the trial court erred in adopting the report when no transcript of the master's hearing had been filed. *Id.* at [1]. The appellate court further held the trial court erred in adopting the report in that the master had not taken the oath required by Rule 68.01(d) and the parties had not waived the requirement. *Id.* at 576–77[4].

*R.J.* differs from the instant case in two respects.

First, the docket sheet in the instant case shows that the court reporter, on October 30, 1996, filed in the trial court a transcript of the Master's hearing of September 26, 1996. Thus, unlike the trial court in *R.J.*, the trial court in the instant case had access to a transcript of the Master's hearing for almost eight months before the trial court entered judgment confirming the Master's report.

Second, unlike the father in *R.J.*, John never complained to the trial court in the instant case that the

Master failed to comply with Rule 68.01(d). At the hearing in the trial court June 6, 1997 (mentioned earlier), John's lawyer voiced a number of objections to the Master's report, but uttered no protest that the Master failed to take and subscribe the oath required by Rule 68.01(d).

In *Rickman v. White*, 266 S.W. 997 (Mo.App.1924), the parties agreed to submit a dispute to arbitration. On appeal from a judgment enforcing the arbitrators' award, the defendant complained that neither the arbitrators nor witnesses were sworn. *Id.* The appellate court held the law requires arbitrators and witnesses to be sworn. *Id.* at 998[2]. However, added the court:

“[T]hat requirement may be waived, and a party who, with knowledge of the facts, proceeds without objection or request that oaths be administered, waives it.” *Id.*

In the instant case, John appeared in person and with his lawyer at the Master's hearing. Neither John nor his lawyer registered any objection about non-compliance \*122 with Rule 68.01(d) when the Master commenced the hearing, or later when lawyers Seiler and Callison testified. Furthermore, John filed no such objection in the trial court during the eight-month interval between the Master's hearing and the trial court's hearing on whether the Master's report should be confirmed.<sup>FN14</sup> Finally, as underscored earlier, John voiced no such objection during the latter hearing.

FN14. Rule 68.01(g)(2) grants a party thirty days after service of notice of the filing of a master's report to file written objections. The timely objections filed by John did not mention Rule 68.01(d).

We hold John's eighth point is governed by *Rickman*, 266 S.W. 997. Accordingly, we find John waived the Master's noncompliance with Rule

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68.01(d).

Additionally, we note *R.J.*, 732 S.W.2d 574, did not hold the master's failure to comply with Rule 68.01(d) deprived the trial court of jurisdiction to approve the master's report. Instead, *R.J.* held only that it was error to adopt the report when the parties had not waived the requirement. *Id.* at 576–77[4]. Inasmuch as we have concluded that John did waive the requirement, we hold *R.J.* does not compel reversal here. John's eighth point is denied.

That brings us to John's third point, which reads:

“The trial court erred in calculating the amount of pension funds due [Beth] because its allocation of interest and earnings to [her] on her share of the funds retroactive to December 31, 1991 and its award of interest and earnings for the Plan funds as a whole from June 7, 1996 forward rather than awarding actual earnings on \$216,252.50 which was segregated at the request of [Beth] and pursuant to court order as well as its considered [sic] of [Beth's] Exhibit ‘H’ was contrary to the law and a misapplication of the law in that 29 U.S.C. § 1056 prohibits retroactive application of a qualified domestic relations order beyond an eighteen month period and the trial court's order requires approximately five year retroactive application, 29 U.S.C. §§ 1104 and 1056 require a plan administrator to pay actual interest and earnings on segregated accounts and 29 U.S.C. § 1104(1) suggests that when a beneficiary exercises control over her portion of plan funds she must bear any losses resulting from this control, and Exhibit ‘H’ was neither offered nor entered into evidence.”

[2] After diligently studying this bewildering point and the argument following it, we have deduced that the point attempts to charge the trial court with three errors. Before setting forth our understanding of the trio, we note that a point relied on should assert a

single claim of error, not multiple claims. *Thummel v. King*, 570 S.W.2d 679, 688[14] (Mo. banc 1978); *McCormack v. Maplewood–Richmond Heights School District Board of Education*, 935 S.W.2d 703, 707[5] (Mo.App. E.D.1996).

[3] The first alleged error in John's third point, as we decipher it, is that the trial court violated certain ERISA provisions when it undertook to award Beth the earnings on her \$216,252.50 share of the Plan from and after December 31, 1991.

The ERISA provision cited by John in support of the first alleged error in his third point is 29 U.S.C. § 1056(d).<sup>FN15</sup> For brevity, this opinion henceforth omits the preface “29 U.S.C.” when referring to § 1056.

FN15. The version of U.S.C. in force when the trial court entered the judgment appealed from in appeal 21808 is the version that preceded the 1997 amendments.

§ 1056(d)(3) permits payment of benefits by a pension plan to persons other than participants if certain requirements are met. In setting forth the requirements, § 1056(d)(3) uses the term “domestic relations order”—defined in § 1056(d)(3)(B)(ii)—and the term “qualified domestic relations order”—defined in § 1056(d)(3)(B)(i). Additionally, § 1056(d)(3) uses the term “alternate payee”—defined in § 1056(d)(3)(K).

The procedure to be followed by the administrator of a pension plan upon receiving a domestic relations order is spelled out in § 1056(d)(3)(G)(i)(II), which reads:

\*123 “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.”

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§ 1056(d)(3)(H) provides:

“(i) 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 subparagraph 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.

(ii) If within the 18-month period described in clause (v) 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.

(iii) If within [the] 18-month period described in clause (v)

(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.

(iv) Any determination that an order is a qualified domestic relations order which is made after the close of the 18-month period described in clause (v) shall be applied prospectively only.

(v) For purposes of this subparagraph, the 18-month period described in this clause 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.”

John's hypothesis, as we cull it from the argument in his brief, is that the term “payment” in § 1056(d)(3)(H)(v) encompasses the accounting procedure that occurs under § 1056(d)(3)(H)(i) when the plan administrator identifies the amounts which would have been payable to the alternate payee during the period in which the issue of whether the domestic relations order is a qualified domestic relations order is being determined. Those amounts, referred to as the “segregated amounts,” are to ultimately be paid to the alternate payee if, within the 18-month period specified in § 1056(d)(3)(H)(v), the domestic relations order is determined to be a qualified domestic relations order. Under § 1056(d)(3)(H)(v), the 18-month period begins on the date the first payment would be required to be made by the domestic relations order.

As we grasp John's argument, he maintains that awarding Beth the earnings on her \$216,252.50 share of the Plan from and after December 31, 1991, requires “funds” to be retroactively transferred to Beth's account starting December 31, 1991, and this violates ERISA's 18-month limit on “retroactive application.”

If we are correct in our understanding of John's argument, we find it meritless.

The purpose of the provisions relied on by John appears to be to protect a pension plan and its administrator by allowing the administrator to specifically account for the amounts in dispute and withhold payment of them to anyone during an 18-month period beginning on the date the first payment would be due under the domestic relations order. During this 18-month period, the issue of whether the domestic

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relations order is a qualified domestic relations order will—hopefully—be resolved. If the issue is resolved favorably to the alternate payee, the plan administrator pays the “segregated amounts” to the alternate payee. If the issue is not resolved during the 18-month period, the plan administrator is thereafter allowed to pay the “segregated amounts” to the person who would have been entitled to them had there been no domestic relations order.

\*124 John asserts—and we agree—that a plan administrator’s obligation to an alternate payee does not arise until the plan receives a domestic relations order. In the instant case, no domestic relations order existed until the trial court signed QDRO–1 on March 1, 1996. Consequently, no payment could have been “due” from the Plan to Beth under QDRO–1 before that date. It follows that here, the 18-month period in § 1056(d)(3)(H)(v) did not commence until some date after March 1, 1996—whatever date John, as administrator of the Plan, received QDRO–1.

When that occurred, the ERISA provisions quoted above required John, as administrator of the Plan, to separately account for the sum due Beth and preserve the “segregated amounts” for 18 months if it took that long to determine whether QDRO–1 was a qualified domestic relations order. John cites no evidence that the earnings on Beth’s share of the Plan after December 31, 1991, could not have been calculated during that 18-month period. Furthermore, he cites no authority for the proposition that calculating them and accounting for them in Beth’s “segregated” share would have constituted a “payment” to her under ERISA.

We glean from the record that John was not entitled to any payment from the Plan on December 31, 1991, and did not become entitled to any payment from it prior to the June 26, 1997, judgment. Therefore, it was unnecessary for the Plan to withhold any payment from John after receiving QDRO–1. All of the assets of the Plan remained invested up to the time

of the hearing in the trial court June 6, 1997. Furthermore, inasmuch as the Plan paid John nothing after December 31, 1991, calculating the earnings on Beth’s \$216,252.50 share of the Plan and crediting them to her in the accounting required by § 1056(d)(3)(H)(i) would not result in her receiving an award of earnings already paid by the Plan to John.

[4] On appeal, a trial court’s action is presumed correct and the burden is on the appellant to establish that the action was error. *Linzenni v. Hoffman*, 937 S.W.2d 723, 725[3] (Mo. banc 1997). John cites nothing that supports the first theory of error in his third point. After sedulous study of the ERISA provisions on which John bases the theory, we conclude they do not support it. It is denied.

[5] The second alleged error in John’s third point is that the trial court wrongly calculated the amount due Beth from the Plan in that the court awarded her, in John’s words, “interest and earnings for the Plan funds as a whole from June 7, 1996 forward rather than awarding actual earnings on \$216,252.50 which was segregated at the request of [Beth] and pursuant to court order.”

As reported earlier, the trial court signed an order June 7, 1996, commanding John, as administrator of the Plan, to deposit in the registry of the court certain documents evidencing ownership of funds comprising “the segregated amount of \$216,252.50.” As we understand the record, John thereafter delivered to the circuit clerk certificates evidencing ownership of three funds aggregating \$216,252.50. This opinion henceforth refers to those certificates as “the \$216,252.50 certificates.” The \$216,252.50 certificates identify their owner as the JDGDDSPC “Pension and Profit Sharing Trust.”

John’s brief argues that the earnings on the funds represented by the \$216,252.50 certificates “differ from the unencumbered pension plan funds.” Ac-

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ording to John, the trial court's order "fails to adjust for this difference, and requires the Plan to distribute interest and earnings to [Beth] as if these funds had never been segregated."

John's brief yields no clue about the extent of the alleged "difference" and supplies no hint as to where we can find that information in the record.

Rule 84.04(c) requires the statement of facts in an appellant's brief to be a fair and concise statement of the facts relevant to the questions presented for determination. The purpose of the rule is to ensure that the statement of facts affords an immediate, accurate, complete and unbiased understanding of the facts of the case. *Walker v. Thompson*, 338 S.W.2d 114, 118[9] (Mo.1960). Compliance with the rule facilitates the work of the appellate court and benefits the litigants \*125 in that the issues may be properly presented and considered. *Id.*

The statement of facts in John's brief does not set forth the earnings on the funds represented by the \$216,252.50 certificates from and after the date the certificates were delivered to the circuit clerk, nor does the statement of facts set forth the earnings on the Plan's other assets from and after that date. Consequently, we cannot determine, from the statement of facts, whether the earnings on the former were more or less than the earnings on the latter. Furthermore, the statement of facts furnishes no inkling as to where we can find that information in the record (if indeed it is there).

The argument in John's brief, like the statement of facts, does not set forth the earnings on the funds represented by the \$216,252.50 certificates from and after the date the certificates were delivered to the circuit clerk, nor does the argument set forth the earnings on the Plan's other assets from and after that date. Additionally, the argument surrenders no hint as to where we can find that information in the record.

Rule 84.04(h) requires that all statements of fact and argument in an appellant's brief have specific page references to the legal file or transcript. In *State ex rel. Webster v. Missouri Resource Recovery, Inc.*, 825 S.W.2d 916, 936 (Mo.App. S.D.1992), the argument on a point in a brief furnished no citation to the record where evidence might be found to support the argument. This court said:

"Because of the complexity of this case and the number of issues raised on appeal, it was imperative that we have an immediate, accurate, complete, and unbiased understanding of the facts relevant to those issues. This we do not find in the plaintiffs' brief as it relates to the foregoing issues."

*Id.* at 937. Because the brief in that case furnished no citation to the record supporting the factual averments on which the point was based, this court held the point was not preserved for review. *Id.* at 936–37[19].

The same treatment is warranted here. As the length of this opinion demonstrates, this case presents a multitude of issues, some complex. We have endeavored to compile and narrate the evidence pertinent to the assignments of error addressed so far. However, we decline to seine the record for evidence to support the second claim of error in John's third point. We hold it is not preserved for review.

[6] Before leaving it, we point out that for error to require reversal, it must have been prejudicial to the complaining party. *Wilcox v. St. Louis–Southwestern Railroad Co.*, 418 S.W.2d 15, 19–20[3] (Mo.1967). Error without prejudice is no ground for reversal. *Neavill v. Klemp*, 427 S.W.2d 446, 448 [9] (Mo.1968).

Absent evidence about the earnings on the funds represented by the \$216,252.50 certificates and the earnings on the Plan's other assets, there is no showing

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that John was harmed by the second alleged error in his third point.

[7] The third—and final—alleged error in John's third point is that the trial court wrongly considered Beth's Exhibit H. According to John, Exhibit H was not received in evidence at the June 6, 1997, hearing.

The record furnished us includes a three-page document marked Exhibit H. It is a memorandum dated March 29, 1997, prepared by BMC Consultants, Inc. The stationery indicates that entity is a provider of retirement plan administration services. As we comprehend Exhibit H, it sets forth a series of calculations showing Beth's share of the Plan's earnings from December 31, 1991, through December 31, 1996.

John's brief does not reveal the page of the transcript of the June 6, 1997, hearing at which the admissibility of Exhibit H is addressed. On our own, we have found the pages where Exhibit H is mentioned. Those pages show Beth's lawyer presented Exhibit H to the court. Thereupon, John's lawyer said: "There were two BMC calculations. One of them was incorrect. I just wanted to make sure [Beth's lawyer] was presenting the correct one to you."

Beth's lawyer then asked the trial court to sign a domestic relations order using the calculations in Exhibit H. John's lawyer registered no objection to that procedure.

\*126 [8] The trial court could have readily inferred from that colloquy that John had no objection to the court's use of Exhibit H in determining the earnings on Beth's share of the Plan since December 31, 1991. A party cannot complain on appeal about an alleged error in which that party joined or acquiesced at trial. *In re Marriage of Glueck*, 913 S.W.2d 951, 956[10] (Mo.App. E.D.1996). Accordingly, in using Exhibit H to determine the earnings on Beth's share of the Plan after December 31, 1991, the trial court

committed no error about which John can complain in this court.

Furthermore, John makes no attempt to show that any calculation in Exhibit H is erroneous. As observed earlier, error without prejudice is no ground for reversal. *Neavill*, 427 S.W.2d at 448[9]. The third claim of error in John's third point is denied.

[9] John's fourth point avers the trial court erred in awarding Beth earnings on her share of the Plan "retroactive to December 31, 1991," in that the E5 award in the dissolution decree did not purport to award Beth earnings, but only a fifty percent interest in the Plan which, as of December 31, 1991, the trial court valued at \$216,252.50. John cites § 452.330.5, RSMo 1994, which pertains to disposition of property in a proceeding for dissolution of marriage. The statute reads:

"The court's order as it affects distribution of marital property shall be a final order not subject to modification; provided, however, that orders intended to be qualified domestic relations orders affecting pension, profit sharing and stock bonus plans pursuant to the U.S. Internal Revenue Code shall be modifiable only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of [the] order."

The E5 award in the dissolution decree is silent regarding the earnings on Beth's \$216,252.50 share of the Plan. As noted earlier, the decree was entered September 21, 1993, twenty-one months after the date used by the trial court to value Beth's share (December 31, 1991). Obviously, at the time the decree was entered, earnings (or losses) on Beth's share would have accrued since the valuation date.

We gather from the transcript of the Master's

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hearing (September 26, 1996) that John's share of the Plan, combined with Beth's share, amounted to 97.5 percent of the Plan's assets. Obviously, if the earnings on Beth's share since December 31, 1991, were not credited to her, John's share would be credited with them.

As reported earlier in this opinion, QDRO-1, signed by the trial court March 1, 1996 (twenty-nine months after entry of the dissolution decree), provided that Beth was to receive, as her share of the Plan, \$216,252.50 "plus accrued earnings and/or losses from December 31, 1991." The judgment entered June 26, 1997, contained a similar provision.

QDRO-2, signed by the trial court June 24, 1997 (two days before the June 26, 1997, judgment), awarded Beth, from John's beneficial interest in the Plan, \$339,376.89. QDRO-2 provided that this sum shall be treated as Beth's share as of December 31, 1995. We infer this sum is the total of Beth's \$216,252.50 share of the Plan as of December 31, 1991, plus the earnings (less losses) on her share from that date to December 31, 1995. QDRO-2 further provided that Beth's share shall be increased (or decreased) by treating Beth as a participant for all purposes including allocation of earnings and losses for each full plan year in which distribution to her is not made.

John maintains that because the E5 award in the dissolution decree makes no reference to earnings on Beth's share of the Plan, the provisions regarding earnings in QDRO-1, QDRO-2 and the June 26, 1997, judgment constitute an "impermissible modification" of the E5 award in violation of § 452.330.5 (quoted earlier). According to John, the provisions regarding earnings do not fall within either of the exceptions in the statute, i.e., modifications "for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of [the] order."

\*127 We disagree. We hold QDRO-1, QDRO-2 and the June 26, 1997, judgment merely confirm what Beth was awarded in the E5 award, and that QDRO-1 and QDRO-2 were entered for the purpose of enforcing the E5 award. *See: Seal v. Raw*, 954 S.W.2d 681, 682-83[1] (Mo.App. W.D.1997).

As observed earlier, the dissolution decree was entered twenty-one months after the date used by the trial court in valuing Beth's fifty percent share in the Plan at \$216,252.50. Because the Plan's assets were generating earnings (or losses) from and after the valuation date, it would have been virtually impossible for the trial court, in entering the decree September 21, 1993, to include therein the precise dollar value of Beth's fifty percent share at the instant the court signed the decree.

John's theory appears to be that because the E5 award did not specifically provide that Beth was to receive the earnings (or losses) generated by her share in the Plan after December 31, 1991, the decree implicitly awarded such earnings (or losses) to him.

That is nonsense. The effect of such a construction would be to award one party the earnings (or losses) generated by an adverse party's assets. John cites no authority supporting such an interpretation. His fourth point is denied.

[10] John's fifth point avers the trial court erred "in excluding from the expenses to be allocated to [Beth's] share of the pension funds expenses in any way relating to the determination of the status or the administration of the domestic relations order."

Nowhere in the point or the argument following it does John identify the order about which he complains.

We divine from a reference to the legal file in the

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statement of facts in John's brief that the order he seeks to attack is paragraph "D" of the June 26, 1997, judgment. It orders that

"[Beth] pay a pro rata share of any plan expenses from and after March 1, 1996, provided that no expenses (including but not limited to attorneys fees and expenses, court costs and expert witness fees and expenses) in any way relating to the determination of the status of or the administration of [QDRO-2] attached hereto or the March 1, 1996 Domestic Relations Order of this Court shall be charged directly or indirectly against [Beth.]"

As we have seen, calculation of the earnings on Beth's share of the Plan from and after December 31, 1991, was done by BMC Consultants, Inc. Additionally, lawyer Seiler, at John's request, reviewed QDRO-1 and testified about his conclusions regarding it at the Master's hearing. We infer the expenses for those services, and perhaps others, are the expenses toward which John's fifth point is directed.

John's brief tells us there is no reported case addressing the issue of whether the share of an alternate payee in a pension plan can be charged with expenses incurred in determining whether a domestic relations order is a qualified domestic relations order. According to John, "the only existing authority" on that issue is an opinion letter of the Department of Labor denominated "Opinion 94-32A," dated August 4, 1994. This opinion henceforth refers to that document as "Opinion 94-32A."

Lawyer Seiler referred to a segment of Opinion 94-32A during his testimony at the Master's hearing. That segment reads:

"[I]t is the view of the Department that imposing a separate fee or cost on a participant or alternate payee (either directly or as a charge against a plan account) in connection with a determination or [sic]

the status of a domestic relations order or administration of a QDRO would constitute an impermissible encumbrance on the exercise of the right of an alternate payee, under ... ERISA, to receive benefits under a QDRO. Additionally, in the Department's view, because ... ERISA imposes specific statutory duties on plan administrators regarding QDRO determinations and the administration of QDROs, reasonable administrative expenses thus incurred by the plan may not appropriately be allocated to the individual participants, and beneficiaries affected by the QDRO."

We detect no conflict between paragraph "D" of the June 26, 1997, judgment and the \*128 excerpt from Opinion 94-32A. Paragraph "D" bars any charges against Beth, "directly or indirectly," for expenses incurred in determining whether QDRO-1 or QDRO-2 was a qualified domestic relations order. That is consistent with Opinion 94-32A.

It must be remembered that at the time of the Master's hearing, John's share of the Plan, combined with Beth's share, amounted to 97.5 percent of the Plan's assets. Obviously, if John, in his role as Plan administrator, could charge Beth's share with expenses incurred by John individually in challenging QDRO-1 and QDRO-2, John individually, as one of the two holders of the 97.5 percent share, would benefit financially.

We do not imply the Plan may not pay, from its assets, the reasonable expenses of administering it. Such expenses are specifically authorized by 29 U.S.C. § 1103(c)(1) and 29 U.S.C. § 1104(a)(1)(A)(ii). Inasmuch as John's share of the Plan, combined with Beth's share, amounts to 97.5 percent of the Plan's assets, payment of reasonable expenses of administering the Plan from its assets will obviously have an adverse effect on the interests of both John and Beth until Beth ultimately obtains everything due her from the Plan (if she ever does).

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However, reasonable expenses of administering the Plan do not include expenses incurred by John individually in an effort to benefit himself financially by defeating or delaying the E5 award.

If, when the Plan pays Beth the E5 award, she believes John, as Plan administrator, has improperly charged expenses against Plan assets that he should have paid personally, she can seek redress. As John points out, a plan administrator must “discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries.” 29 U.S.C. § 1104(a)(1). Consequently, if John wrongfully charges against Plan assets any expenses he should have paid personally, he is in violation of that statute.

Because we espy no conflict between paragraph “D” of the June 26, 1997, judgment and Opinion 94–32A, we find no merit in John's fifth point.

John's sixth point challenges paragraph “J” of the June 26, 1997, judgment. That paragraph reads:

“ ... John ... shall not amend or alter or cause to be amended or altered that portion of the Corporate Benefits Inc. regional prototype basic plan documents with respect to distributions under domestic relations orders and interest accruals in the year of distribution and shall not permit or cause delay of distribution in any manner whatsoever, except for the required waiting periods under controlling law, but shall promptly cause distribution to be made as provided under the terms and provisions of the Regional Prototype Document Sponsored by Corporate Benefits, Inc., copyrighted January 1, 1990[.]”

[11] John's sixth point:

“The trial court erred in ordering that the Plan administrator may not alter or amend the pension plan with respect to distributions under domestic

relations orders and may not permit or cause delay of distribution in any manner whatsoever but must cause distribution to be made as provided under the terms and provisions of the Original [sic] Prototype Document sponsored by Corporate Benefits, Inc., copyrighted January 1, 1990, because this order misapplies the law, violates ERISA, and requires [John] to violate ERISA, 29 U.S.C. § 1104(1) [sic]. In that both the Plan as it existed at the time of the dissolution decree and as it existed on the date of the court order does not permit immediate distribution of pension funds to an alternate payee, and any distribution which is contrary to Plan documents, compels [John] as Plan administrator to violate his fiduciary duty under 29 U.S.C. § 1104(1) [sic], for the reason that the applicable plan is either the plan that was in place at the time of the decree of dissolution or the one in place at the time of the signing of [QDRO–2].”

We begin our effort to adjudicate this esoteric point with four observations.

First, we infer the point's reference to “29 U.S.C. § 1104(1)” was meant to be a reference to 29 U.S.C. § 1104(a)(1).

\*129 Second, we infer the point's reference to the “Original Prototype Document” was meant to be a reference to the “Regional Prototype Document” mentioned in paragraph “J” of the June 26, 1997, judgment (quoted earlier).

Third, if there is any clue in the statement of facts in John's brief or the argument following point six as to where the “Regional Prototype Document” appears in the record, the clue is too well concealed for us to detect it.

Fourth, we have examined the tables of contents of the two volumes of exhibits furnished us by the parties and have found no listing for the “Regional

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Prototype Document.” All we can find is a listing in one of the tables for “Section 6.07 of the Plan procedures.” Under that listing, we find a two-page document marked Exhibit W. Its relevance is explained later.

Because it appears the “Regional Prototype Document” referred to by the trial court in paragraph “J” of the June 26, 1997, judgment has not been filed with us, we assume the content of that document is favorable to the trial court’s ruling and unfavorable to John. Cf. *In re Marriage of Gourley*, 811 S.W.2d 13, 16[3] n. 2 (Mo.App. S.D.1991).

One segment of the argument following John’s sixth point, as we comprehend it, asserts that at the time the dissolution decree was entered (September 21, 1993), the Plan did not allow distribution to anyone until John’s retirement. However, as we fathom the argument, some time after entry of the dissolution decree and before January 1, 1997, the Plan was amended to provide “for a lump sum distribution.” According to John’s argument, as we grasp it, the amendment mentioned in the preceding sentence remained in effect until January 1, 1997.

The only document we find in the record that appears to be a provision of the Plan pertinent to John’s sixth point is Exhibit W, mentioned above. One passage therein reads:

“This Plan specifically permits distribution to an alternate payee under a qualified domestic relations order at any time, irrespective of whether the Participant has attained his earliest retirement age (as defined under Code § 414(p)) under the Plan. A distribution to an alternate payee prior to the Participant’s attainment of earliest retirement age is available only if: (1) the order specifies distribution at that time or permits an agreement between the Plan and the alternate payee to authorize an earlier distribution; and (2) if the present value of the al-

ternate payee’s benefits under the Plan exceeds \$3,500, and the order requires, the alternate payee consents to any distribution occurring prior to the Participant’s attainment of earliest retirement age.”

We surmise from the argument in John’s brief that Exhibit W is the provision that allowed “lump sum distribution” to an alternate payee prior to John’s attainment of retirement age—the provision that took effect after the date the dissolution decree was entered and remained in effect until January 1, 1997. An attentive reader will recall the trial court signed QDRO–1 on March 1, 1996, and John, as administrator of the Plan, evidently received QDRO–1 a few days later. Accordingly, we deduce Exhibit W was in effect when the Plan received QDRO–1. If that assumption be correct, at the time the Plan received QDRO–1, Beth, as an alternate payee, was entitled to a distribution even though John had not yet reached retirement age.

John concedes he can find no authority supporting his premise that Beth’s right to an immediate distribution from the Plan at the time the Plan received QDRO–1 can be defeated by amending the Plan thereafter. The mischief that could result from such a holding is too obvious to require explanation. We decline to adopt such a rule.

Accordingly, we hold Beth’s rights to receive distribution from the Plan are those she had at the time the Plan received QDRO–1. Having decided that, we conclude that any issue as to whether the trial court could properly prohibit John from amending the Plan after the Plan received QDRO–1 is moot, as any such amendment would not divest Beth of any right with which she was vested when the Plan received QDRO–1. \*130 John’s sixth point thus presents no basis for reversal.

[12] We next consider John’s first point, a task that requires an account of certain events not yet

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mentioned in this opinion. An alert reader will recognize that the events chronicled hereunder occurred during the same time frame as events already recounted.

On March 7, 1995, at the request of Beth's lawyer, the clerk of the trial court issued an execution against John. In aid of the execution and at the direction of Beth's lawyer, the sheriff issued a garnishment to First State Bank and Trust Company of Caruthersville, Missouri ("First State Bank"), attaching all assets of John in the possession or under the control of the garnishee.

On March 10, 1995, at the request of Beth's lawyer, a second execution was issued against John. This time, at the direction of Beth's lawyer, the sheriff issued a garnishment to First State Bank, attaching all assets of JDGDDSPC in the possession or under the control of the garnishee. This opinion henceforth refers to this garnishment as "Garnishment Two."

On March 16, 1995, at the request of Beth's lawyer, a third execution was issued against John. At the direction of Beth's lawyer, the sheriff issued a garnishment to JDGDDSPC, attaching all assets of John in the possession or under the control of the garnishee. This opinion henceforth refers to this garnishment as "Garnishment Three."

We infer Beth's lawyer took the steps described in the three preceding paragraphs to collect the \$225,000 award.

Almost fifteen months later, on June 7, 1996, at the request of Beth's lawyer, the clerk of the trial court issued an execution against John. In aid of the execution and at the direction of Beth's lawyer, the sheriff issued a garnishment to John and a garnishment to JDGDDSPC. These two garnishments are mentioned in the statement of facts in John's brief, but are unmentioned in his first point and the argument follow-

ing it, hence we assume they are not in issue in this appeal. They are noted in this opinion only to provide continuity to the saga in the trial court.

Pursuant to the June 7, 1996, execution, the clerk of the trial court issued a directive to the sheriff to levy on two parcels of real estate in Pemiscot County. The sheriff levied on the parcels and issued a notice they would be sold at public sale August 15, 1996.

We infer Beth's lawyer took the steps described in the two preceding paragraphs to collect the \$225,000 award.

On August 5, 1996, John filed a "Motion for Contempt" in the trial court. The motion averred, *inter alia*, that the dissolution decree awarded John the "professional corporation" JDGDDSPC, and that one of the corporation's assets was a 1990 Toyota automobile. The motion further pled that Beth had possession of the Toyota when the decree was entered (September 21, 1993) and kept it until May 31, 1996 (a period of some 32 months), during which time its value diminished by \$18,000. The motion prayed that Beth show cause why she should not be punished for contempt and why John should not recover the amount of the depreciation.

On August 15, 1996 (the day the sheriff was scheduled to sell the two parcels of land), the trial court entered the "Order Staying Execution Sale for One Month and Consolidating Issues for Submission to Special Master" mentioned earlier in this opinion. The order recited, *inter alia*, that John was endeavoring to obtain a loan "to pay off the balance [due on the \$225,000 award]."

The August 15, 1996, order also stated the Master was to determine, among other issues, "all issues of contempt claimed by either party of [sic] against the other ... [and] allegations of wrongful garnishment as submitted in Circuit Court of Pemiscot County Case

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No. CV395–89CC.” That number is different than the number assigned the instant case in the trial court. The instant case bears number CV391–235DR. The significance of this anomaly will become apparent later when we analyze John's first point.

As detailed earlier in this opinion, the Master held a hearing September 26, 1996, and filed his report in the trial court October 29, 1996. The Master's report contains a multitude\*131 of findings, one of which is: “On March 10, 1996 [sic], another garnishment was issued to First State Bank attaching the funds of [JDGDDSPC]....” We conclude this finding refers to Garnishment Two, mentioned earlier in this opinion.

Another finding in the Master's report is: “On March 16, 1995, a garnishment was directed to [JDGDDSPC] attaching the property, money, etc. of the corporation....” We conclude this finding refers to Garnishment Three, mentioned earlier in this opinion.

It appears to us that the Master understood Garnishment Three differently than we do. As we comprehend Garnishment Three, it attached all assets of *John* in the possession or under the control of JDGDDSPC; it did not attach any of JDGDDSPC's assets. However, as shall become apparent hereafter, whether our notion or the Master's notion is correct is immaterial.

The Master's report contains further findings pertinent to John's first point. Those findings are:

“The answer to interrogatories by First State Bank listed one personal account, two corporate accounts, and one pension and profit sharing trust account. On March 10, 1995, the attorney for [Beth] wrote a letter to the attorney for First State Bank stating that he intended to pursue all of these funds.

[John] maintains that the two corporate accounts and the pension and profit sharing trust account

were not subject to garnishment to collect a personal indebtedness.

[Beth] maintains that the corporate accounts were subject to garnishment because the corporation was the ‘alter ego’ of [John]....

[Beth] did not receive the funds from First State Bank although the accounts were ‘frozen’ for a time and some checks on the accounts were dishonored by the bank.

... [John's] personal account clearly was subject to garnishment.

[JDGDDSPC] is a professional corporation of which [John] is the sole shareholder and has complete domination. He can unilaterally control the amount of his compensation for his personal services in the practice of dentistry. He manipulated the funds of the corporation to defer income to such an extent that the Internal Revenue Service intervened to assess a deficiency against him. He also paid personal debts from the corporate account. For practical purposes [John] and his professional corporation are indistinguishable; it is his alter ego and the corporate accounts were subject to the garnishments. If this were not so he could live on other income and shelter his earnings for his professional services from garnishment indefinitely.

....

The allegations of wrongful executions and garnishments were not proven by the facts nor established under the law and there should be no recovery on these claims.”

As set forth earlier in this opinion, the trial court filed a judgment June 26, 1997, confirming the Master's report.

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John's first point:

“The trial court erred in adopting that portion of the report of the ... Master which found that the garnishment of the funds belonging to [JDGDDSPC] was proper and that the allegations of wrongful garnishment and execution were not proven by the facts nor established under the law based on a specific finding that the professional corporation was the alter ego of [John] and that thereby the corporate accounts were subject to the garnishments because this finding was against the weight of the evidence, unsupported by substantial evidence, and the trial court misapplied the law in that: (a) the professional corporation was not a party to the dissolution proceeding and under Missouri law, a marital dissolution decree may not affect property of a corporation that is not a party; (b) Missouri law requires that in order to pierce the corporate veil, the evidence must establish: (1) that the corporation is controlled and influenced by persons or by another corporation and, (2) that the corporate cloak was used as a subterfuge to defeat public convenience, to justify a \*132 wrong, or to perpetuate a fraud, and there was no evidence to support these elements.”

It is evident from the argument following the above point that John is complaining because the trial court denied a claim by him for “wrongful garnishment of the corporation.” Neither the point nor the argument enlightens us about this “claim,” nor do the point or argument reveal where the “claim” can be found in the record. We have combed the statement of facts in John's brief in search of a clue, but have discovered none.

The only document arguably constituting a “claim” by John against Beth in the record presented us is the “Motion for Contempt” filed by John August 5, 1996. As recounted earlier, the subject of that motion was a Toyota automobile, not any garnishment or execution.

In striving to figure out why John's “claim of wrongful garnishment of the corporation” does not appear in the record, we have deduced that the claim must have been filed in a different lawsuit—perhaps case number CV395–89CC, mentioned earlier in this opinion. As we noted there, the trial court's August 15, 1996, order listing the issues to be determined by the Master included “allegations of wrongful garnishment as submitted in ... Case No. CV395–89CC.”

Our search of the record has turned up no pleadings in case number CV395–89CC. The only inkling about them is a docket entry May 23, 1995, stating, in part: “BETH ANDREWS ANSWER TO PETITION FOR DAMAGES FOR WRONGFUL GARNISHMENT ... filed by fax....” The index in the legal file does not list this pleading and we cannot find it in the legal file.

Rule 81.12(a)<sup>FN16</sup> provides, in pertinent part:

FN16. Rule references are to Missouri Rules of Civil Procedure (1997).

“The legal file shall always include, in chronological order: the pleadings upon which the action was tried....”

[13] It is the appellant's duty to provide a complete record on appeal for the determination of questions presented to the appellate court. *Morovitz v. Morovitz*, 693 S.W.2d 189, 191[5] (Mo.App. E.D.1985); *Coulter v. Michelin Tire Corp.*, 622 S.W.2d 421, 437[34] (Mo.App. S.D.1981), *cert. denied*, 456 U.S. 906, 102 S.Ct. 1752, 72 L.Ed.2d 162 (1982).

In a case of this complexity, we decline to attempt appellate review of a trial court ruling on issues joined by pleadings which John, the appellant, did not see fit to place before us. Such an undertaking would be an

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imprudent exercise in guesswork, accompanied by the risk of establishing bad precedent. We hold John's violation of Rule 81.12(a) bars review of his first point.

John's second point (the final claim of error in appeal 21808) avers the trial court erred in adopting a conclusion of the Master regarding "allegations of wrongful execution and garnishment of the funds of the [JDGDDSPC] Pension and Profit Sharing Trust." We glean from the argument following the point that John is complaining because the trial court denied an "action for wrongful garnishment of the pension funds." Neither the point nor the argument reveals where the pleading setting forth this "action" can be found in the record. We have scrutinized the statement of facts in John's brief in quest of a hint, but have found none.

Consequently, everything we said in regard to John's first point applies with equal force to his second. Consistent with our treatment of the first point, we hold the second is ineligible for review.

[14] Before leaving the first and second points, we note John cites no authority supporting the notion that a trial court is empowered to enter a judgment in one case resolving issues in a different case without consolidating the cases. Consolidation of civil actions is authorized by Rule 66. We find no order in the record purporting to consolidate the instant case (CV391–235DR) with any other case per that rule.<sup>FN17</sup>

FN17. A recital in the judgment appealed from states the trial court took "judicial notice of the record appurtenant to the Circuit Court of Pemiscot County, Missouri, Division I, Cause No. CV395–89CC, styled First State Bank and Trust Company v. Beth Andrews (Gardner), John D. Gardner, John D. Gardner, D.D.S., P.C., John D. Gardner, D.D.S., P.C. Pension Trust and John D.

Gardner, D.D.S., P.C. Profit Sharing Trust, the Circuit Court of Pemiscot County, Missouri, Cause No. CV395–170CC, styled John D. Gardner, D.D.S., P.C., et al v. Beth Andrews (Gardner) and First State Bank and Trust Company, the United States District Court, Eastern District of Missouri, Southeast Division, Cause No. 1:96CV0113ERW, styled John D Gardner, D.D.S., P.C. et al v. Beth Andrews (Gardner), the United States District Court, Eastern District of Missouri, Southeastern Division, Cause No. 1:96CR00007SNL, styled United States Of America v. John D. Gardner, D.D.S...." We find nothing in the judgment appealed from purporting to adjudicate any issues in any of those actions. Furthermore, it appears First State Bank is a party to case number CV395–89CC (and also a party to case number CV395–170CC). Consequently, there may be issues involving First State Bank in those cases. The judgment appealed from resolves no issues involving First State Bank, hence if such judgment purported to adjudicate any issues between John and Beth in either of those cases, it would likely be unappealable for lack of finality. *See: Mohawk Flush Doors, Inc. v. Kabul Nursing Homes, Inc.*, 938 S.W.2d 347, 349[1–3] and [4, 5] (Mo.App. S.D.1997).

\*133 That no consolidation occurred is borne out by John's notice of appeal in appeal 21808. The notice identifies the number of the case from which the appeal is taken as CV391–235DR (alone). The judgment itself displays only that number.

We recognize that the August 15, 1996, order enumerating the issues to be determined by the Master included issues in cases other than the instant case. We do not imply it was improper to refer issues in multiple cases to the Master. We merely point out there is nothing before us suggesting the trial court ever un-

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dertook to consolidate the instant case (CV391–235DR) with any other case. The effect of the judgment in the instant case on issues in any other case is not a subject requiring comment by us in appeal 21808. We leave the judgment as we find it.

[15] One loose end remains in appeal 21808. As pointed out earlier in this opinion, after the mandate in the first appeal, the only pleadings we find in the record which present issues for the trial court's adjudication are Beth's "Motion for Contempt" filed May 24, 1995, and John's "Motion for Contempt" filed August 5, 1996.

The only reference to contempt in the judgment appealed from is:

"[Beth] is ordered to pay ... \$4,000 ... to [John] to balance the equities of the parties as to their attorneys fees and the damage and deterioration to the 1990 Toyota ... automobile within ... 30 ... days [after] the entry of this Order; that there is no present need for a coercive Order to the parties and that neither party should be granted further relief on the contempt motion [.]"<sup>FN18</sup>

FN18. A meticulous reader may recall that John's "Motion for Contempt" averred the Toyota was owned by JDGDDSPC. It thus appears the \$4,000 awarded John from Beth should have been awarded to JDGDDSPC. However, as John's first point emphasizes, JDGDDSPC is not a party to this suit. Consequently, it appears the trial court would have been unable to award anything to JDGDDSPC. At the Master's hearing, John's lawyer said JDGDDSPC assigned the claim regarding the Toyota to John "so we didn't have to file a separate lawsuit." We find no such assignment in the record filed here.

[16] The general rule is that a civil contempt order

is not a final judgment for purposes of appeal until the order is enforced. *In re Marriage of Beaver*, 954 S.W.2d 717, 721[1] (Mo.App. S.D.1997); *State ex rel. Watson v. Watson*, 858 S.W.2d 841, 842[1] (Mo.App. S.D.1993). A discerning reader may thus wonder whether the judgment is appealable, inasmuch as the trial court did not undertake to enforce any provision of the dissolution decree or any provision of the judgment by coercion.

At the Master's hearing, Beth's lawyer acknowledged that during the time Beth's "Motion for Contempt" was pending, she, with counsel's assistance, was gradually able to get the items that were "the subject matter of the motion for contempt." Then, this:

"THE [MASTER]: ... So what is it that you are asking to be done in regard to the contempt motion ... ?

[Beth's lawyer]: Award the legal fees that we've incurred in order to try to get [John] to live up to the obligations of the judgment."

It is obvious from the above exchange that Beth, at the Master's hearing, abandoned her \*134 request that John be held in contempt, and sought only an award of attorney fees.

John's lawyer, as we grasp his remarks at the Master's hearing, indicated that the only relief John wanted on his contempt motion against Beth was a monetary award "to restore the corporation to its status equal to either the diminution of the value [of the Toyota] or the cost of repair."

It is thus obvious that John, at the Master's hearing, abandoned his request that Beth be held in contempt, and sought only compensation for depreciation of the Toyota while Beth possessed it.

As we have seen, the trial court (upon recom-

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mentation of the Master) awarded John \$4,000 from Beth to “balance the equities” regarding attorney fees and for “damage and deterioration” to the Toyota.

Apart from that award, the effect of the judgment was, in the main, to declare the rights and obligations of the parties regarding the E5 award, QDRO–1 and QDRO–2 (and perhaps to resolve issues about garnishments, a subject about which we have declined to speculate).

A declaratory judgment is appealable. Rule 87.11; *Fults v. Missouri Board of Probation and Parole*, 826 S.W.2d 103, 104–05[2] (Mo.App. W.D.1992). Accordingly, we hold the judgment appealed from in appeal 21808 is appealable. It is affirmed.

As reported in the third paragraph of this opinion, John's brief presents only one assignment of error in appeal 22070. That assignment (John's seventh point) charges the trial court with error in awarding Beth and her lawyers \$7,500 from John for attorney fees and expenses in responding to appeal 21808.

An attorney fee award is within the trial court's discretion. *Mehra v. Mehra*, 819 S.W.2d 351, 356–57[14] (Mo. banc 1991). An appellate court will reverse such an award only if a trial court manifestly abuses its discretion. *Keefe v. Keefe*, 435 S.W.2d 313, 317[6] (Mo.1968).

We determine that the attorney fee award is supported by substantial evidence and is not against the weight of the evidence, that no error of law appears in the award, and that an opinion addressing the issue would have no precedential value. Accordingly, the judgment appealed from in appeal 22070 is affirmed in compliance with Rule 84.16(b)(1) and (5).

GARRISON, P.J., and BARNEY, J., concur.  
ON MOTION FOR REHEARING OR REHEARING

BY THE COURT EN BANC and APPLICATION TO TRANSFER TO SUPREME COURT OF MISSOURI PER CURIAM.

In a post-opinion motion per Rule 84.17, John avers this court's opinion is wrong in four respects.

First, says John: “[T]his Court inadvertently misinterpreted and overlooked material matters of law and fact by holding that an alternate payee's rights to receive distribution from a pension plan are vested at the time the plan receives a copy of a domestic relations order not yet qualified and concluding that the issue of whether the trial court could properly prohibit the plan administrator from amending the plan after the plan received QDRO–1 is moot.”

Although the motion does not identify the point relied on in John's brief which precipitated the ruling about which he now complains, we infer he is challenging this court's ruling on his sixth point. John's complaint, as we grasp it, is that Beth had no “vested” rights in the Plan until a domestic relations order awarding her an interest therein was “deemed qualified.” John argues: “In the instant case, no domestic relations order was qualified until the trial court's June 26, 1997, order.”

As explained in the opinion, the trial court signed QDRO–1 on March 1, 1996; John, administrator of the Plan, received a copy of QDRO–1 sometime between then and May 16, 1996, the date lawyer Seiler sent Beth's lawyer the letter mentioned in the opinion. We surmised in the opinion that at the time John received QDRO–1, the Plan allowed “lump sum distribution” to an alternate payee\*135 prior to John's attainment of retirement age. That assumption was apparently correct, as John does not now argue otherwise.

John's motion avers that an amendment to the Plan which took effect January 1, 1997, “does not provide for a lump sum distribution.” The motion

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alleges the amended version of the Plan was in effect on the date the trial court signed QDRO-2 (June 24, 1997). Therefore, insists John, when Beth obtained her right to distribution from the Plan pursuant to 29 U.S.C. § 1056(d)(3)(H), the Plan did not provide for lump sum distribution. Consequently, reasons John, the judgment requires him to breach his fiduciary duties as Plan administrator by compelling him to distribute funds in a manner contrary to Plan documents.

The gist of John's contention is that when a pension plan administrator receives a domestic relations order awarding an alternate payee the right to receive a lump sum distribution as authorized by the existing terms of the plan, the plan administrator (or whoever is empowered to amend the plan) may nullify the right the alternate payee had at the time the domestic relations order was received by amending the plan between that date and the date the domestic relations order is determined to be a qualified domestic relations order (or the date a replacement domestic relations order meeting ERISA's requirements for qualification is received). As noted in the opinion, John cites no authority supporting that hypothesis.

John's contention was considered and rejected in our opinion. The opinion underscored the mischief that could result were John's hypothesis adopted. The opinion held Beth's right to receive a lump sum distribution from the Plan at the time John, the Plan administrator, received QDRO-1 could not thereafter be abrogated by amending the Plan.

Nothing in John's motion persuades us that our holding was improvident. Had we embraced John's position, we would have established precedent allowing a plan administrator to annul the right of an alternate payee at whim. We are unpersuaded the Congress of the United States, in enacting ERISA, intended such knavery.

Our belief is buttressed by 29 U.S.C. § 1056(d)(3)(H)(i), which requires a plan administrator to separately account for the amounts which shall become payable to the alternate payee if the domestic relations order is ultimately determined to be a qualified domestic relations order. Nothing there suggests such amounts can be diminished or eliminated by amending the plan during the interval between receipt of the domestic relations order and the determination that it is qualified.

Having held Beth's right to receive distribution from the Plan is the right she had at the time John, the Plan administrator, received QDRO-1, our opinion concluded that any issue as to whether the trial court could properly prohibit John from amending the Plan after receiving QDRO-1 is moot, as any such amendment would not divest Beth of the right with which she was vested when John received QDRO-1, and no other alternate payee's rights are at issue in these appeals.<sup>FN1</sup>

FN1. As noted in the opinion, John's and Beth's shares in the Plan total 97.5 percent of the Plan's assets.

For the forgoing reasons, we find no merit in John's first attack on the opinion.

John's second attack challenges the opinion's ruling on the second claim of error in the third point relied on in his brief. For the reasons set forth in the opinion, we held the assignment of error was not preserved for review. We adhere to that ruling.

The assignment of error, had it been preserved, would have hypothesized that the trial court "erred in calculating the amount of pension funds due [Beth] because its ... award of interest and earnings for the Plan funds as a whole from June 7, 1996 forward rather than awarding actual earnings on \$216,252.50 which was segregated at the request of [Beth] and

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pursuant to court order ... was contrary to the law and a misapplication of the law in that ... 29 U.S.C. §§ 1104 and 1056 require a plan administrator to pay \*136 actual interest and earnings on segregated accounts and 29 U.S.C. § 1104(1) suggests that when a beneficiary exercises control over her portion of plan funds she must bear any losses resulting from this control.”

The point relied on (from which the excerpt quoted in the preceding paragraph is taken) does not identify the portion of the judgment which contains the allegedly erroneous ruling. We have reexamined the argument which follows the point in John's brief. There, we are told that the trial court's “method of calculation of the amount due [Beth] is outlined in [QDRO–2] and in the [judgment filed June 26, 1997].” In studying the portions of those documents specified in John's argument, we find nothing that demonstrates the trial court, in John's words, “fail[ed] to consider actual earnings on \$216,252.50 which was segregated at the request of Beth.” If indeed that was the effect of QDRO–2 or the June 26, 1997, judgment, it was John's burden, as the appealing party, to demonstrate the error. *Linzenni*, 937 S.W.2d at 725[3]. Nowhere in the argument in John's brief are we informed as to wherein or how QDRO–2 or the June 26, 1997, judgment reveal that the trial court committed the alleged error John unsuccessfully sought to present in the second component of his third point.

For the reasons above, we hold John's second attack on the opinion is meritless.

John's third attack impugns the opinion's holding on the fifth point relied on in his brief. In the opinion, we deduced from a reference to the legal file in the statement of facts in John's brief that the point was directed toward paragraph “D” of the June 26, 1997, judgment.<sup>FN2</sup> John's post-opinion motion confirms our supposition was correct.

FN2. Paragraph “D” of the judgment is

quoted in the opinion.

John's motion avers our opinion wrongly holds there is no conflict between paragraph “D” of the judgment and Opinion 94–32A (an opinion letter of the Department of Labor, quoted in pertinent part in our opinion). John appears to construe paragraph “D” of the judgment as requiring that all expenses incurred in determining whether QDRO–1 and QDRO–2 satisfied ERISA requirements are “to be allocated to John as participant.”

That was not the meaning our opinion ascribed to paragraph “D” of the judgment. Our opinion notes that reasonable expenses of administering the Plan may be paid from Plan assets (97.5 percent of which represent John's and Beth's shares). Our opinion further notes that payment of reasonable expenses of administering the Plan from its assets will have an adverse effect on the interests of *both* John and Beth until (if ever) Beth obtains everything due her from the Plan. However, our opinion emphasizes that reasonable expenses of administering the Plan do not include expenses incurred by John in an effort to benefit himself financially by defeating or delaying the E5 award. John should understand that, as he was present at the Master's hearing when lawyer Callison testified:

“[T]he comment was made earlier by [John's lawyer] that ... [John] intended to charge his costs for all these lawyers and consultants and whatever to the plan. To the extent that these costs are unreasonable or benefits [sic] [John] or are designed to benefit [him] personally as opposed to benefitting the plan, that is an impermissible use of plan assets, and he should bear those costs himself or let his corporation bear those costs.”

Nowhere in the fifth point relied on in John's brief, or in the argument following it, or in John's post-opinion motion does he identify the expenses he believes should be borne by the Plan instead of by him

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individually. We have reexamined the record and have espied no such itemization. Consequently, it was impossible for the trial court or this court to list the expenses John, as Plan administrator, could properly pay from Plan assets.

Given the arcane record, we construed paragraph “D” of the judgment as being consistent with the excerpt from Opinion 94–32A. Additionally, to ensure our holding was clear, our opinion cited ERISA provisions authorizing payment of reasonable expenses of administering a plan from plan assets. However, our opinion provided a caveat that if, when John pays Beth the E5 award, she \*137 believes he, as Plan administrator, has improperly charged expenses against Plan assets that he should have paid personally, she can seek redress. John's motion concedes that remedy is available to Beth.<sup>FN3</sup>

FN3. A footnote in John's motion reads: “If there is any question as to the propriety of allocating particular QDRO-related expenses to the plan, Beth, as well as any other participant or beneficiary could bring an action against John Under ERISA for breach of his fiduciary duty.”

John's third attack on the opinion is without merit.

John's final attack avers this court erred in affirming the trial court's award of \$7,500 to Beth and her lawyers for attorney fees and expenses in responding to appeal 21808.

The trial court, apparently observant of John's demonstrated resolve to circumvent the dissolution decree—despite its affirmance in the first appeal—and apparently familiar with the tenacity of John's counsel, accurately foresaw that Beth would be compelled to respond to a multitude of intricate issues in appeal 21808. The length of our opinion and this post-opinion order confirm the trial court's clairvoyance.

John's complaint about the attorney fee award is too meritless to deserve further comment.

John's motion per Rule 84.17 is denied.

Simultaneously with that motion, John filed an application per Rule 83.02 for transfer of this case to the Supreme Court of Missouri. The application is likewise denied.

Mo.App. S.D., 1998.  
In re Marriage of Gardner  
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 (Cite as: 98 S.W.3d 530)

**H**

Supreme Court of Missouri,  
 En Banc.  
 Julia BROOKS, Respondent,  
 v.  
 Jeffrey M. BROOKS, Appellant.

No. SC 84748.  
 March 4, 2003.

In proceedings under previously entered decree of marital dissolution, the Circuit Court, City of St. Louis, Steven R. Ohmer, J., entered Qualified Domestic Relations Order (QDRO) to implement division of husband's pension plan. Husband appealed. On transfer from the Court of Appeals, the Supreme Court, Stephen N. Limbaugh, C.J., held that: (1) QDRO came within "special order" exception to general rule that only final judgments are appealable; (2) perfection of appeal therefrom required that QDRO be denominated judgment or decree, overruling *Tyree v. Tyree*, 978 S.W.2d 846; and (3) nunc pro tunc amendment of dissolution decree to establish QDRO did not affect QDRO's appealability.

Matter retransferred.

West Headnotes

**[1] Divorce 134 ↪ 1202**

134 Divorce  
 134V Spousal Support, Allowances, and Disposition of Property  
 134V(I) Appeal  
 134k1202 k. Jurisdiction. Most Cited Cases  
 (Formerly 134k280)

Appealability of a Qualified Domestic Relations Order (QDRO) is a jurisdictional question.

**[2] Appeal and Error 30 ↪ 66**

30 Appeal and Error  
 30III Decisions Reviewable  
 30III(D) Finality of Determination  
 30k66 k. Necessity of final determination.  
 Most Cited Cases

As a general rule a party in a civil action may only appeal from a trial court's final judgment.

**[3] Divorce 134 ↪ 1207**

134 Divorce  
 134V Spousal Support, Allowances, and Disposition of Property  
 134V(I) Appeal  
 134k1203 Decisions Reviewable  
 134k1207 k. Finality of determination.  
 Most Cited Cases  
 (Formerly 134k280)

Qualified Domestic Relations Order (QDRO) is an order that may be obtained after and pursuant to a previously entered final judgment, including a dissolution decree, and fits within the "special order" exception to the general rule that only final judgments are appealable. V.A.M.S. § 512.020.

**[4] Divorce 134 ↪ 1225**

134 Divorce  
 134V Spousal Support, Allowances, and Disposition of Property  
 134V(I) Appeal  
 134k1222 Transfer of Cause

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134k1225 k. Petition or prayer, allowance and certificate or affidavit. Most Cited Cases (Formerly 134k283)

Although a Qualified Domestic Relations Order (QDRO) is an appealable special order, to perfect an appeal therefrom it is still necessary to denominate the order as a judgment or decree; overruling *Tyree v. Tyree*, 978 S.W.2d 846. V.A.M.S. § 512.020; V.A.M.R. 74.01(a).

## [5] Divorce 134 ↪ 1209

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1203 Decisions Reviewable

134k1209 k. Mode of rendition, form and entry of judgment or order. Most Cited Cases (Formerly 134k280)

Although nunc pro tunc amendment of previously entered decree of marital dissolution denominating Qualified Domestic Relations Order (QDRO) entered pursuant thereto as “judgment” was not effective to satisfy requirement that order be denominated judgment or decree in order to permit appeal therefrom, such characterization was mere surplusage and did not affect appealability of QDRO in light of trial court's clear intent to finalize judgment for purposes of order on date nunc pro tunc order was entered. V.A.M.S. § 512.020; V.A.M.R. 74.01(a).

## [6] Judgment 228 ↪ 273(3)

228 Judgment

228VII Entry, Record, and Docketing

228k273 Entry Nunc Pro Tunc

228k273(3) k. Errors or irregularities in previous entry. Most Cited Cases

Nunc pro tunc mechanism is only available to correct clerical errors, not judicial errors.

\*530 Lawrence G. Gillespie, Clayton, for Appellee.

Benicia A. Baker-Livorsi, St. Charles, Nathan S. Cohen, Clayton, for Respondent.

STEPHEN N. LIMBAUGH, JR., Chief Justice.

Jeffrey M. Brooks (“Husband”) appeals from a Qualified Domestic Relations Order \*531 (QDRO) entered by the trial court to implement the division of Husband's pension plan pursuant to a previously entered decree of dissolution, which dissolved the marriage of Husband and Julia Brooks (“Wife”). This Court granted transfer pursuant to Mo. Const. art. V, sec. 10, to consider whether such an order is appealable. Having now determined that the order is appealable, the case is retransferred to the court of appeals for consideration on the merits.

### I.

On October 7, 1994, the trial court entered findings of fact, conclusions of law and decree of dissolution, dissolving the marriage of Husband and Wife. Under Paragraph 20 of the decree, Wife was awarded 50% of any benefits payable to Husband as a participant in an employee pension plan, “as more specifically provided in a [QDRO] to be prepared by counsel for Wife and submitted to this Court for signature.” For reasons that are not part of the record, no proposed QDRO was presented to the court until 2001, but on July 9 of that year, the trial court entered a QDRO providing Wife with survivor benefits as follows:

### III. Death Benefits

A. In the event that the participant predeceases the alternate payee prior to the participant's earliest retirement date, the alternate payee shall be deemed to be a surviving spouse, as defined in the Plan, and shall be entitled to receive the portion of the death

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benefit payable under the plan with respect to the participant's entire accrued benefit prior to division. The benefit paid under this paragraph shall be in lieu of any other benefit provided under this order.

On August 20, 2001, Husband filed a notice of appeal. Then on November 1, 2001, the trial court entered a nunc pro tunc order retitling the QDRO as a "Judgment." On appeal, Husband asserts that the "trial court erred in entering the Qualified Domestic Relations Order and Judgment which awarded Wife survivor benefits in excess of those necessary to implement the division of property set forth in the Decree of Dissolution because the [QDRO] is based on a misapplication of law and is in excess of the trial court's jurisdiction in that full survivor benefits set up a possible windfall for Wife in the event of Husband's death and prevent a subsequent spouse of Husband from receiving survivor benefits."

## II.

[1][2][3] The appealability of the QDRO is a jurisdictional question. As a general rule a party in a civil action may only appeal from a trial court's final judgment. *Avidan v. Transit Cas. Co.*, 20 S.W.3d 521, 523 (Mo. banc 2000). Section 512.020, RSMo 2000, however, sets forth certain exceptions to this rule and permits a party to directly appeal "from any special order after final judgment in the cause." The phrase "any special order after final judgment in the cause" ... 'contemplates that a judgment has become final and that one of the parties is attempting to enforce the judgment or to attack the enforcement of the judgment [with a subsequent order].' " *State ex rel. Westmoreland v. O'Bannon*, 87 S.W.3d 31, 34 (Mo.App.2002). A QDRO is in fact an order that may be obtained after and pursuant to a previously entered final judgment (here, a dissolution decree) and fits within the "special order" exception. See *Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. banc 2000) (holding that trial court's denial of a motion to set aside its previous order modifying the judgment of dissolution constituted a "special order after final judgment");

\*532 *State ex rel. Westmoreland*, 87 S.W.3d at 35; *Williams v. Williams*, 997 S.W.2d 80, 81 (Mo.App.1999).

[4] Although the QDRO is an appealable special order, to perfect the appeal it is still necessary to denominate the order as a "judgment or decree." This requirement, set out in Rule 74.01(a), applies to "decree[s] and any order from which an appeal lies." *Tyree v. Tyree*, 978 S.W.2d 846 (Mo.App.1998), which appears to be the only case to address the application of Rule 74.01(a) to special orders under section 512.020, holds to the contrary, and is now overruled.

[5][6] In this case the nunc pro tunc amendment denominating the QDRO as a "judgment" was not effective to satisfy the Rule 74.01(a) requirement because the nunc pro tunc mechanism is only available to correct clerical errors, not judicial errors. *Pirtle v. Cook*, 956 S.W.2d 235, 240 (Mo. banc 1997). However, because it is clear that the trial court intended to finalize the judgment for purposes of appeal on November 1, 2001, the date the nunc pro tunc order was entered, the denomination of the order as a judgment on that date satisfied Rule 74.01(a), and the characterization of the entry as nunc pro tunc is considered as mere surplusage.

## III.

Having determined that the appeal of the QDRO was proper, the case is retransferred for a decision on the merits.

All concur.

Mo.,2003.  
Brooks v. Brooks  
98 S.W.3d 530

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(Cite as: 98 S.W.3d 530)

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## C

United States District Court,  
 C.D. California.

In re John Elbert WILLIAMS, dba John E. Williams,  
 M.D., Medical Corp., Debtor.

Shannon Wilcox, aka Mary Williams, Plaintiff,  
 v.

John Elbert Williams, dba John E. Williams, M.D.,  
 Medical Corp., et. al., Defendants.

And Related Cross-Actions.

No. CV 97-4074 ABC.  
 May 24, 1999.

Former wife moved for partial summary judgment and ex-husband moved for summary judgment in suit arising from the parties' dispute regarding the application of law to their marital dissolution judgment. The District Court, Collins, J., held that dissolution judgment constituted qualified domestic relations order (QDRO).

Former wife's motion granted.

### West Headnotes

#### [1] Labor and Employment 231H 551

231H Labor and Employment  
 231HVII Pension and Benefit Plans  
 231HVII(G) Eligibility, Participation, and Coverage  
 231Hk550 Forfeiture; Loss of Eligibility or Coverage  
 231Hk551 k. In General. Most Cited Cases  
 (Formerly 296k138)

#### Labor and Employment 231H 592

231H Labor and Employment  
 231HVII Pension and Benefit Plans  
 231HVII(I) Persons Entitled to Benefits  
 231Hk590 Assignment of Benefits  
 231Hk592 k. Anti-Alienation. Most Cited Cases  
 (Formerly 296k138)

As a general matter, ERISA prohibits forfeiture or alienation of pension plan interests. Employee Retirement Income Security Act of 1974, § 206(d)(1), as amended, 29 U.S.C.A. § 1056(d)(1).

#### [2] Labor and Employment 231H 597

231H Labor and Employment  
 231HVII Pension and Benefit Plans  
 231HVII(I) Persons Entitled to Benefits  
 231Hk594 Qualified Domestic Relations Orders  
 231Hk597 k. Operation and Effect. Most Cited Cases  
 (Formerly 296k138, 134k261)

Where a qualified domestic relations order (QDRO) is in place, a spouse may enforce his or her rights under an ERISA plan. Employee Retirement Income Security Act of 1974, § 206(d)(3)(A), as amended, 29 U.S.C.A. § 1056(d)(3)(A).

#### [3] Labor and Employment 231H 596

231H Labor and Employment  
 231HVII Pension and Benefit Plans  
 231HVII(I) Persons Entitled to Benefits  
 231Hk594 Qualified Domestic Relations

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Orders

231Hk596 k. Necessity and Sufficiency  
of Order. Most Cited Cases  
(Formerly 296k138)

Greater lenience is due to domestic relations orders which were drafted prior to the Retirement Equity Act (REA) when determining whether a domestic relations order satisfies ERISA's mandates for a qualified domestic relations order (QDRO). Employee Retirement Income Security Act of 1974, § 206(d)(3)(C)(i)-(iv), as amended, 29 U.S.C.A. § 1056(d)(3)(C)(i)-(iv).

#### [4] Labor and Employment 231H ↪596

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations

Orders

231Hk596 k. Necessity and Sufficiency  
of Order. Most Cited Cases  
(Formerly 296k138)

Dissolution judgment constituted qualified domestic relations order (QDRO) for purposes of QDRO exception to ERISA's non-alienation provisions, where ERISA plan bore ex-husband's name, his attorney's address and called for physical segregation of plan assets "at the earliest possible time" without causing adverse tax consequences; fact that judgment neither set forth a periodic payment schedule nor provided that payment occur immediately or at any date prior to ex-husband's earliest age of retirement permitted only one reasonable interpretation that distribution be made in a lump sum and in accordance with the provisions of ERISA and the plans, and slippage in language between "plan" and "Plans" was meaningless since plans *were* sufficiently intertwined that a reference to one was for all relevant intents and purposes, a reference to both. Employee Retirement

Income Security Act of 1974, § 206(d)(3)(C)(i)-(iv), as amended, 29 U.S.C.A. § 1056(d)(3)(C)(i)-(iv).

#### [5] Labor and Employment 231H ↪596

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations

Orders

231Hk596 k. Necessity and Sufficiency  
of Order. Most Cited Cases  
(Formerly 296k138)

Fact that plan administrators, who received dissolution judgment, did not make determination that judgment qualified as qualified domestic relations order (QDRO) did not preclude court from determining that judgment constituted QDRO under QDRO exception to ERISA's anti-alienation provisions. Employee Retirement Income Security Act of 1974, § 206(d)(3)(G)-(H), as amended, 29 U.S.C.A. § 1056(d)(3)(G)-(H).

\*952 David Affeld, David A. Mallen, Law Offices of David W. Affeld, Los Angeles, CA, Joseph P. Buchman, Burke, Williams & Sorensen, Los Angeles, CA, for plaintiff.

Randall J. Dean, Allen Mescobi, Chapman, Glucksman & Dean, Los Angeles, CA, Jeanette Ross Gardon, Downey, CA, Rebecca Mocciano, Farmer & Ridley, Los Angeles, CA, for defendant.

ORDER RE: CROSS MOTIONS FOR SUMMARY  
JUDGMENT RE: QDRO ISSUES  
COLLINS, District Judge.

Plaintiff's motion for partial summary judgment re: QDRO issues and EW & C and the Williams Defendants' cross-motions for summary judgment came on regularly for hearing before this Court on May 24, 1999. After reviewing the materials submitted by the

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parties, argument of counsel, and the case file, it is hereby ORDERED that Plaintiff's motion for partial summary judgment is GRANTED. EW & C and the Williams Defendants' motions for summary judgment are DENIED.

### I. Background

The issues presented in this case arise in large part from the parties' dispute regarding the application of law to the Marital Dissolution Judgment ("Dissolution Judgment") between Plaintiff Shannon Wilcox, a.k.a. Mary Williams ("Plaintiff") and Defendant John Elbert Williams ("Williams"). Specifically, the parties raise, by cross-motions for summary judgment, the issue of whether the Dissolution Judgment already constitutes or could be modified to constitute a qualified domestic relations order ("QDRO") as such term is defined by the Employee Retirement Security Act of 1974, as amended ("ERISA") (Title 29 of the U.S.C.), in connection with Plaintiffs' claims to a property interest in two ERISA-covered pension plans.

#### A. Factual Background

The following facts are undisputed unless otherwise noted:

##### 1. Dissolution Judgment between Williams and Wilcox

On October 5, 1965, Williams and Wilcox married. In 1985, Williams and Plaintiff divorced. UF 13. Consequently, in a \*953 family law action the Superior Court of the State of California entered a Dissolution Judgment on June 28, 1985 (sometimes referred to as a domestic relations order or "DRO"). EW & C's Request for Judicial Notice, Exh. 2. The Dissolution Judgment approved and attached the Marital Settlement Agreement, which provides for the distribution of the marital property of Williams and Wilcox. The Agreement provides for the distribution of the marital property of Williams and Wilcox. Under the Dissolution Judgment, Plaintiff was awarded as her sole and separate property a one-half interest in the "John E. Williams, M.D., Inc. Retirement Plans." *Id.* at ¶ 1(C).

The Dissolution Judgment further provided for the "physical segregation of the Plan assets." *Id.* The segregation was ordered to be made "at the earliest possible time, but provided that it involves no adverse tax consequences to the parties." *Id.* The Dissolution Judgment also ordered "the Plan" to be valued as of May 18, 1984 and to be "divided equally as of that date." *Id.* The parties dispute whether the Plan Administrators received a copy of the June 1985 Dissolution Judgment.

##### 2. The Benefit Plans

On or about July 31, 1974, John E. Williams, M.D., A Medical Corporation ("Medical Corporation") created the "John E. Williams, M.D., A Medical Corporation Employees' Money Purchase, Pension Plan" and the "John E. Williams, M.D., A Medical Corporation Employees' Profit-Sharing Plan" (collectively "Plans").<sup>FN1</sup> Pl.'s Stmt. of Genuine Issues in Opp'n to EW & C's Mot. for S.J., Undisputed Fact ("UF") 1. Defendant Williams along with some of his employees were participants in the Plans. UF 6.

FN1. The Plans were employee benefit plans and thus regulated by the Employee Retirement Income Security Act as Amended ("ERISA"). UF No. 3.

From at least 1984 to April 1992, Jerome S. Mark ("Mark"),<sup>FN2</sup> Richard S. Hume ("Hume"), and Keith Nicol ("Nicol") served as members of the advisory committee of the Plans. UF 4. These individuals were all employed by Executive Business Management ("EBM"). Hume Decl. at ¶¶ 2, 6. EBM provided business management services to its clients, and often served as trustees of client trusts and pension and profit sharing plan administrators or advisory committee members. *Id.* at ¶ 2. EBM retained a third-party administrator to counsel EBM personnel with respect to the administration of pension plans. *Id.* at ¶ 3. For the Williams' Plans, EBM retained C/K Associates, Inc. ("C/K") as third-party administrators. UF 7.

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FN2. Mark is now deceased. Hume Decl. at ¶ 6.

### 3. Williams as Trustee of the Plans

In 1992, Williams took over from the administrative committee and served as the trustee and administrator for the Plans, in addition to continuing his role as Plans participant. UF 6. Williams' conduct during this period lies at the center of Plaintiff's Second Amended Complaint. In essence, Plaintiff alleges that Williams engaged in excessive withdrawals from the Plans in violation of the terms of the Dissolution Judgment and was aided in this process by the actions of other Defendants.

In early 1994, Williams stopped paying alimony. Affeld Decl., Exh. C at 148–49. In response, Plaintiff retained a lawyer to investigate and obtain payment for her. As part of the investigation, in June 1994, Plaintiff, through her attorney, demanded that Plaintiff's interest in the Plans be segregated in accordance with the terms of the Dissolution Judgment. Dean Decl., ¶ 5(a)–(b).

Although the parties dispute who hired EW & C, they agree that EW & C was retained to act as a consultant with respect to the calculation of the respective interests of Williams and Plaintiff in the Plans. *See* Pl.'s obj. to UF 10. Thereafter, EW & C also began to perform bookkeeping for \*954 the Plans. UF 11. Specifically, EW & C prepared trial balances reflecting income and expenditures of the Plans. UF 11. The trial balances were then submitted to C/K which prepared the benefit statements and the Form 5500 C/Rs. UF 12. The parties dispute whether C/K also filed termination documents with the Internal Revenue Service and whether the Plans were, in fact, terminated. *See* Pl.'s Obj. to EW & C's UF 12.

### 4. Williams' Bankruptcy

On December 24, 1996, Williams filed a Chapter

7 bankruptcy petition.

In Williams' bankruptcy petition, Williams claimed an exemption for what he asserted was his interest in the Plans. Pursuant to an order of the bankruptcy court filed February 11, 1998, objections by the bankruptcy trustee to Williams' claimed exemptions in the Plans were sustained. Pl.'s Amended Request for Judicial Notice, Exh. B. The Court held that to the extent that Williams had a beneficial interest in the Plans, the interest was the non-exempt property of the estate. Williams was thereafter divested entirely of any interest in the Plans.

The Bankruptcy Court later held that, by operation of law, Williams was divested of his capacity as Plan Administrator for the Plans when he filed for bankruptcy. The bankruptcy trustee then assumed this position. After extensive briefing, bidding, hearings, and continuances, on October 22, 1998, the Court approved Plaintiff's appointment as Plan Administrator of the Plans. Pl.'s Request for Jud. Notice, Exh. C; Affeld Supp. Decl., Exh. D.<sup>FN3</sup>

FN3. Williams' motion for summary judgment attacks two Bankruptcy Court orders, specifically, the Bankruptcy Court Order Sustaining Trustee's Objections to Debtor's Claimed Exemptions, entered February 12, 1998 and the Bankruptcy Court Order of October 22, 1998 Authorizing Trustee to Compromise Controversy. The Court finds that these orders are irrelevant to the issues before the Court, i.e. whether the Dissolution Judgment constitutes a QDRO, or alternatively whether Wilcox is entitled to obtain a QDRO in state court. Moreover, even if these issues did bear upon the instant motions, Williams' objections arrive belatedly and are clearly in error. Williams did not bring a motion for reconsideration or appeal the ruling. This motion is not the proper forum in which to do so.

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In any event, the Court finds Williams' objections are invalid. Defendant claims that the February 11, 1998 order was in error because the trustee filed his objections late, 10 months after the first creditors meeting, the deadline for issuing. Williams Motion for S.J. at 4 n. 10. However, as the docket for this case shows, the trustee continued the creditor's meeting from its original date several times, most recently to December 5, 1997. Supp. Affeld Decl., Exh. D.

Williams' collateral attack against the October 22, 1998 order is similarly misguided. Wilcox and the bankruptcy trustee originally sought approval of the settlement reflected in the October 22, 1998 order by filing a motion on August 24, 1998. Affeld Supp. Decl., Exh. D, entry nos. 61, 62. The docket reflects that after several different objections and continuances were permitted so that parties could engage in bidding for the claims Wilcox was seeking to obtain, the Bankruptcy Court had a three hour hearing on the issue before rendering its decision. It is far too late for Williams to protest the outcome of this well-considered matter now.

#### **5. Plaintiff's Application to Obtain a Supplemental/ Amended QDRO**

Although Plaintiff contends that the 1985 Dissolution Judgment constituted a QDRO as a matter of law, Plaintiff also filed an application with the Los Angeles Superior Court seeking an order that the Dissolution Judgment Constitutes a QDRO or that the state court enter a supplemental/amended QDRO. The hearing on this issue was scheduled to be held on May 19, 1999.

#### **B. Procedural Background**

Following Williams' December 1996 bankruptcy petition, Plaintiff filed a Complaint commencing an adversary proceeding on April 28, 1997.

On July 18, 1997, this Court granted in part EW & C's and Plaintiff's motions to withdraw reference of the adversary proceeding, by withdrawing the reference of the third through tenth causes of action of \*955 the adversary proceeding. Thus, Plaintiff's first two causes of action remain under the jurisdiction of the bankruptcy court.

On September 2, 1997, EW & C filed a motion to dismiss Plaintiff's sixth, seventh, and eighth causes of action for fraud, RICO violations, and breach of contract, as well as a motion to strike Plaintiff's request for punitive damages and attorney's fees. On November 3, 1997, the Court granted EW & C's motion to dismiss as to Plaintiff's claims for fraud and RICO violations, with leave to amend. The Court also granted EW & C's motion to strike as to Plaintiff's request for punitive damages, with leave to amend.

Subsequently, on December 3, 1997, Plaintiff filed a First Amended Complaint alleging essentially the same causes of action contained in her original Complaint. On January 30, 1998, the Court denied EW & C's second motion to dismiss and motion to strike Plaintiff's amended claims of relief for fraud and RICO, as well as Plaintiff's request for punitive damages.

On January 13, 1999, the Court granted leave for Plaintiff to file a Second Amended Complaint ("SAC"). The SAC, filed on March 4, 1999, adds individual partners of EW & C, reflects Plaintiff's recently acquired standing to bring claims on the Plans' behalf, and accounts for information Plaintiff gleaned through one and one-half years of discovery.

Agreeing that the status of the Dissolution

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Judgment and other issues pertaining to the existence of a QDRO are central to many issues in this litigation, the parties stipulated to sever these issues for the Court's determination. Accordingly, on April 5, 1999, Plaintiff filed a motion for partial summary judgment re: QDRO issues. This motion was opposed by EW & C on May 3, 1999, the Williams Defendants on May 3, 1999, Defendant William Wolf, C/K on May 5, 1999, and Defendant William Wolf on May 10, 1999.<sup>FN4</sup> Plaintiff filed her reply on May 10, 1999.

FN4. C/K filed a joinder to EW & C's and the Williams' Defendants' oppositions to Plaintiff's motion for partial summary judgment on May 5, 1999. The Williams Defendants also joined EW & C's statement of genuine issues of fact in opposition to Plaintiff's motion.

Both the EW & C and the Williams Defendants filed cross-motions for summary judgment against Plaintiff on April 26, 1999.<sup>FN5</sup> Plaintiff filed an opposition to EW & C's motion on May 3, 1999, and to the Williams' Defendants on May 5, 1999. On May 10, 1999, both EW & C and the Williams Defendants filed their replies.<sup>FN6</sup>

FN5. C/K filed a joinder in both EW & C's motion and the Williams Defendants' motion on April 27, 1999 and April 29, 1999, respectively. Defendant William Wolf ("Wolf") also joined in EW & C's motion on April 28, 1999.

FN6. On May 20, 1999, two court days before the hearing on this matter, C/K filed a reply in support of C/K's opposition to Plaintiff's partial summary judgment motion and a motion to strike late filed declarations supportive of Plaintiff's motion. The pleading was procedurally improper, particularly as it was filed nearly two weeks after the reply

which it addressed. In any event, the Court rejects the contentions in the rebuttal finding them repetitive of prior papers or, irrelevant to the issue of whether the Dissolution Judgment constitutes a QDRO.

## II. Discussion

### A. Summary Judgment Standard

It is the burden of the party who moves for summary judgment to establish that there is "no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 951 (9th Cir.1978), *cert. denied*, 440 U.S. 981, 99 S.Ct. 1790, 60 L.Ed.2d 241 (1979). If the moving party has the burden of proof at trial (the plaintiff on a claim for relief, or the defendant on an affirmative defense), the moving party must make a showing sufficient for the court to hold that no reasonable trier of fact could find other than for the moving party. *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir.1986) (citing W. Schwarzer, \*956 *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 487-88 (1984)). This means that, if the moving party has the burden of proof at trial, that party must establish beyond peradventure *all* of the essential elements of the claim or defense to warrant judgment in that party's favor. *Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir.1986). Furthermore, the court must view the evidence presented to establish these elements "through the prism of the substantive evidentiary burden." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

If the opponent has the burden of proof at trial, then the moving party has no burden to negate the opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). In other words, the moving party does not have the burden to produce *any* evidence showing the absence of a genuine issue of material fact. *Id.* at 325, 106 S.Ct. 2548. "Instead, ... the burden on the moving party may

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be discharged by ‘showing’—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party’s case.” *Id.*

Once the moving party satisfies this initial burden, “an adverse party may not rest upon the mere allegations or denials of the adverse party’s pleadings ... [T]he adverse party’s response ... *must set forth specific facts* showing that there is a genuine issue for trial.” Fed.R.Civ.P. 56(e) (emphasis added). A “genuine issue” of material fact exists only when the nonmoving party makes a sufficient showing to establish an essential element to that party’s case, and on which that party would bear the burden of proof at trial. *Celotex*, 477 U.S. at 322–23, 106 S.Ct. 2548. “The mere existence of a scintilla of evidence in support of the plaintiff’s position will be insufficient; there must be evidence on which a reasonable jury could reasonably find for plaintiff.” *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Id.* at 248, 106 S.Ct. 2505; *Griffeth v. Utah Power & Light Co.*, 226 F.2d 661, 669 (9th Cir.1955).

## B. Analysis

### 1. ERISA’s Non–Alienation Provisions and the QDRO Exception

[1] Congress enacted ERISA to provide protections for participants in private employee benefit plans. 29 U.S.C. § 1001. To this end, Congress included so-called “spendthrift” provisions to “‘protect an employee from his own financial improvidence in dealings with third parties.’” *Hawkins v. Commissioner of Internal Revenue*, 86 F.3d 982, 988 (10th Cir.1996) (quoting *Amer. Tel. & Tel. Co. v. Merry*, 592 F.2d 118, 124 (2d Cir.1979).) As a general matter, therefore, ERISA prohibits forfeiture or alienation of pension plan interests. *See* 29 U.S.C. § 1056(d)(1).<sup>FN7</sup>

FN7. 29 U.S.C. § 1056(d)(1) provides that, “Each pension plan shall provide that benefits provided under the plan may not be assigned or alienated.”

After ERISA’s enactment, courts split as to whether ERISA’s spendthrift provision should trump the state domestic relations laws which permitted plan benefits to be alienated or divided following the dissolution of a marriage or the death of a spouse. *See* S.Rep. No. 575, 98th Cong., 2d Sess. 20 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2547, 2566. As the Ninth Circuit noted, “The statutory confusion often left women who worked in the home and contributed significantly to the family’s financial security without the ability to obtain any pension benefits upon their husband’s death or upon divorce.” *Ablamis v. Roper*, 937 F.2d 1450, 1453 (9th Cir.1991).

[2] To address this inequity, Congress passed the Retirement Equity Act of 1984 (“REA”), Pub.L. No. 98–397, 98 Stat. 1426. The REA amended ERISA to recognize an express exception to the broad anti-alienation provisions where a QDRO exists. 29 U.S.C. § 1056(d)(3)(A). The purpose of the REA was “primarily to safeguard the financial security of widows and divorcees.” *Ablamis*, 937 F.2d at 1453; \*957 *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 838–39, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988) (stating that “‘primary focus’ alienation of plan benefits for spouses seeking enforcement of domestic support orders.”); *see also In re Gendreau*, 122 F.3d 815, 817 (9th Cir.1997) (same); *Metropolitan Life v. Wheaton*, 42 F.3d 1080, 1083 (7th Cir.1994) (“The draftsmen of the Retirement Equity Act were concerned with the financial security of the spouses and other survivors of employees who died enrolled in ERISA plans.”). Thus, where a QDRO is in place, a spouse may enforce his or her rights under a plan. *Gendreau*, 122 F.3d at 819.<sup>FN8</sup>

FN8. Notably, the Ninth Circuit does not

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make a spouse's property interest contingent upon the QDRO. *Gendreau*, 122 F.3d at 819. Instead, the interest vests based on state property rights at the moment a dissolution order issues from the state court: "The QDRO provisions of ERISA do not suggest that a [spouse who does not have a QDRO] has no interest in the plans until she obtains a QDRO[;] they merely prevent her from enforcing her interest until the QDRO is obtained." *Id.*

## 2. Requirements of a QDRO

While protecting the interests of divorcees and widows, Congress also tried to reduce the expense of ERISA plans and protect plan providers from litigation for making improper payments. *Wheaton*, 42 F.3d at 1084. For this reason, it required that QDROs be "specific and clear." *Gendreau*, 122 F.3d at 817; *Wheaton*, 42 F.3d at 1084. In particular, to be classed as a QDRO a DRO must "clearly specif[y]": 1) the name and address of each alternate payee, 2) the amount or percentage of benefits or formula for determining such to be paid by the plan to the alternate payee; 3) the number of payments or period to which the order applies and 4) each plan to which the domestic relations order applies. 29 U.S.C. § 1056(d)(3)(C)(i)–(iv).

The statute also sets forth certain limitations as to what the DRO may contain to be considered a QDRO. Under subparagraph D, a qualified DRO: (1) may not require a plan to provide any type of benefit or option not otherwise provided under the plan, (2) may not require the plan to provide increased benefits; and (3) may not supersede any benefits already allocated under a previously approved QDRO. 29 U.S.C. § 1056(d)(3)(D)(i)–(iii).

[3] The central purpose justifying these requirements must be borne in mind when determining whether a DRO satisfies ERISA's mandates. The requirements are to "spare the plan administrator from

litigation-fomenting ambiguities as to who the beneficiaries designated by the divorce decree are." *Wheaton*, 42 F.3d at 1084. Accordingly, "the cases in this area all seem to allow some degree of latitude" in determining whether a DRO satisfies ERISA's mandates. W.P. Hogoboom & D.B. King, *Cal. Prac. Guide: Fam. Law* ¶ 10:465.1b (The Rutter Group 1998). Even courts which generally are more conservative in their approach to the ERISA requirements nonetheless caution against "unduly narrow" interpretations of the language within a DRO. *Hawkins*, 86 F.3d at 889–990. In rejecting a narrower approach by the tax court, the Tenth Circuit Court of Appeals reasoned that "[n]othing in the plain language of § 414(p)(1)(A)(i) [the I.R.S. counterpart to ERISA provision] exhorts domestic relations lawyers literally to mimic the statutory language when drafting these agreements." *Id.* at 990; *see also Wheaton* 42 F.3d at 1085 (finding QDRO where plan administrator was "not forced to run a *significant risk*" by failure of stipulation to specify division of proceeds from plan and finding order was "specific enough."). In *Wheaton*, Judge Posner explained that faithfulness to the statute not only permits, but mandates a flexible approach:

To require more specificity would defeat the purpose of the provision creating an exception to inalienability for qualified domestic relations orders ... It is asking too much of domestic relations lawyers and judges to expect them to dot every *i* and cross every *t* in formulating divorce decrees that have ERISA implications.\*958 Ideally, every domestic relations lawyer should be conversant with ERISA, but it is unrealistic to expect all of them to be. We do not think Congress meant to ask the impossible, not the literally, but the humanly, impossible.

*Wheaton*, 42 F.3d at 1084.<sup>FN9</sup>

FN9. Applying these standards to the instant plan, the likelihood that a plan administrator would be confused as to how to implement

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the DRO provisions relating to whom to pay and when is particularly low in this case. At its most active point, the Plans had just over a dozen participants. Indeed, for 13 years no administrator appears to have raised any point of confusion as to payment terms.

Moreover, even greater lenience is due to domestic relations orders which were drafted prior to the REA. *See Metropolitan Life v. Marsh*, 119 F.3d 415, 422 (6th Cir.1997) (“As the divorce decree was written before the REA amended ERISA in 1984, we should not demand literal compliance where Congress’ intent has been to give effect to domestic relations orders where it is clear what the decree intended.”); *Cummings by Techmeier v. Briggs & Stratton Retirement Plan*, 797 F.2d 383, 388–89 (7th Cir.1986), *cert. denied*, 479 U.S. 1008, 107 S.Ct. 648, 93 L.Ed.2d 703 (1986); *see also Layton v. TDS Healthcare Sys. Corp.*, No. C–93–1827–MHP, 1994 WL 224352, at \*5 (N.D.Cal. May 17, 1994) (noting practice of finding QDRO despite absence of technical requirements for DROs entered before enactment of REA).<sup>FN10</sup>

FN10. Such deference is similarly appropriate in this case, where the Agreement was prepared in the very early days of the REA legislation and the Dissolution Judgment was entered only six months after the REA took effect. EBM employees even wrote to C/K to determine how to conform the Agreement to the “new 1984 law.” Affeld Decl., Exh. D at 188. C/K’s response to this letter indicates that the new law referred to the REA. *See* Affeld Decl., Exh. D at 190.

Defendants, however, urge the Court to construe ERISA’s requirements stringently. They refer the Court to the language of the Tenth Circuit in *Hawkins*, for instance, which asserts that relaxing the specificity requirements or eliminating them altogether in some cases “does violence to the plain meaning of the statute.... Nowhere ... has Congress implied that its factual

requirements are optional, indeed, the language rather plainly states that a QDRO ‘must’ clearly specify certain facts.” *Hawkins*, 86 F.3d at 992 (citations omitted) (emphasis in *Hawkins*). Through this lens, Defendants contend that the Dissolution Judgment does not constitute a QDRO. Specifically, Defendants assert that the Dissolution Judgment 1) fails to specify that Williams was a “participant” in the Plans; 2) the DRO does not specify when the alternate payee is to be able to begin receiving benefit payments and the number of payments or the period to which such order applies; 3) the DRO does not specify each plan to which such order applies; 4) the DRO wrongfully requires the Plans to provide for a benefit or option not otherwise provided under the Plans; 5) the DRO does not specify the amount or percentage of the participant’s benefits to be paid by the Plans to the alternative payee and wrongfully provides for increased benefits; and 6) the order does not specify the name and last known address of the participant and each alternate payee covered by the DRO.

[4] Keeping in mind the purpose behind the QDRO exception, and even accounting for the most exacting standards courts have required,<sup>FN11</sup> the Court finds the \*959 Dissolution Judgment satisfies ERISA’s mandates, as explained below:

FN11. The Court is skeptical as to the extent to which even the *Hawkins* case, by far the most conservative in its approach to the ERISA specificity requirements, actually advances Defendants’ arguments. On its own review of the *Hawkins* opinion, the Court finds the *Hawkins* opinion does not require the exacting standards Defendants assert it does. Although *Hawkins* stands for the proposition that certain items enumerated in the requirements be present, it nonetheless demonstrates a willingness to find such requirements satisfied if at all possible in the DRO’s text. *See* 86 F.3d at 988 (eschewing the tax court’s interpretation as “unduly nar-

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row”). Moreover, as opposed to the situation here, the *Hawkins* court interpreted a DRO which was created in 1987, by which time the REA was already firmly established law.

**a. Plan Participant (29 U.S.C. § 1056(d)(3)(B)(i))**

ERISA defines a QDRO as a DRO “which creates or recognizes the existence of an alternate payee's right to ... receive all or a portion of the benefits payable with respect to a participant under a plan.” 29 U.S.C. § 1056(d)(3)(B)(i). Because the Dissolution Judgment does not identify Williams as a plan “participant,” Defendants argue, it does not qualify as a QDRO.

Defendants' argument is meritless. First, it is worth noting that this “definition” is not included in ERISA's list of requirements. There is no indication that the labels of “participant” and “alternate payee” must be used to identify Williams and Wilcox in order for the DRO to be considered a QDRO. Rather, the definition merely describes the relationship between the parties that exists under a QDRO. Significantly, Defendants cite no case which even considers the propriety of using a party's name in a DRO, let alone any case which makes this issue determinative of the validity of a QDRO. Indeed, the opposite appears to be true. In *Hawkins*, the only case the Court discovered which directly addresses this issue, the Tenth Circuit Court of Appeals held that even though the former spouse was not specifically identified as an “alternate payee” in the DRO, ERISA's requirements were satisfied because the divorcee did, in fact, come within the statutory definition of an “alternate payee.” *Hawkins*, 86 F.3d at 990; see also *Marsh*, 119 F.3d at 417, 422 (finding valid QDRO where parties referred to by name). The *Hawkins* reasoning plainly also applies to a decree which fails to refer to Williams as a participant, but the parties involved fit the definitions of participant and alternate payee.

Second, even if parties are required by ERISA to identify themselves as “participants” in a plan, the

Court finds the Judgment sufficiently complies. No plan administrator could reasonably question whether Williams himself was a participant in the Plans which bore his own name. The plan administrator never raised this issue previously, and no one disputes this fact now. Accordingly, the Court finds it would be an “unduly narrow” reading of the statute to require more precision. *Hawkins*, 86 F.3d at 889–990.

**b. Address Information (29 U.S.C. § 1056(d)(3)(C)(i))**

In order to be considered a QDRO, ERISA first requires a DRO to contain the name and last known mailing address of the participant and each alternate payee covered by DRO. Defendants argue that the DRO fails to comply with this mandate because it lists neither Wilcox's nor Williams' last known address.

Courts have recognized that an attorney's address satisfies this requirement. See *Metropolitan Life v. Person*, 805 F.Supp. 1411, 1416 (E.D.Mich.1992), *abrogated on other grounds by Metropolitan Life v. Fowler*, 922 F.Supp. 8 (E.D.Mich.1996); *Bass v. Mid-America Co., Inc.*, No. CIV. A.94–CV–40087–FL, 1995 WL 622397 (N.D.Ill. Oct. 20, 1995). Williams' attorney's address appears on the judgment; accordingly this requirement is satisfied as to the participant.

Although the Dissolution Judgment contains neither Wilcox's own address nor her attorney's address,<sup>FN12</sup> this requirement is unnecessary under the circumstances. The Senate Report accompanying the REA noted that a DRO would not be disqualified “merely because the order does not specify the current mailing address of the participant and alternate payee\*960 if the plan administrator has reason to know of that address independently of the order.” S.Rep. No. 575, 98th Cong., 2d Sess. 20 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2566. Even the *Hawkins* court, which maintained a rigid approach to the QDRO requirements, did not reverse the tax court's finding that an otherwise qualified order would not be deemed

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unsatisfactory for failure to list a beneficiary's address because the plan administrator possessed this information. *Hawkins*, 86 F.3d at 993.

FN12. Plaintiff asserts that the Agreement, which was approved by the Dissolution Judgment, contains the address of Wilcox's attorney. *See* Pl.'s Motion at 15. However, the Court did not find this address anywhere in the Agreement.

In this case, no one has suggested that Wilcox's address was unknown at any time. In fact, Wilcox and Williams appear to have been in contact frequently after their divorce. *See* Affeld Depo., Exh. C at 150–51. Accordingly, under the Senate Report and *Hawkins* reasoning, the Court finds Wilcox has sufficiently satisfied the address requirement.

**c. Number of Payments or Period (29 U.S.C. § 1056(d)(3)(C)(iii))**

The list of criteria for a DRO to be considered qualified includes the provision that an order clearly specify the number of payments or period to which such order applies. *See* 29 U.S.C. § 1056(d)(3)(C)(iii). Defendants assert that the DRO at issue fails to meet this condition because it does not specify when Plaintiff should begin receiving payments.

Defendants rely on conclusory assertions to make this argument, failing to quote any of the Dissolution Judgment's language or explain why the DRO's text does not meet this standard of clause (iii). *See* EW & C's Opp'n at Motion at 12 (“The DRO at issue fails [the requirement of 29 U.S.C. § 1056(d)(3)(C)(iii)] in that it does not specify when the alternate payee is to be able to *begin* receiving benefit payments from the Plans and the number of payments or the period to which such order applies. It is critical to understand that this ERISA section includes a mandate that the *order must clearly specify certain facts.*”); *see also* EW & C's Motion at 11 (same); Wolf's Opp'n at 5

(same). In fact, the Dissolution Judgment calls for the physical segregation of Plan assets to be made “at the earliest possible time,” provided, however, that no adverse tax consequences are caused. With similar language, the court in *Stott v. Bunge Corp.*, 800 F.Supp. 567, 575 (E.D.Tenn.1992), found no difficulty regarding the time of payments. Although finding the DRO did not qualify on other grounds, the court was untroubled by the time requirement where the dissolution agreement mandates that payments be made “as soon as administratively possible.” *Id.* at 575; *see also Hawkins*, 86 F.3d at 993 (finding payment which was to be made “immediately” satisfied 29 U.S.C. 1056(d)(3)(C)(iii)). As long as a formula within a plan can be clearly and easily followed, courts have not hesitated to find the specificity requirements satisfied despite the fact that the decree calls for some modicum of interpretation. *See Wheaton*, 42 F.3d at 1084 (divining most “plausible interpretation” as to formula for dividing proceeds of plan, even though plan could be read consistently to support different outcome).

It is true that the Dissolution Judgment sets forth a time for segregation, but does not specifically set forth a detailed schedule for payments. This silence, however, when combined with the Dissolution Judgment's concern for tax liabilities, permits only one reasonable interpretation as to distribution: that distribution is to be made in a lump sum and in accordance with the provisions of ERISA and the Plans. As the *Stott* court's detailed review of literature on the REA indicates, payment can only be required after the participant spouse reaches his or her earliest retirement age. *Stott*, 800 F.Supp. at 574–75 (providing list of citations, including “ ‘REA's QDRO provisions specifically provide for payment of a pension benefit to an ex-spouse (alternate payee) before the participant elects to retire, but ‘on or after the date on which the participant attains ... earliest retirement age.’ ” (citation omitted)). The *Stott* holding makes clear that problems only arise regarding payment dates when a dissolution agreement provides\*961 for a payment at

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times *other* than those envisioned by ERISA. The default position for an administrator, therefore, would be to follow ERISA and the plan's mandates.

Here, the Dissolution Judgment neither sets forth a periodic payment schedule nor provides that payment should occur immediately or at any date prior to Williams' earliest age of retirement. Mindful that the central concern in making a QDRO evaluation is whether an administrator would be confused or subject to litigation in implementing a plan, the Court finds that a reasonable administrator would have no difficulty in determining that payment would be in a lump sum and under such terms as ERISA and the Plans provide.

**d. Specification of the Plans (29 U.S.C. § 1056(d)(3)(C)(iv))**

The next subdivision in ERISA provides that "each" plan to which a dissolution order applies must be "clearly specific[d]." *See* 29 U.S.C. § 1056(d)(3)(c)(iv). According to Defendants, the Dissolution Judgment fails this requirement because it provides that Plaintiff is to receive an interest in the "John E. Williams, M.D. Inc. Retirement Plans." Notwithstanding this plural reference, Defendants point out that the remaining portions of the Dissolution Judgment only make reference to Williams and Wilcox's interests in the "Plan." Because Williams had two plans, a pension plan and a profit-sharing plan, and the DRO is unclear as to whether it applies to one or both of the Plans, Defendants contend that Plaintiff may not properly enforce her rights because the confusion in terms violates ERISA.

The slippage in language between "plan" and "Plans" is meaningless to any reasonable administrator. Defendants do not dispute that the two Plans shared the same bank accounts; their funds were invested jointly; the assets were at all times 100 percent commingled; and that they had the same employer ID number for tax purposes. Given this close relationship, it defies logic to argue that what is admittedly sloppy

draftsmanship could, in actuality, cause any confusion for a plan administrator. The plans were sufficiently intertwined that a reference to one is for all relevant intents and purposes, a reference to both.

**e. No Benefit Not Otherwise Provided (29 U.S.C. § 1056(d)(3)(D)(i))**

ERISA prohibits any QDRO from requiring "a plan to provide any type or form of benefit, or any option, not otherwise provided under the plan." Defendants point to the DRO's call for physical segregation of the assets between the Plaintiff and Williams as a deficiency which keeps the DRO from being classed as a QDRO. The relevant paragraph of the Dissolution Judgment contemplates:

[A] physical segregation of the assets of the Plan... The Plan IS ORDERED to be valued as of May 18, 1984, and divided equally as of that date. Earnings on the respective divided portions since May 18, 1984 are to be credited to the respective portions transferred to Petitioner and Respondent. In the event the Plan Administrator cannot determine values as of May 18, 1984, IT IS ORDERED that values may be determined as of the next succeeding date representing the end of the Plan year.

Dissolution Judgment, Section I.C. Defendants interpret this paragraph to violate ERISA's "no separate benefit" requirement for several reasons, including that the DRO (1) orders the Plan to be valued as of May 18, 1984 (or as of the following end of the Plan year) (*see* Williams Motion at 21); (2) would require the Plans to be terminated and their assets divided equally on May 18, 1984 (*see* Williams Motion at 21); and (3) would require the establishment of individual investment accounts (*see* EW & C Motion at 12; C/K Opp'n at 5).

The Court is perplexed as to how Defendants arrive at these conclusions, particularly because Defendants neither explain\*962 their reasoning nor pro-

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vide the Court with definitions from case law,<sup>FN13</sup> treatises, or textbooks. The Court's own reading of the Dissolution Judgment reveals that neither immediate termination nor establishment of individual investment accounts is envisioned. The "physical segregation" is, rather, a method of accounting and a restriction of access. Indeed, the statute defines "segregated amounts" as amounts for which "the plan administrator shall separately *account*," as opposed to *pay*. 29 U.S.C. § 1056(d)(3)(H)(i) (emphasis added). Valuation of the Plans, which Defendants also claim exceeds the scope of the Plans, is simply a necessary part of this process. Given that even EW & C admits that upon entry of a QDRO, ERISA requires segregation<sup>FN14</sup> of accounts, the Court finds it nonsensical to suggest that by providing for this same segregation the Dissolution Judgment has somehow violated ERISA by supplying a benefit which the Plans do not otherwise supply.<sup>FN15</sup>

FN13. The only case which any defendant even refers to in passing to support this proposition is *Stott*. See EW & C Motion at 12. However, the Court finds this case inapplicable here. In *Stott*, the DRO mandated the immediate "disbursement" of the spouse's benefits. Because Plaintiff would not be entitled to his payments until he reached his "earliest retirement age," the Court found that permitting an immediate disbursement would provide the spouse more rights than those provided under the plan. In this case, however, the terms do not permit an early disbursement or any option or benefit not otherwise available to plan members. Instead, all that is called for is a separate accounting for Wilcox's and Williams' account. The Court cannot find, and Defendants have not proffered, any explanation as to why or how these terms could be construed otherwise.

FN14. See EW & C's Opp'n at 3 ("Had a

valid QDRO been obtained by the plaintiff, the administrators of the Plans would have properly segregated Williams' benefits long before EW & C had been retained to perform the accounting services for the Plans."); see also 29 U.S.C. § 1056(d)(3)(H).

FN15. Moreover, a review of the Plans reveals that segregated accounts were permitted. See Affeld Decl., Exh. A at § 9.3 ("Segregation and Disbursement.... When so directed, in writing, by the Committee, the Trustee shall segregate the Trust Fund, set up special accounts, and disburse the Trust Fund when disbursement becomes proper under the terms of the Plan...."); Exh. B at § 9.3 (same).

**f. No Increased Benefits (29 U.S.C. § 1056(d)(3)(D)(ii))**

Finally, Defendants contend that the Dissolution Judgment violates ERISA requirements because it provides for *all* of the Plans' assets to be split between the parties. Defendants argue that the DRO therefore assumes incorrectly that Williams was the only member of the Plans, when, in fact, the Plans included several of Williams' employees as participants.

This type of minutiae cannot be the basis for depriving a person of a vested right. The Dissolution Judgment literally confers upon Wilcox and Williams each "a one-half interest" in the Plans. However, this provision must be read in the context of the Agreement as a whole, the purpose of which is to divide marital community property. Consequently, the only fair reading of this provision indicates that the parties merely intended to split the *marital community's interest* in the Plans. One certainly cannot properly divide interests in an asset which one does not own. Accordingly, the Court declines to stretch this statement beyond its obvious, if not its literal, meaning.

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### 3. Duties of the Plan Administrators to “qualify” a DRO

[5] Even if the Dissolution Judgment satisfies ERISA's specifications, Defendants maintain that without being properly “qualified” by the plan administrators, it cannot be considered a valid QDRO. Because neither the Plans administrators for the 18 months following the date of the Dissolution Judgment nor any subsequent administrators made a determination that the Judgment was a QDRO, Defendants reason, the Judgment cannot properly be \*963 considered a QDRO under 29 U.S.C. § 1056(d)(3)(G)–(H).

Although it is clear that the ERISA statute mandates certain conduct by a plan administrator upon receipt of a DRO in order to qualify it as a QDRO, (*see* 29 U.S.C. § 1056(d)(3)(G)–(H)), case law does not suggest that a court is precluded from finding a valid QDRO despite the plan administrator's failure to follow this course. In *Marsh*, 119 F.3d at 421–22, for instance, the Sixth Circuit Court of Appeals considered whether a divorce decree from 1978 constituted a valid QDRO. The court was entirely unconcerned as to whether the plan administrator had made a determination as to the divorce decree's status as a QDRO. *Id.* Indeed, it appears that the qualification issue there, as here, had never been raised until nearly 20 years later when payment under the life insurance policy became due. *Id.* at 417. At this later date the court merely determined that the decree constituted a QDRO based solely on its compliance with the technical requirements of ERISA § 1056(d)(3)(B)–(C). *Id.* at 422; *see also Boggs v. Boggs*, 520 U.S. 833, 845, 117 S.Ct. 1754, 138 L.Ed.2d 45 (1997) (listing requirements for a domestic relations order to qualify as a QDRO as those found in 29 U.S.C. § 1056(d)(3)(C)–(E)); *Fortmann v. Avon Products, Inc.*, 1999 WL 160258, No. 97 C 5286 (N.D.Ill. March 9, 1999) (plan administrator's failure to follow its written procedures to determine the qualified status of DRO did not affect court's separate analysis as to whether DRO qualified as QDRO).

Undoubtedly this issue could have been more deftly handled had the Plans Administrators followed subpart (G) upon receiving a copy of the domestic relations order. *See Metropolitan Life v. Pettit*, 164 F.3d 857, 863–64 (4th Cir.1998) (noting importance of filing QDRO with plan administrator to ensure predictability, and minimize litigation). But even the strictest cases have held only that the purported QDRO be *received* by the plan administrator; they have not made a claimant's rights dependent upon the administrator taking further action once it is aware of the terms. *See Pettit*, 164 F.3d at 863 n. 6 (“According to the [ERISA] statute, the plan administrator must “receive” the QDRO and we imply nothing more. *See* 29 U.S.C.A. § 1056(d)(3)(G) (West 1998).”); *Cummings*, 797 F.2d at 388–89; *see also Layton*, No. C–93–1827–MHP, at \*4.

The distinction between requiring filing of a DRO and not requiring any further action in order for a spouse's rights to be protected is understandable in light of the various purposes behind ERISA's specificity requirements. The Ninth Circuit in *Gendreau*, for example, noted that Congress included the specificity requirements because it was “concerned with reducing the expense to plan providers and protecting them from suits for making improper payments.” *Gendreau*, 122 F.3d at 817. For this reason, too, courts have held that plan administrators need not “look beneath the surface” of a DRO in determining whether it constitutes a QDRO. *Blue v. UAL Corp.*, 160 F.3d 383, 385 (7th Cir.1998); *Fortmann*, 1999 WL 160258, at \*5; *see also Pettit*, 164 F.3d at 864 (refusing to hold administrator liable for failing to make payments based on contract external to QDRO because to do so would impact plan relationships based on “outside agreement of which the administrator will likely be unaware.”). Under both these rationales, administrators can protect themselves, should they choose to do so, provided that they have received the dissolution judgment.

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The Ninth Circuit's description of ERISA's QDRO mandates in *Gendreau* provides further support that notice, but nothing more, is required for a spouse to enforce her rights. In that case, the Ninth Circuit carefully distinguishes between the acts "required" of plan administrators and those they are "allowed" to do, noting Congress "required that QDROs be specific and clear and allowed plan administrators to approve the QDRO before they would be required to act in accordance with it." *Gendreau*, 122 F.3d at 817–18 (citing \*964 *Wheaton*, 42 F.3d at 1084; 29 U.S.C. § 1056(d)(3)(G)) (emphasis added). The fact that, for their own protection, administrators are "allowed" to pass judgment as to the validity of a QDRO suggests that the onus to challenge a QDRO rests with them. Administrators bear the risk of loss, and they can protect themselves, should they have questions as to what is required of them under a marriage dissolution agreement, by withholding payment until they have determined a payment order meets certain specifications. *Id.*

Defendants argue, however, that a DRO filing is intended to serve not just the administrator, but to ensure that *all* parties have "notice and predictability," *Pettit*, 164 F.3d at 863. As the *Pettit* court noted, this purpose is sufficiently accomplished by the plan administrator's receipt of the DRO. The plan administrator lies at the center of the different relationships affected by a DRO. For this reason, the *Pettit* court concerned itself only with the information the administrator had when it made its QDRO determination, rather than the information which was available to the other parties involved or any external documents which may have been intended to affect the DRO's terms. *Pettit*, 164 F.3d at 863 ("If [the life insurance beneficiary] designation is trumped by an external contract, such as the property settlement agreement, then the relationships between the employee and the plan, the plan and the named beneficiary, and the administrator and the plan will all be impacted by an outside agreement of which *the administrator* will likely be unaware. This situation leads

to unpredictability, whereas a QDRO, which must be filed with a *plan administrator*, provides notice and predictability for the plan administrator, participants, and beneficiaries." (emphasis added)).

If a plan administrator fails to perform its duties, and, for this reason, parties are injured or do not have notice of a qualifying DRO's provisions, then it makes no sense to punish a spouse for a plan's dereliction. Instead, as several courts have recognized, it is the plan administrator who should be subject to suit for failure to follow these procedures. See *Schoonmaker v. Employee Savings Plan of Amoco Corp.*, 987 F.2d 410, 414 (7th Cir.1993); *Nachwalter v. Christie*, 805 F.2d 956, 960 (11th Cir.1986). In *Fortmann v. Avon Products, Inc.*, No. 97 C 5286, 1999 WL 160258 (N.D.Ill. March 9, 1999), \*8, plaintiff asserted that the plan did not properly notify him about a DRO it had received from plaintiff's spouse. Plaintiff claimed this violated ERISA's mandate that the plan administrator establish written procedures to determine the status of a DRO. See 29 U.S.C. § 1056(d)(3)(G)(ii). The court examined the document upon which the administrators relied in making disbursement decisions and found it was a QDRO, notwithstanding the alleged failure of the plans to establish written procedures in accordance with subparagraph G. *Fortmann*, No. 97 C 5286 at \*6. At the same time, the Court found that plaintiff could maintain an action against the plan under ERISA for its alleged failure to maintain proper QDRO procedures. *Id.* at \*7.

In this case, there is no question that the Plans administrators received the 1985 Dissolution Judgment. The three administrators, Hume, Mark, and Nicol, were all officers of EBM either by virtue of their employment with EBM (Hume and Nicol) or stock ownership (Mark). Hume Decl. ¶¶ 2, 8. Hume explained that as part of EBM's business management services, EBM often acted as trustees of client trusts and pension and profit sharing plan administrators. Hume Decl. ¶ 2. Williams, Hume, Mark, and Nicol served on the Plans' advisory committee on behalf of

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their client Williams as “part and parcel” of the services EBM rendered for the Plans. Hume Decl. ¶ 6 and Exh. A. As advisory committee members, the three acted as trustees and plan administrators. Hume Decl. ¶ 6.

According to EBM's bookkeeper, EBM had a copy of the Dissolution Judgment on file. Asido Decl. at ¶ 5. All advisory committee members, in addition to any EBM \*965 employee, had access to these files. Hume Decl. ¶ 7; Asido Decl. ¶ 5. Thus, because it was filed at EBM, the Dissolution Judgment was on file with the advisory committee, the Plans' administrators.

As the *Pettit* court held, all that ERISA requires is that the DRO be filed with the plan administrators. *Pettit*, 164 F.3d at 863 n. 6. In this case, however, correspondence between C/K and EBM indicates that not only were the administrators aware of the DRO, but they also intended the Dissolution Judgment to be construed as a QDRO. In particular, on November 30, 1984, Robert Carusi, an EBM employee, contacted Arlene Kaplan, the former president of C/K, inquiring as to whether and how Wilcox could withdraw her segregated balances “under the current plan provisions and in conformity with the new 1984 law.” *See* Affeld Decl., Exh. D at 188. Kaplan replied on December 13, 1984, noting that she had in the past been asked to segregate accounts due to DROs and explained the procedure. *See* Affeld Decl., Exh. D at 190. Although Kaplan stated that she could not, on counsel's advice, answer EBM's question, she enclosed a bulletin entitled, “The Retirement Equity Act of 1984; Impact on Your Retirement Plan.” Later, in 1988, the subsequent president of C/K, Judith Superstein, informed John Harzell, an EBM employee, that C/K would “continue to follow-up on the status of the segregated account that you have indicated has been ordered by a QDRO on behalf of Mrs. Williams.” Affeld Decl., Exh. D at 201.

Based on this documentary evidence, it is clear

that the plan administrators treated or at least considered the Dissolution Judgment to be a QDRO. This evidence may not be used to prove that the parties were, in fact, correct, that the Dissolution Judgment was a QDRO.<sup>FN16</sup> However, the evidence suggests that despite the fact that the administrators never issued a formal statement approving of the DRO, this was because they never disputed either its existence or its validity.

FN16. Using the statements to prove that the Dissolution Judgment actually complied with the QDRO requirements would be improper hearsay. However, Defendants' evidentiary objections to these statements are overruled because Plaintiff does not employ these statements to prove the truth of the matter asserted, i.e. it is a QDRO because this letter called it a QDRO. Instead, these statements are being used to show that the parties believed and operated under the assumption that the Judgment was a QDRO. In other words, the statements are relevant to demonstrate both the declarant's state of mind (a hearsay exception under Fed.R.Evid. 803(3) and the hearer's reaction (which is not hearsay)). Accordingly, Defendants' hearsay objections are overruled.

Moreover, these documents were sufficiently authenticated by EBM employee, Cathy Asido. The letter from Kaplan of C/K to Carusi of EBM bears signs of authenticity in that it is a response to a properly authenticated document. *See* Asido Decl. ¶ 6; Fed.R.Evid. 901(2), (4). Defendants' other evidentiary objections to these items are overruled as meritless.

### III. Conclusion

In short, because the Dissolution Judgment sufficiently satisfies the ERISA specificity requirements, and the Plans administrators received the Dissolution

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Judgment, the Court finds the Dissolution Judgment is a QDRO. Accordingly, the Court hereby ORDERS that Plaintiff's motion for partial summary judgment re: QDRO issues is GRANTED. EW & C and the Williams Defendants' motions for summary judgment are DENIED.

**SO ORDERED.**

C.D.Cal.,1999.

In re Williams

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END OF DOCUMENT

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

(Cite as: 122 F.3d 815)



United States Court of Appeals,  
Ninth Circuit.  
In re: William O. GENDREAU, Debtor.  
William O. GENDREAU, Appellant,  
v.  
Colleen Rae GENDREAU, Appellee.

No. 96-15432.  
Argued and Submitted May 7, 1997.  
Decided Aug. 15, 1997.

Chapter 7 debtor sought declaratory judgment that divorce decree award to former wife of portion of his pension plans was dischargeable debt. Parties cross-moved for summary judgment. The United States Bankruptcy Court for the District of Nevada, James H. Thompson, J., granted summary judgment for former wife. Debtor appealed. The Bankruptcy Appellate Panel, Meyers, J., 191 B.R. 798, affirmed. Debtor appealed. The Court of Appeals, Choy, Circuit Judge, held that former wife's interest in pension plans was not dischargeable debt.

Affirmed.

West Headnotes

**[1] Bankruptcy 51** **3364**

51 Bankruptcy  
51X Discharge  
51X(C) Debts and Liabilities Discharged  
51X(C)2 Debts Arising from Divorce or Separation  
51k3364 k. Pension Allocations. Most Cited Cases

(Formerly 51k3348.20)

Former wife's interest in portion of Chapter 7 debtor's ERISA pension plans awarded under divorce decree was not dischargeable debt, regardless of whether wife had obtained qualified domestic relations order (QDRO) entitling her to payment of proceeds at time debtor filed petition; wife's claim was against plan administrator, not debtor, intended QDRO gave wife at least right to obtain proper QDRO that could not be discharged in debtor's bankruptcy proceeding, and allowing debtor to cut off wife's interest through timing of petition was contrary to both ERISA and bankruptcy purposes. Bankr.Code, 11 U.S.C.A. §§ 101(5, 12), 523; Employee Retirement Income Security Act of 1974, § 206(d)(3)(A, B), (d)(3)(H)(i), 29 U.S.C.A. § 1056(d)(3)(A, B), (d)(3)(H)(i).

**[2] Labor and Employment 231H** **595**

231H Labor and Employment  
231HVII Pension and Benefit Plans  
231HVII(I) Persons Entitled to Benefits  
231Hk594 Qualified Domestic Relations Orders  
231Hk595 k. In General. Most Cited Cases  
(Formerly 296k138)

Qualified domestic relations order (QDRO) exception to ERISA's antialienation provision was enacted to protect financial security of divorcees. Employee Retirement Income Security Act of 1974, § 206(d)(3)(A, B), 29 U.S.C.A. § 1056(d)(3)(A, B).

**[3] Bankruptcy 51** **3364**

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

(Cite as: 122 F.3d 815)

51 Bankruptcy  
 51X Discharge  
 51X(C) Debts and Liabilities Discharged  
 51X(C)2 Debts Arising from Divorce or Separation  
 51k3364 k. Pension Allocations. Most Cited Cases  
 (Formerly 51k3348.20)

Award of portion of pension benefits may constitute property settlement that will be discharged in bankruptcy if it is determined to be debt. Bankr.Code, 11 U.S.C.A. §§ 101(5, 12), 523.

**[4] Bankruptcy 51 ↪ 3364**

51 Bankruptcy  
 51X Discharge  
 51X(C) Debts and Liabilities Discharged  
 51X(C)2 Debts Arising from Divorce or Separation  
 51k3364 k. Pension Allocations. Most Cited Cases  
 (Formerly 51k3348.20)

Former wife's claim for her interest in Chapter 7 debtor's pension plans, pursuant to divorce decree, was against pension plans, not debtor, and thus was not personal liability of debtor dischargeable by his bankruptcy, given state court order, which was intended to serve as qualified domestic relations order (QDRO), requiring plans to pay wife her share of proceeds and to segregate such funds until paid, consistent with ERISA; if plans failed to pay, wife's recourse would be to sue plans, not debtor. Bankr.Code, 11 U.S.C.A. §§ 101(5, 12), 523; Employee Retirement Income Security Act of 1974, § 206(d)(3)(H)(i), 29 U.S.C.A. § 1056(d)(3)(H)(i).

**[5] Bankruptcy 51 ↪ 3364**

51 Bankruptcy  
 51X Discharge  
 51X(C) Debts and Liabilities Discharged  
 51X(C)2 Debts Arising from Divorce or Separation  
 51k3364 k. Pension Allocations. Most Cited Cases  
 (Formerly 51k3348.20)

Even if former wife seeking her portion of Chapter 7 debtor's pension plans awarded under divorce decree did not have qualified domestic relations order (QDRO) requiring plans to pay her portion to her at time debtor filed for bankruptcy, his bankruptcy could not eliminate her right to obtain QDRO and seek payment from different party. Employee Retirement Income Security Act of 1974, § 206(d)(3)(A, B), 29 U.S.C.A. § 1056(d)(3)(A, B).

**[6] Bankruptcy 51 ↪ 3364**

51 Bankruptcy  
 51X Discharge  
 51X(C) Debts and Liabilities Discharged  
 51X(C)2 Debts Arising from Divorce or Separation  
 51k3364 k. Pension Allocations. Most Cited Cases  
 (Formerly 51k3348.20)

Even if it was not proper qualified domestic relations order (QDRO) under ERISA, state court order requiring pension plans to pay former wife her interest in Chapter 7 debtor's pension plans pursuant to divorce decree at least gave wife right to obtain proper QDRO that could not be discharged in debtor's bankruptcy proceeding; wife's interest, or right to obtain QDRO giving her interest in plans, was established under state law at time of decree, and debtor, whose interest was correspondingly limited at that time, could not use bankruptcy to acquire greater interest than that which he possessed prior to bank-

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

**(Cite as: 122 F.3d 815)**

ruptcy. Employee Retirement Income Security Act of 1974, § 206(d)(3)(A, B), 29 U.S.C.A. § 1056(d)(3)(A, B).

that wife had no interest in plans until she obtained QDRO. Employee Retirement Income Security Act of 1974, § 206(d)(3)(A, B), 29 U.S.C.A. § 1056(d)(3)(A, B).

**[7] Bankruptcy 51  2532**

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)1 In General

51k2532 k. Interest of Debtor in General. Most Cited Cases

\***816** John R. Martz, Reno, NV, for Appellant.

\***817** Gus W. Flangas, Las Vegas, NV, for Appellee.

Appeal from the Ninth Circuit Bankruptcy Appellate Panel; Meyers, Ashland, and Hagan, Judges, Presiding. BAP No. NV-94-01832-HMeAs.

**Bankruptcy 51  2534**

51 Bankruptcy

51V The Estate

51V(C) Property of Estate in General

51V(C)1 In General

51k2534 k. Effect of State Law in General. Most Cited Cases

Before: HUG, Chief Judge, CHOY, and HAWKINS, Circuit Judges.

CHOY, Circuit Judge:

Appellant William O. Gendreau (“William”) appeals the grant of summary judgment in favor of appellee Colleen R. Gendreau (“Colleen”) by the United States Bankruptcy Court and the subsequent affirmation by the Bankruptcy Appellate Panel (“BAP”) of the Ninth Circuit.

Bankruptcy recognizes state property rights, and filing bankruptcy cannot give debtor greater interest in asset than that which he owned pre-bankruptcy.

**FACTUAL AND PROCEDURAL BACKGROUND**

William and Colleen were married in 1985. In 1992 they were divorced. The Family Court for Loudoun County, Virginia, issued a divorce decree, awarding Colleen a fifty percent interest in amounts William accrued in his two United Pilot's pension plans during the years they were married. The Family Court did not award either party maintenance or spousal support.

**[8] Labor and Employment 231H  597**

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations Orders

231Hk597 k. Operation and Effect.

Most Cited Cases

(Formerly 296k138)

In January, 1993, the Family Court entered an order entitled “Qualified Domestic Relations Order” (“QDRO”), which was intended to satisfy an exception to the Employee Retirement Income Security Act's (“ERISA”) prohibition against the alienation of pension plan funds. The order directed the plans' administrator to pay Colleen directly her percentage of

Qualified domestic relations order (QDRO) provisions of ERISA merely prevented former wife from enforcing her interest in Chapter 7 debtor's pension plans until QDRO was obtained; they did not suggest

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

(Cite as: 122 F.3d 815)

the pension funds. On May 17, 1993, the administrator determined that the payment order did not meet the specific criteria of a QDRO and refused to pay out funds to Colleen until he received an amended payment order that was approved as a QDRO.

On November 15, 1993, William filed a petition under Chapter 7 of the United States Bankruptcy Code, 11 U.S.C. § 701, *et. seq.* On November 29, William filed suit seeking a declaratory judgment that Colleen's award of part of his pension plans benefits was a dischargeable debt. Both parties filed motions for summary judgment. After a hearing on the matter, the bankruptcy judge entered an order denying William's motion and granting Colleen's. William appealed the grant of summary judgment in favor of Colleen. The BAP affirmed, finding that there was no claim against the debtor, William, to be discharged in bankruptcy. *In re Gendreau*, 191 B.R. 798 (9th Cir. BAP 1995).

William timely filed an appeal in this court. Having reviewed the bankruptcy court's conclusions of law de novo, *see In re Alsberg*, 68 F.3d 312, 314 (9th Cir.1995), *cert. denied*, 517 U.S. 1168, 116 S.Ct. 1568, 134 L.Ed.2d 667 (1996), and its findings of fact for clear error, *see id.*, we affirm.

#### DISCUSSION

[1] At issue is whether William's bankruptcy petition cut off any rights Colleen may have in a portion of William's pension proceeds that were awarded to her in the divorce. ERISA was promulgated to protect participants in private employee benefit plans. 29 U.S.C. § 1001. ERISA strictly prohibits the assignment or alienation of pension benefits. 29 U.S.C. § 1056(d)(1); *see also Patterson v. Shumate*, 504 U.S. 753, 760, 112 S.Ct. 2242, 2247-48, 119 L.Ed.2d 519 (1992); *Guidry v. Sheet Metal Workers Nat'l Pension Fund*, 493 U.S. 365, 372, 110 S.Ct. 680, 685, 107 L.Ed.2d 782 (1990). However, Congress expressly excepted QDROs from ERISA's anti-alienation rule.

29 U.S.C. § 1056(d)(3)(A). Domestic relations orders must meet specific requirements in order to qualify as QDROs. *See* 29 U.S.C. § 1056(d)(3)(B).

[2] The QDRO exception was enacted to protect the financial security of divorcees. *Ablamis v. Roper*, 937 F.2d 1450, 1453 (9th Cir.1991). Because Congress was also concerned with reducing the expense to plan providers and protecting them from suits for making improper payments, it required that QDROs be specific and clear and allowed plan administrators to approve the QDRO before they would be required to act in accordance with it. \*818 *Metropolitan Life Ins. Co. v. Wheaton*, 42 F.3d 1080, 1084 (7th Cir.1994); 29 U.S.C. § 1056(d)(3)(G).

William asserts that ERISA's strict anti-alienation rules preclude Colleen from having a property interest in his pension plans absent a QDRO, which according to the plan administrator she does not have. Accordingly, he argues, Colleen merely has a right to obtain a QDRO and payment, which fits the bankruptcy code's definition of debt. Colleen concedes that the plan administrator was within his rights to determine that the state court order did not qualify as a QDRO, but maintains that she has a nondischargeable interest in a portion of the pension proceeds.

[3][4] The Bankruptcy Code provides for the discharge of all debts that are the personal liability of the debtor and that arose before the debtor filed for bankruptcy under title 11. 11 U.S.C. §§ 524 and 727(a). Debt is defined as a "liability on a claim," 11 U.S.C. § 101(12), and claim is broadly defined to include a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured." 11 U.S.C. § 101(5). Debts incurred as a result of divorce, including property settlement debts,<sup>FN1</sup> are dischargeable except to the extent they represent obligations in the nature of alimony, maintenance, or sup-

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

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port. 11 U.S.C. § 523. The award of a portion of pension benefits may constitute a property settlement that will be discharged in bankruptcy if it is determined to be a debt.

FN1. The 1994 Amendments to the Bankruptcy Code included a change to section 523 making property settlement debts incurred in divorce proceedings nondischargeable. 11 U.S.C. § 523(a)(15). Because William filed his petition before the effective date of the amendments, it is not applicable to this case.

We find that Colleen's interest is not a dischargeable debt. Firstly, we agree with the BAP that Colleen's claim is against the United Pilot's pension plans and not against William. *See Gendreau*, 191 B.R. at 802. Therefore, the claim is not a personal liability of William that could be discharged by his bankruptcy.

The order required United to pay directly to Colleen her share of the proceeds and instructed the plan administrator to separately account for the portion awarded to Colleen until the benefits are distributed and provided that the “benefits awarded by this Order shall not be assigned, pledged, or otherwise transferred, voluntarily or involuntarily, before [Colleen] has received those benefits.” Also, ERISA provides that “[d]uring 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 segregate in a separate account in the plan or in an escrow account the amounts which would have been payable to the alternate payee [Colleen] during such period...” 29 U.S.C. § 1056(d)(3)(H)(i) (emphasis added).

[5] If the plans failed to pay Colleen, her recourse would be to sue the plans, not William. *See id.* at 802 (“To obtain the pension funds, [Colleen] would file a

civil court action against the administrator. [Colleen's claim is against United, not the Debtor.”) In no way can William be personally liable to Colleen for this money, so it cannot be a personal debt of William's that is dischargeable in bankruptcy. Even if Colleen did not have a QDRO at the time William filed for bankruptcy, his bankruptcy cannot eliminate her right to obtain a QDRO and seek payment from a *different* party.

[6][7][8] Likewise, we agree with the BAP that the order by the Family Court, if not itself a proper QDRO, at least gave Colleen a right to obtain a proper QDRO that could not be discharged in William's bankruptcy proceeding. Colleen's interest in the pension plans (or, at a minimum, her right to obtain a QDRO which would in turn give her an interest in the plans) was established under state law at the time of the divorce decree. *See id.* at 803. William's interest in the plans was limited at that time, or at least subject to being limited at any time Colleen obtained a QDRO (much like a current property owner's rights may be subject to divestment by a contingent interest). *See id.* at 802-03. \*819 Bankruptcy recognizes state property rights, and filing bankruptcy cannot give a debtor a greater interest in an asset than that which he owned pre-bankruptcy. *Id.* at 802. Whether or not Colleen's domestic relations order, as issued, was a QDRO is irrelevant: The QDRO provisions of ERISA do not suggest that Colleen has *no* interest in the plans until she obtains a QDRO, they merely prevent her from enforcing her interest until the QDRO is obtained. *See id.* at 804 n. 4. William did not file bankruptcy before Colleen had an interest in the plans—he filed bankruptcy before the plan administrator was authorized under ERISA to pay her according to that interest. As such, Colleen does not have an unmatured “debt” against William that is dischargeable in bankruptcy; rather, Colleen has a claim to her own interest in the plans that will be enforceable when the domestic relations order is approved as a QDRO.

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

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Finally, allowing William to cut off Colleen's interest in the pension plans because of the timing of his bankruptcy petition would be contrary to both ERISA and bankruptcy purposes. William filed his petition after the plan administrator concluded the order did not qualify as a QDRO but before it was modified for compliance. The Family Court retained jurisdiction to make any changes that might be deemed necessary by the plan administrator. Likewise, the plan administrator anticipated that it may require multiple drafts of the order to meet QDRO specifications as is evident in his letter to Colleen offering "to review the draft revised QDRO before it is entered by the court, ... [and to] given any comments [he] may have." Finally, ERISA itself accommodates for periods when the status of a QDRO is at issue. *See* 29 U.S.C. § 1056(d)(3)(H)(i).

As noted above, the purpose of the QDRO exception was to protect the financial security of divorcees. This protection would be meaningless if William could thwart his spouse's interest by filing bankruptcy before she obtained a QDRO, a process which everyone (including Congress) recognizes as time-consuming. Furthermore, the result would be a windfall to William and would not further bankruptcy's goal of accumulating a pool of assets to be distributed among creditors. William exempted his interest in the pension plan from the bankruptcy estate. Thus, discharging Colleen's interest in the plans would not enlarge the pool of assets available to William's creditors, it would only enlarge his personal wealth.

#### CONCLUSION

ERISA section 1056 permits a state court to apportion pension proceeds pursuant to state domestic relations laws so long as the order complies with the section's QDRO requirements. Whether Colleen had acquired a QDRO at the time of William's bankruptcy, however, is irrelevant for the purposes of this appeal. Colleen does not have a personal claim against William that could be discharged by his bankruptcy-her

rights are against United. Furthermore, William's rights to United's pension plans were limited, or subject to limitation by Colleen, at the time of the divorce decree and he cannot use bankruptcy to obtain a greater interest in an asset than that which he possessed prior to bankruptcy. Finally, to allow William to cut off Colleen's right to obtain a QDRO based on the timing of his bankruptcy petition would subvert Congress' efforts to safeguard the financial interests of plan participants' spouses and protect plan administrators from inconsistent claims on pension proceeds, without furthering bankruptcy's goal of preserving a pool of assets to be divided among the debtor's creditors. Accordingly, we hold that Colleen's claim against the pension plan for a portion of the benefits is not discharged by William's bankruptcy petition.

AFFIRMED.

C.A.9,1997.

In re Gendreau

122 F.3d 815, Bankr. L. Rep. P 77,497, 21 Employee Benefits Cas. 1533, 97 Cal. Daily Op. Serv. 6492, 97 Daily Journal D.A.R. 10,622, Pens. Plan Guide (CCH) P 23936M

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**C**

Missouri Court of Appeals,  
Eastern District,  
Division Two.

In re the MARRIAGE OF Richard V. GREEN and  
Sigrid V. Green.

Richard V. Green, Petitioner/Appellant,  
v.

Sigrid V. Green, Respondent/Respondent.

No. ED 94417.

May 3, 2011.

**Background:** Wife sought to modify original dissolution judgment with respect to division of marital portion of husband's pension account. The Circuit Court, St. Louis County, John R. Essner, J., granted wife's motion for entry of a fourth amended qualified domestic relations order (QDRO). Husband appealed.

**Holdings:** The Court of Appeals, Kathianne Knaup Crane, J., held that:

- (1) Circuit Court was without authority to replace QDRO, and
- (2) date of dissolution, rather than the date trial court entered QDRO was the final date of time period during which marital portion of husband's pension account accrued for purposes of calculating wife's benefits.

Reversed and remanded.

West Headnotes

**[1] Divorce 134 827**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

tion of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)6 Methods of Distribution

134k827 k. Distribution of pension and retirement benefits. Most Cited Cases

To alienate or assign Employee Retirement Income Security Act (ERISA) retirement benefits when dividing marital property, a court must enter a qualified domestic relations order (QDRO), which assures that a spouse receives pension benefits as an alternate payee. Employee Retirement Income Security Act of 1974, § 206(d)(1), (d)(3)(A), 29 U.S.C.A. § 1056(d)(1), (d)(3)(A).

**[2] Divorce 134 1207**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1203 Decisions Reviewable

134k1207 k. Finality of determination.

Most Cited Cases

A qualified domestic relations order (QDRO) is an order that may be obtained after and pursuant to a previously entered final judgment of dissolution and it, therefore, falls under the "special order" exception to the rule that a party may only appeal from a final judgment. V.A.M.S. § 512.020(5).

**[3] Divorce 134 1266(6)**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

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134k1259 Review

134k1266 De Novo Review

134k1266(6) k. Disposition of property. Most Cited Cases

Interpretation of a dissolution judgment and a qualified domestic relations order (QDRO) is an issue of law that the Court of Appeals reviews de novo.

#### [4] Divorce 134 ⚡ 893(9)

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k893 Modification

134k893(4) Particular Cases

134k893(9) k. Methods of distribution. Most Cited Cases

Trial court was without authority to replace qualified domestic relations order (QDRO), even though replacement was intended to also be a QDRO, where the plan administrator expressly determined replacement was not qualified after the court had entered it, and the modification was not for purposes of establishing or maintaining the first QDRO as a QDRO, or to effectuate the expressed intent of the dissolution decree. V.A.M.S. § 452.330(5).

#### [5] Courts 106 ⚡ 4

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k3 Jurisdiction of Cause of Action

106k4 k. In general. Most Cited Cases

When a court is statutorily barred from taking a specific action, it lacks “authority” and not subject matter jurisdiction.

#### [6] Divorce 134 ⚡ 893(2)

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k893 Modification

134k893(2) k. Prohibitions and exceptions in general. Most Cited Cases

As a general matter, a final judgment distributing marital property may not be modified in the same case; a party cannot seek redistribution of property covered by the decree. V.A.M.S. § 452.360(2).

#### [7] Labor and Employment 231H ⚡ 595

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations Orders

231Hk595 k. In general. Most Cited Cases

#### Labor and Employment 231H ⚡ 597

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations Orders

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231Hk597 k. Operation and effect. Most Cited Cases

“Qualification,” with regard to a qualified domestic relations order (QDRO), is a specific procedure for federal recognition of state property in Employee Retirement Income Security Act (ERISA) plans; however, the qualification process does not change a spouse's adjudicated property rights. Employee Retirement Income Security Act of 1974, § 206(d)(1), (d)(3)(A), 29 U.S.C.A. § 1056(d)(1), (d)(3)(A).

#### [8] Divorce 134 893(3)

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k893 Modification

134k893(3) k. Grounds in general.

Most Cited Cases

#### Labor and Employment 231H 595

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(I) Persons Entitled to Benefits

231Hk594 Qualified Domestic Relations

Orders

231Hk595 k. In general. Most Cited

Cases

After a state court orders a qualified domestic relations order (QDRO), the plan administrator determines whether the order satisfies Employee Retirement Income Security Act (ERISA) requirements for it to be qualified; if it does not satisfy ERISA's standards, the state court may modify its order to

achieve qualification. Employee Retirement Income Security Act of 1974, § 206(d)(1), (d)(3)(A), 29 U.S.C.A. § 1056(d)(1), (d)(3)(A).

#### [9] Divorce 134 891

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k891 k. Amendment or correction.

Most Cited Cases

When a qualified domestic relations order (QDRO) has been given “qualified” status, and there is no evidence that the qualified QDRO is in jeopardy of losing its “qualified” status, a court cannot enter an amended QDRO for the purpose of establishing or maintaining the order as a qualified domestic relations order. V.A.M.S. § 452.330(5).

#### [10] Divorce 134 891

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)9 Proceedings for Division or Assignment

134k882 Judgment or Decree

134k891 k. Amendment or correction.

Most Cited Cases

To determine if the trial court entered an amended qualified domestic relations order (QDRO) to effectuate the expressed intent of the order, the Court of Appeals looks at the original order, including the

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dissolution decree. V.A.M.S. § 452.330(5).

**[11] Divorce 134 ↪ 730**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)3 Proportion or Share Given on Division

134k730 k. Time of assessment or measure. Most Cited Cases

**Divorce 134 ↪ 803**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(D) Allocation of Property and Liabilities; Equitable Distribution

134V(D)5 Valuation, Division or Distribution of Particular Property or Interests

134k803 k. Retirement or pension rights. Most Cited Cases

Date of dissolution, rather than the date trial court entered qualified domestic relations order (QDRO), was the final date of time period during which marital portion of husband's pension account accrued for purposes of calculating wife's benefits.

\*170 Denise Watson–Wesley Coleman, Watson–Wesley Coleman, L.C., St. Louis, MO, for appellant.

Sigrid Green, Deerfield Beach, FL, pro se.

KATHIANNE KNAUP CRANE, Judge.

Husband appeals from a judgment entered by the trial court granting wife's motion for entry of a “fourth amended qualified domestic relations order” for the

distribution of the marital portion of one of husband's pension accounts. This judgment modified the original dissolution judgment with respect to the division of the marital portion of the pension account and entered a fourth amended qualified domestic relations order (QDRO IV) <sup>FN1</sup> that modified the original QDRO (QDRO I), which had been approved as “qualified.” The plan administrator determined that QDRO IV was not a “qualified” order. We reverse and remand with directions.

FN1. Hereinafter, all references to a qualified domestic relations order will be abbreviated as QDRO.

Richard Green (husband) and Sigrid Green (wife) were married on July 7, 2001, and separated on or around February 7, 2004. On September 15, 2005, the trial \*171 court entered a Judgment of Dissolution. As relevant to this appeal, it ordered:

4. Each party shall receive as their portion of the marital property, free and clear from the claims of the other party the property specified on Attachment B. To achieve an equitable division of the marital estate of the parties, the SBC pension account shall be divided by QDRO such that Husband shall receive 20.9% of the account and Wife shall receive 79.1% of that account.

One of the attachments to the judgment was “SCHEDULE B—MARITAL PROPERTY.” It listed “assets” in the first column and the “equity value” for each asset in the second column. The third column listed which of the assets were allocated to husband, and the fourth column listed which of the assets were allocated to wife. Schedule B showed that the marital portion of the SBC pension account had an “equity value” of \$54,894, that \$11,483 of this amount was allocated to husband, and that \$43,411 of this amount was allocated to wife. These dollar amounts represented 20.9% and 79.1%, respectively, of the marital

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portion of the SBC pension account. Apart from the \$11,483, husband was allocated assets with an “equity value” of \$54,153. When the \$11,483 was added to the \$54,153, the “equity value” of husband’s total allocated assets were \$65,636. Apart from the \$43,411, wife was allocated assets with an “equity value” of \$22,225. When the \$43,411 was added to the \$22,225, the “equity value” of wife’s total allocated assets was also \$65,636.

On January 26, 2006, the trial court entered QDRO I pursuant to the dissolution judgment. QDRO I contained a finding that a portion of husband’s SBC pension plan had accrued during the marriage and constituted marital property. It designated wife as “Alternate Payee” and ordered in paragraph 1.d.:

d. The Alternate Payee is hereby assigned, and the plan administrator shall pay directly to the Alternate Payee 79.1% of the marital portion of the benefits payable to the Participant from the Plan. The “marital portion” is that portion accrued between July 7, 2001 (the date of marriage) and September 15, 2005 (the date of the dissolution of the marriage).

It further provided that payments to wife shall be made at husband’s normal retirement date, whether or not he has retired, or at the time husband retires and begins receiving benefits, if he retires at an earlier date. Husband was employed by SBC Services at the time the dissolution was pending in 2005, and he was 49 years old when the dissolution decree was entered. Normal retirement age under the SBC pension account was 65. The SBC pension account was administered by Fidelity Employer Services Company LLC (the plan administrator).<sup>FN2</sup> On March 27, 2006, the plan administrator approved QDRO I as “qualified.”

FN2. The name of the plan was subsequently changed to the AT & T Pension Benefit Plan. For clarity, we will continue to refer to it as the SBC pension account.

Thereafter, on April 20, 2007, wife filed a motion with the trial court for entry of an amended QDRO. She alleged that, according to calculations she made from documentation that she had received from the plan administrator, the marital portion of the SBC pension account should be \$86,831.15. She further alleged that husband had received correspondence from the plan administrator indicating that the marital portion was \$48,810.07. She sought an amended QDRO that would clarify the value of the SBC pension account. She attached a proposed QDRO. Husband \*172 filed a motion in opposition. After a hearing, the trial court entered a judgment dated June 26, 2007. It concluded:

The court retains jurisdiction to order the entry of an amended QDRO to clarify the court’s award of the respective portions of [husband’s] SBC Pension Benefit Plan that was intended by the court’s judgment of September 15, 2005. The marital interest to be divided is the difference between the value of [wife’s] interest in the Plan as of the date of the marriage (July 7, 2001) which has now been documented to be \$167,790.65 and the value of that interest as of the date of the dissolution judgment (September 15, 2005) which has now been documented to be \$248,975.11. Since the marital interest in the Plan is larger than originally presented to the court, in order to preserve the court’s equitable division of the marital property and debts of the parties, [wife] should properly receive 68.3% of the marital interest and [husband] should properly receive 31.7% of the marital interest.

It ordered wife to submit an amended QDRO consistent with the terms of the judgment.

On July 9, 2007, the trial court entered a second amended QDRO (QDRO II). QDRO II changed paragraph 1.d. to the following:

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d. The Alternate Payee is hereby assigned, and the plan administrator shall pay directly to the Alternate Payee 68.3% of the marital portion of the benefits payable to the Participant from the Plan. The “marital portion” to be divided is the difference between the value of Participant's interest in the Plan as of the date of the marriage, July 7, 2001, which was \$167,790.65 and the value of that interest as of the date of the Dissolution Judgment, September 15, 2005, which was \$248,975.11.

On September 12, 2007, the plan administrator sent a letter rejecting QDRO II because it was not “qualified.” Among the reasons given for lack of qualification, the plan administrator specified:

*Alternate Payee's Awarded Benefit*

- The Order fails to provide a clear and calculable award. Specifically Paragraph 1.d provides dollar values of the Participant's accrued benefit as of the date of marriage and the date of Dissolution Judgment which do not correspond to the values in the Plan's records. Please review Section 2.E of the QDRO Guidelines regarding how the Alternate Payee's awarded benefit should be stated. *Please amend the Order to state clearly the Alternate Payee's award as a fraction, percentage OR specific dollar amount of the Participant's vested accrued benefit as a specified date or accrued between two dates, in accordance with the Parties' intent.*

Wife's attorney then sent a draft of a third amended QDRO (QDRO III) to the plan administrator. On October 25, 2007, the plan administrator informed wife's attorney that the draft did not contain the necessary requirements for qualification. Among other reasons, the plan administrator advised that the draft still failed to provide a clear and calculable award, repeating the language from its September 12, 2007 letter set out above.

On December 3, 2007, wife filed a motion for

entry of a third amended QDRO with the trial court. The record does not disclose any action taken with respect to this motion.

On August 24, 2009, the trial court entered an order requesting husband to submit a memorandum of law challenging its \*173 June 26, 2007<sup>FN3</sup> judgment along with a proposed QDRO, and it ordered wife to submit a reply and her proposed QDRO. On September 16, 2009, husband filed a memorandum of law that opposed any modification of QDRO I not in compliance with section 452.330.5 RSMo (2000),<sup>FN4</sup> requested a hearing on the value of the pension benefits, and requested the trial court use a division formula approach approved in prior Missouri cases. He attached an expert's affidavit on the value of the account.

FN3. The minutes refer to a June 26, “2009” judgment. However, it appears from the context that the court was referring to the June 26, 2007 judgment.

FN4. All further statutory references are to RSMo (2000), unless otherwise indicated.

On January 6, 2010, the trial court granted wife's motion for a fourth amended QDRO (QDRO IV) and entered a judgment ordering QDRO IV. This judgment provided:

The judg[ ]ment entered on June 26, 2007 was for a sum certain which represents the marital portion of the total pension benefits based on the final judg[ ]ment of the court in the dissolution judg[ ]ment. Under Missouri law, the interest income on separate property which accrues during the marriage is marital property. The stated figure of \$55,448.99 represents the value of [wife's] portion of the marital portion as of the date of the judg[ ]ment, which is the proper date of valuation as it is the date upon which the division of property was to become ef-

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fective. Therefore, this figure has been entered in paragraph 1d of the fourth amended qualified domestic relations order.

However, neither the dissolution decree of September 15, 2005 nor the modification judgment of June 26, 2007 was intended to order the plan administrator to immediately issue a check in a specified amount to [wife] as the alternate payee. Instead, [wife's] right to receive her share of the total benefits is subject to whatever form and conditions are provided under the plan as specified in paragraph 1e of the fourth amended qualified domestic relations order.

The court ordered QDRO IV, which changed paragraph 1.d. to the following:

d. The alternate payee is hereby assigned and the plan administrator shall pay the alternate payee \$55,448.99 as of June 26, 2007 of the benefits payable to the participant from the Plan.

On January 22, 2010, the plan administrator rejected QDRO IV on the ground that it was not a “qualified” order. Among the listed reasons for non-qualification, the plan administrator pointed out: “The award, as written, will be interpreted to assign the Alternate Payee \$55,448.99 of the Participant [’s vested accrued benefit as of June 26, 2007.” The plan administrator further explained: “If the award is not in accordance with the Parties’ intent, please amend the Order accordingly.” The plan administrator also warned that a flat dollar award would be subject to actuarial adjustments.

Husband appeals from the January 6, 2010 judgment and QDRO IV incorporated therein. He asserts that the trial court erred in entering QDRO IV because it did not modify QDRO I for either of the purposes allowed by section 452.330.5. Alternatively, he claims that if the court had the authority to modify QDRO I by entering QDRO IV, it erred in using an

improper date, June 26, 2007, and it erred in not holding an evidentiary hearing.

#### \*174 DISCUSSION

[1][2] Generally, a party to a civil action may only appeal from a final judgment. Section 512.020(5). However, one exception to this rule is that an appeal may be taken from “any special order after final judgment in the cause.” Section 512.020(5). To alienate or assign Employee Retirement Income Security Act (ERISA) retirement benefits when dividing marital property, a court must enter a QDRO, which assures that a spouse receives pension benefits as an alternate payee. *Ochoa v. Ochoa*, 71 S.W.3d 593, 595–96 (Mo. banc 2002); see 29 U.S.C. 1056(d)(1), (3)(A) (2000). A QDRO is an order that may be obtained after and pursuant to a previously entered final judgment of dissolution, and it therefore fits within the “special order” exception contained in section 512.020(5). *Brooks v. Brooks*, 98 S.W.3d 530, 531 (Mo. banc 2003). Accordingly, the January 6, 2010 judgment is appealable.

[3] We review the trial court’s decision modifying a QDRO pursuant to *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). See *Bradley v. Bradley*, 194 S.W.3d 902, 906 (Mo.App.2006). Interpretation of a dissolution judgment and a QDRO is an issue of law that we review *de novo*. *In re Marriage of Lueken*, 267 S.W.3d 800, 801 (Mo.App.2008).

#### I. Authority to Enter QDRO IV

[4][5] For his first point, husband contends that the trial court exceeded its statutory authority when it entered QDRO IV to modify QDRO I because the amendment did not serve to establish or maintain the order as a QDRO or to effectuate the intent of QDRO I.<sup>FN5</sup>

FN5. Although husband used the term “subject matter jurisdiction,” when a court is statutorily barred from taking a specific ac-

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tion, it lacks “authority” and not “subject matter jurisdiction.” *J.C.W. ex rel. Webb v. Wyciskalla*, 275 S.W.3d 249, 254 (Mo. banc 2009).

In this case, neither party appealed from the trial court's judgment of dissolution dated September 15, 2005. As a result, the judgment was final with respect to all property with which it dealt. *Meissner v. Schnettgoecke*, 211 S.W.3d 157, 160 (Mo.App.2007). Further, it is undisputed that QDRO IV modified the language in QDRO I, which the plan administrator had determined was a “qualified” QDRO. QDRO I assigned to wife a percentage of the marital portion of the benefits payable to husband from the SBC pension account that accrued between July 7, 2001, and September 15, 2005, whereas QDRO IV assigned to wife \$55,448.99 “as of June 26, 2007[,] of the benefits payable to” husband from the SBC pension account. It is also undisputed that QDRO IV was not “qualified.”

[6] As a general matter, a final judgment distributing marital property may not be modified in the same case. *Ochoa*, 71 S.W.3d at 595; *Chrun v. Chrun*, 751 S.W.2d 752, 755 (Mo. banc 1988); *Meissner*, 211 S.W.3d at 159–60; section 452.360.2. A party cannot seek redistribution of property covered by the decree. *Meissner*, 211 S.W.3d at 160. However, the legislature allows courts to modify orders “intended to be” QDROs in two limited situations: (1) “for the purpose of establishing or maintaining the order as a qualified domestic relations order” or (2) “to revise or conform its terms so as to effectuate the expressed intent of the order.” Section 425.330.5; *Lueken*, 267 S.W.3d at 802; *Meissner*, 211 S.W.3d at 160; *Miles v. Miles*, 43 S.W.3d 876, 879 (Mo.App.2001). In addition, there is nothing in the statute that authorizes a court to replace a *qualified* domestic relations order with a domestic relations order that has not been qualified by the plan administrator.\*175 *Offield v. Offield*, 955 S.W.2d 247, 249 (Mo.App.1997).

The judgment ordering the entry of QDRO IV is

unauthorized because QDRO IV was not qualified. Although QDRO IV was intended to be a QDRO, the plan administrator expressly determined that it was not qualified after the court had entered it; QDRO IV is therefore a non-qualified domestic relations order. By entering QDRO IV, the trial court effectively invalidated the QDRO I's “qualified” status. *Offield*, 955 S.W.2d at 249. Section 452.330.5 does not permit this. *Id.* The trial court had no authority to replace QDRO I with an unqualified domestic relations order.

This is reason enough to reverse that part of the judgment ordering QDRO IV. However, the judgment ordering QDRO IV also was not authorized under either of the two exceptions contained in section 452.330.5, and this constitutes another reason for reversal.

[7][8] The first exception requires that a modification be for the purpose of “establishing or maintaining the order as a QDRO” under section 452.330.5. *Ochoa*, 71 S.W.3d at 595. In enacting section 452.330.5, the legislature “anticipated that an order could decide ownership[ ] but not meet the federal requirements.” *Id.* at 597. It “ensured that state court orders could be modified to establish or preserve federal recognition of state property rights.” *Id.*; 29 U.S.C. 1056(d)(3)(A), (J). The first exception has been interpreted to mean that the trial court “retains continuing jurisdiction to establish, to maintain, or to revise a QDRO to ensure that it is ‘qualified.’” *Shelton v. Shelton*, 201 S.W.3d 576, 580 (Mo.App.2006); *Offield*, 955 S.W.2d at 249. “Qualification ‘is a specific procedure for federal recognition of state property in ERISA Plans.’” *Meissner*, 211 S.W.3d at 160 (quoting *Ochoa*, 71 S.W.3d at 596). However, the qualification process does not change a spouse's adjudicated property rights. *Ochoa*, 71 S.W.3d at 596; *Meissner*, 211 S.W.3d at 160. After a state court orders a QDRO, the plan administrator determines whether the order satisfies ERISA's requirements for it to be “qualified.” *Ochoa*, 71 S.W.3d at 596; 29 U.S.C. 1056(d)(3)(G)(i). If it does not satisfy ERISA's

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standards, the state court may modify its order to achieve qualification. *Ochoa*, 71 S.W.3d at 596.

[9] When a QDRO has been given “qualified” status, and there is no evidence that the qualified QDRO is in jeopardy of losing its “qualified” status, a court cannot enter an amended QDRO “ ‘for the purpose of establishing or maintaining the order as a qualified domestic relations order.’ ” *Miles*, 43 S.W.3d at 879 (quoting section 452.330.5). Here, there was no evidence that QDRO I was in danger of losing its qualified status. Accordingly, the trial court did not enter QDRO IV for the purpose of establishing or maintaining QDRO I as a QDRO. The trial court did not have authority under the first exception in section 452.330.5 to enter QDRO IV.

[10] The second exception listed in section 452.330.5 permits a court to modify a QDRO “to revise or conform its terms so as to effectuate the expressed intent of the order.” To determine if the trial court entered an amended QDRO to effectuate the expressed intent of the order, we look at the original order, including the dissolution decree. *Wilson v. Lilleston*, 290 S.W.3d 795, 800 (Mo.App.2009); *Lueken*, 267 S.W.3d at 802–03. Under the second exception in section 452.330.5, a trial court has the authority to hold a hearing to consider the parties’ evidence disputing the effect of a qualified QDRO compared \*176 with the intent of the dissolution decree; and the trial court can then amend the qualified QDRO with another qualified QDRO if the original, qualified QDRO does not effectuate the expressed intent of the order. *Offield*, 955 S.W.2d at 249.

In this case, the revisions in QDRO IV did not effectuate the expressed intent of the dissolution decree. The dissolution decree stated: “To achieve an equitable division of the marital assets of the parties, the SBC pension account shall be divided by QDRO such that Husband shall receive 20.9% of the account and Wife shall receive 79.1% of that account.” QDRO I specified that the percentages were of the marital

portion of the SBC pension account and that the marital portion was that portion accrued between July 7, 2001, and September 15, 2005.

The original decree and QDRO I sought to achieve an equitable division of marital property by using a specific method for doing so. It took the “equity value” of the marital portion of the account that had accrued during the marriage, which was a dollar amount, and then it allocated to wife a dollar amount from this sum that, when added to the dollar amount of her other marital property, would be equal to the dollar amount of husband’s share of the marital property, including pension benefits awarded to husband. The court then took the two dollar amounts representing husband’s and wife’s shares of the “equity value” of the marital portion of the SBC pension account, and it converted these amounts to percentages of the “equity value” of the marital portion of the pension account. In drafting QDRO I, the trial court used the same percentage allocated to wife (79.1%) to represent the percentage of “the marital portion of the benefits payable to [husband] from the Plan” that was to be assigned to wife.

According to wife’s first motion to amend QDRO I, the percentages were erroneous because they were based on erroneous underlying dollar amounts for the “equity value” of the marital portion of the SBC pension account. If wife was correct, then QDRO I did not effectuate the intent to equalize the division of marital assets by utilizing this method, because the underlying dollar amounts used to calculate the percentages were also inaccurate.

To effectuate the intent of making an equitable division of the marital property by its chosen method, the trial court only had to find an accurate “equity value” of the marital portion of the pension account; divide that dollar amount between the parties so that, when the new dollar amounts were added to the dollar amounts of the other marital assets allocated to each party, the division remained equal; convert the two

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new dollar amounts into percentages; and insert the new percentages into the amended QDRO.

QDRO IV did not follow this procedure. Rather, QDRO IV attempted to assign to wife “\$55,448.99 as of June 26, 2007[,] of the benefits payable to the participant under the plan.” This assignment not only fails to effectuate the intent of the dissolution decree and QDRO I, it also goes far beyond the intent of the dissolution decree and QDRO I by awarding wife a lump sum dollar amount, instead of a percentage of the marital portion of the pension plan benefits, which lump sum dollar amount represented a calculation made from the dollar amounts contained in QDRO II, which the plan administrator had rejected because the numbers did not correspond to values in the plan's records. In addition, QDRO IV introduced a new date for determining the benefits payable to wife and failed to account for actuarial adjustments. QDRO IV therefore wholly failed to effectuate the intent of QDRO I.

\*177 After the entry of the qualified QDRO I, the trial court only had the authority to enter a QDRO that was qualified and that satisfied one of the statutory exceptions. It did not do so either in its June 26, 2007 judgment or in its January 6, 2010 judgment, and neither QDRO ordered on those dates was qualified. The only qualified QDRO is QDRO I, entered on January 26, 2006. The trial court exceeded its authority by entering QDRO IV because it was not qualified and did not fall within one of the exceptions of section 452.330.5. Point one is granted.

## II. Date and Hearing

[11] In his second and third points, husband asserts that the trial court erred in using the June 26, 2007 date to calculate benefits and in not holding an evidentiary hearing. Because husband's first point is dispositive, we do not need to address these points. However, because these issues may arise again in this case if one of the parties seeks an amended QDRO, we will clarify that the final date of the time period during

which the marital portion of the SBC pension account accrued is the date of dissolution, which is September 15, 2005, and not June 26, 2007. Further, if one of the parties contends that the “equity value” of the marital portion of the SBC pension account is erroneous, an evidentiary hearing to consider the parties' evidence would be required to determine that value. *Offield*, 955 S.W.2d at 249.

## Conclusion

The judgment of January 6, 2010, is reversed. We remand with directions to vacate QDRO IV and reinstate QDRO I.

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256 F.2d 664, 2 A.F.T.R.2d 5009, 58-2 USTC P 9627  
(Cite as: 256 F.2d 664)

**H**

United States Court of Appeals Fourth Circuit.  
Kenneth T. SULLIVAN, Petitioner,  
v.  
COMMISSIONER OF INTERNAL REVENUE,  
Respondent.

No. 7616.  
Argued April 15, 1958.  
Decided June 2, 1958.

Petition to review a decision of the Tax Court, 29 T.C. 71. The United States Court of Appeals, Sobeloff, Chief Judge, held that where on October 15, 1951 Maryland court granted the husband a divorce a mensa et thoro and the wife appealed and on April 3, 1952 the court of appeals affirmed the decree, the appeal did not suspend the decree so as to permit the spouses to file a joint return for the taxable year ending December 31, 1951.

Affirmed.

West Headnotes

**[1] Internal Revenue 220 3013.1**

220 Internal Revenue  
220I Nature and Extent of Taxing Power in General  
220I(B) Effect of State Laws and Judicial Decisions  
220k3013 Income and Excess Profits Taxes  
220k3013.1 k. In general. Most Cited Cases  
(Formerly 220k3013, 220k20.4, 220k7)

Issuance of marital status as respects right to file a

joint tax return must be determined according to the law of the state in which the decree was issued. 26 U.S.C.A. (I.R.C.1939) § 51.

**[2] Internal Revenue 220 4481**

220 Internal Revenue  
220XIX Returns and Reports  
220k4481 k. Joint or separate returns of husband and wife. Most Cited Cases  
(Formerly 220k1361)

Under Maryland law, a mensa divorce constitutes a sufficient legal separation to prevent the filing of a joint tax return.

**[3] Divorce 134 652**

134 Divorce  
134V Spousal Support, Allowances, and Disposition of Property  
134V(D) Allocation of Property and Liabilities; Equitable Distribution  
134V(D)1 In General  
134k652 k. Power and authority of court. Most Cited Cases  
(Formerly 134k249.1, 134k250)

**Divorce 134 1352**

134 Divorce  
134VI Operation and Effect of Divorce, and Rights of Divorced Persons  
134k1352 k. Divorce from bed and board; separation. Most Cited Cases  
(Formerly 134k314)

Under Maryland law a divorce a mensa et thoro suspends the right of cohabitation and empowers the

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court to award to the wife such property or estate as she had when married.

#### [4] Appeal and Error 30 ↪ 437

30 Appeal and Error

30VIII Effect of Transfer of Cause or Proceedings Therefor

30VIII(A) Powers and Proceedings of Lower Court

30k437 k. Force and effect of judgment or order appealed from. Most Cited Cases

Under Maryland law an appeal does not vacate the decree of an equity court or suspend its operation. Code Md. 1951, art. 5, § 33.

#### [5] Divorce 134 ↪ 182

134 Divorce

134IV Proceedings

134IV(O) Appeal

134k182 k. Effect of appeal. Most Cited Cases

Under Maryland law an appeal does not suspend a decree of divorce. Code Md.1951, art. 5, § 33; art. 16, § 34.

#### [6] Internal Revenue 220 ↪ 4481

220 Internal Revenue

220XIX Returns and Reports

220k4481 k. Joint or separate returns of husband and wife. Most Cited Cases  
(Formerly 220k1361)

Where on October 15, 1951, Maryland court granted the husband a divorce a mensa et thoro and the wife appealed, and on April 3, 1952, the Court of Appeals affirmed the decree, the appeal did not sus-

pend the decree so as to permit the spouses to file a joint return for the taxable year ending December 31, 1951. 26 U.S.C.A. (I.R.C.1939) § 51; Code Md.1951, art. 5, § 33, art. 16, § 34.

\*665 Milton I. Baldinger, Washington, D.C. (Ruth Cooper Breslauer, Washington, D.C., on the brief), for petitioner.

J. Dwight Evans, Jr., Washington, D.C. (Charles K. Rice, Asst. Atty. Gen., Lee A. Jackson and Robert N. Anderson, Attys., Dept. of Justice, Washington, D.C., on the brief), for respondent.

Before SOBELOFF, Chief Judge, SOPER, Circuit Judge, and PAUL, Cistrict judge.

SOBELOFF, Chief Judge.

This petition to review a decision of the Tax Court presents a single issue, whether the pendency of an appeal from a Maryland divorce decree operated to suspend or stay the decree so as to permit Kenneth T. and Carrie Miller Sullivan to file a joint tax return.

The facts are simple and stipulated. On October 15, 1951, the Circuit Court for Montgomery County, Maryland, granted Mr. Sullivan a divorce a mensa et thoro from his wife. Mrs. Sullivan appealed from this and from the denial of her cross bill for an a mensa divorce, and on April 3, 1952, the Court of Appeals of Maryland affirmed the decree of the chancellor. Sullivan v. Sullivan, 1952, 199 Md. 594, 87 A.2d 604.

For the taxable year ending December 31, 1951, the Sullivans filed a joint tax return, but the Commissioner determined that individual returns should have been filed and assessed a deficiency of \$7,256.08 against Mr. Sullivan. The Tax Court affirmed and this proceeding was initiated.

Section 51 of the Internal Revenue Code of 1939

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(26 U.S.C.A., 1952 ed., Sec. 51)<sup>FN1</sup> accords to 'a husband and wife' \*666 the right to make a 'single return jointly.' The statute further provides that 'an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married.' Moreover, as both Sullivans had the same taxable year, the statute declares that their status as husband and wife shall be determined 'as of the close of such year.' Our concern, therefore, is with the marital status of the Sullivans as of December 31, 1951, when they were divorced by a decree of the lower court, and the appeal therefrom was undecided. Tres.Reg. 111, Sec. 29.51-1 (as amended by T.D. 5687, 1949-1 Cum.Bull. 9, 22).

[1] The precise question under Maryland law has not been decided. In *Commissioner of Internal Revenue v. Eccles*, 1953, 208 F.2d 796, we upheld a decision of the Tax Court which permitted a joint tax return to be filed by a husband and wife who were separated by a Utah divorce decree which was interlocutory and not yet final. We noted that 'the decision of the Tax Court was clearly correct for reasons adequately stated in its opinion,' and in so doing, we gave our approval to the rule, adopted in the Tax Court, that the issue of marital status must be determined according to the law of the state in which the decree was issued. *Marriner S. Eccles*, 1953, 19 T.C. 1049. See, also, *Joyce Primrose Lane*, 1956, 26 T.C. 405; *J. R. Calhoun, Jr.*, 1956, 27 T.C. 115. Maryland practice, however, does not know interlocutory divorce decrees.

[2][3] Taxpayer does not dispute that a Maryland a mensa divorce constitutes a sufficient legal separation to prevent the filing of a joint return. Cf. *Marcel Garsaud*, 1957, 28 T.C. 1086 (CCH Dec. 22,547). He recognizes the force of the Maryland decisions and statute under which a divorce a mensa et thoro suspends the right of cohabitation (*Roberts v. Roberts*, 1931, 160 Md. 513, 523, 154 A. 95), and empowers the court to award to the wife such property or estate as she had when married (Md. Code (1951), Art. 16,

Sec. 34; *Tyson v. Tyson*, 1880, 54 Md. 35). Sullivan contends, however, that the entry of his wife's appeal operated to suspend the divorce decree and to restore the parties to the same status as before.

In the absence of a Maryland decision determining the status, before the disposition of an appeal, of a decree dissolving a marriage, taxpayer has resorted to argument based on decisions dealing with the problem of a wife's right to counsel fees and alimony pendente lite. He relies heavily upon *Dougherty v. Dougherty*, 1947, 189 Md. 316, 55 A.2d 787, which held that although a wife's right to permanent alimony depends upon her having a basis for divorce, she is entitled to alimony pendente lite and counsel fees during the prosecution of an appeal, even though, in the lower court, her husband, and not she, was held entitled to the divorce. See, also, *Saltzgraver v. Saltzgraver*, 1944, 182 Md. 624, 35 A.2d 810. This, maintains the taxpayer, shows that there is no finality to a divorce until determination of the appeal.

We disagree. The practice of allowing a divorced wife alimony pendente lite and counsel fees until the disposition of the appeal is dictated by hard practical necessities. The fact that the wife may be awarded alimony and counsel fees until the appeal is ended does not militate against the concept of a valid decree pending appeal. 860.

\*667 In some states the right to alimony and counsel fees during appeal was created by statute. See Annotation, *Alimony- By Trial Court- Pending Appeal*, 19 A.L.R.2d 703, 706; 17 Am.Jur., 'Divorce and Separation,' Sec. 632, p. 707. In others, as in Maryland, the practice of making such allowances simply grew up, without any theorizing about the status of the decree of the lower court pending review. See, e.g., *Buckner v. Buckner*, 1912, 118 Md. 263, 84 A. 471; *Cook v. Cook*, 1934, 166 Md. 704, 71 A. 722. Thus, where the wife had obtained an a mensa decree and appealed only from the amount of permanent alimony, without attacking the divorce, her husband was still

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required to pay her counsel fees and costs of the appeal. Indisputably in this case there was no suspension of the divorce pending appeal. *Timanus v. Timanus*, 1940, 178 Md. 640, 16 A.2d 918.<sup>FN2</sup>

[4] We turn therefore to the rule which prevails in equity cases generally. At an early date, the Court of Appeals of Maryland settled the law that an appeal does not vacate the decree of an equity court, or suspend its operation. *Thompson v. McKim*, 1825, 6 Har. & J. 302, 333. By statute Maryland has provided that an appeal shall not stay a decree or order, unless the appellant shall give bond; and the court which made the decree or order is empowered in its discretion to deny a stay. Md.Code (1951), Art. 5, Sec. 33.

In *Chappel v. Chappel*, 1896, 86 Md. 532, 32 A. 984, and *Berman v. Berman*, 1948, 191 Md. 699, 62 A.2d 787, the general rule was impliedly accepted as applicable to divorce proceedings. In each of these cases the husband was denied the right to file a supersedeas bond to stay the execution of that part of the decree which awarded the wife alimony during the appeal. The Government argues that if an appeal had the effect of staying a decree of a divorce court, the order allowing the wife alimony pendente lite would likewise be suspended, and there would have been no need or possibility for the Court to hold that the alimony order could not be suspended by supersedeas.

While we are not prepared to adopt the Government's logic (see Annotation, Alimony-By Trial Court- Pending Appeal, 19 A.L.R.2d 703, 709, et seq.), the *Chappel* and *Berman* cases were decided on the broad ground that the decree could not be stayed because the statute authorizing stay of a decree was enacted before equity acquired divorce jurisdiction, and could not be applied to divorce cases.<sup>FN3</sup> We know of no precedent for \*668 staying a divorce decree in Maryland, pending appeal, and no such stay was attempted in this case.

Citation of decisions from other jurisdictions is unprofitable. The several states have conflicting theories as to the effect of appeals generally and divorce proceedings in particular, and their decisions are often based upon particular statutory enactments not found in the Maryland law. See 3 Nelson, *Divorce and Annulment* (2d ed., 1945), Sec. 30.07, p. 256; 3 Am.Jur., 'Appeal and Error,' Sec. 552, p. 202; 35 Am.Jur., 'Marriage,' Sec. 164, p. 281<sup>FN4</sup> Even in a state where, unlike Maryland, an appeal was given the effect of a supersedeas, it was held that affirmance of the decree on appeal established the status as of the date of the original decree, a view fatal to the taxpayer's claim here. *Woods v. Woods*, Kansas City Court of Appeals 1942, 236 Mo.App. 855, 159 S.W.2d 320.

[5] We hold that in Maryland an appeal does not suspend a decree of divorce.

Sullivan's second contention is that the Government's position here is inconsistent with the settled construction of another section of the 1939 Internal Revenue Code from which language found in the joint return section is derived.

He calls attention to the legislative history of Section 51 (the joint return section), noting the statement in the Senate Report: 'The rule with respect to the marital status of an individual legally separated from his spouse under a decree of divorce or of separate maintenance is derived from a corresponding provision in section 22(k) of the Code, relating to the tax treatment of alimony and like payments.' S.Rep.No. 1013, 80th Cong.2d Sess.; 1948-1 Cum.Bull. 285, 324.

Since the Tax Court, in *Wick v. Commissioner*, 1946, 7 T.C. 723 decided that certain payments of alimony pendente lite could not be deducted by the husband under section 22(k), Sullivan maintains that during the period of alimony pendente lite, uniformity of tax treatment requires that the parties be permitted

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to file a joint return. The suggestion will not survive a careful examination of the Wick case. It did not hold that alimony pendente lite is never deductible under Section 22(k). It merely declared that alimony pendente lite before the entry of an a mensa decree of divorce in a lower Pennsylvania Court, was not alimony paid under a decree of divorce or of separate maintenance. Moreover, the Tax Court's opinion flatly stated that if it had been considering alimony payments made after the lower Court's divorce decree, such payments would be regarded as made under a decree of separate maintenance (and consequently deductible). Since the lower court's divorce decree, entered January 22, 1944, had been appealed from, and the appeal was not decided until April 9, 1945, the dictum of the Wick case lends strong support to the view that alimony payments pending appeal are deductible, and that, correspondingly, a joint return may not be filed if on the controlling date the decree was on appeal. See, also, McKinney v. Commissioner, 1951, 16 T.C. 916.

[6] We are of the opinion that the Tax Court was correct in its conclusion, and its decision is

Affirmed.

FN1. '51. Individual returns.

'(b) (As amended by Section 303, Revenue Act of 1948), Husband and Wife.

'(1) In general. A husband and wife may make a single return jointly. Such a return may be made even though one of the spouses has neither gross income nor deductions. If a joint return is made the tax shall be computed on the aggregate income and the liability with respect to the tax shall be joint and several.

'(5) Determination of status. For the pur-

poses of this section-

'(A) the status as husband and wife of two individuals having taxable years beginning on the same day shall be determined-

'(i) if both have the same taxable year- as of the close of such year; and

'(ii) if one dies before the close of the taxable year of the other- as of the time of such death; and

'(B) an individual who is legally separated from his spouse under a decree of divorce or of separate maintenance shall not be considered as married. \* \* \*

FN2. Stray expressions in other opinions which may be thought to suggest a contrary view do not deal with our problem. In Tome v. Tome, 1941, 180 Md. 31, 22 A.2d 549, 551, 552, a divorce decree had been in effect for a number of years. The award of alimony had been subsequently reduced and the ex-wife sought to reinstate the original allowance. The Court granted this relief but denied her counsel fees. The Court in such a case was justified in saying that the right to counsel fees is 'based solely on the existence of the marital relation.' This statement, however, does not presuppose a suspension of the divorce during appeal. In fact, in the same opinion, the Court said of an ex-husband: 'His obligations to his former wife are satisfied when he has paid the permanent alimony and payment of such counsel fee as may be allowed for services up to such final decree, or on appeal therefrom.' (Italics supplied.) This identification of the wife's right to counsel fees on appeal with her right to permanent alimony indicates that

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there need be no subsisting marriage to sustain either.

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FN3. The fact that a divorce court in Maryland sits as an ecclesiastical court and applies the principles of the English ecclesiastical law where not inconsistent with Maryland law (Cf., *Dougherty v. Dougherty*, 1946, 187 Md. 21, 48 A.2d 451), does not require us to resort to British cases. The instant case does not raise problems of substantive divorce law, but the question is rather the effectiveness of a decree pending appeal, which is one of appellate procedure, and does not require us to look beyond Maryland.

FN4. For jurisdictions in which, usually by specific statutory enactment, the entry of an appeal within the prescribed time suspends the operation of the divorce decree until the ultimate disposition of the case, see, e.g., *Eirmann v. Moderbach*, 1941, 198 La. 1062, 5 So.2d 335; *Tillinghast v. Tillinghast*, 1928, 58 App.D.C. 107, 25 F.2d 531; *Woods v. Woods*, Kansas City Court of Appeals 1942, 236 Mo.App. 855, 159 S.W.2d 320; *Westphalen v. Westphalen*, 115 Neb. 217, 212 N.W. 429.

On the other hand, the Supreme Judicial Court of Massachusetts held, 'A decree for divorce is not suspended nor are the proceedings stayed by the appeal unless the court so orders.' *Eldridge v. Eldridge*, 1932, 278 Mass. 309, 180 N.E. 137, 140. See, also, *Stewart v. Stewart*, 1937, 127 Pa.Super. 567, 193 A. 860.

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